

The London School of Economics and Political Science

Religion and the Public Order of the European Union

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Declaration

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Abstract

This thesis analyses religion's place within the public order of the European Union. It argues that the Union's approach to religion is characterised by the pursuit of balance between Europe's mainly Christian religious tradition and its strong humanist traditions which place limitations on religious influence over law and politics. Balance between these traditions is sought by treating religion as a form of individual and collective identity. Such an approach protects individual religious identity rights while enabling Member States, on grounds of cultural autonomy, to pursue their own relationships to religion, including the maintenance of institutional and cultural links to individual faiths and the promotion religious morality as part of the legal protection of a broader public morality. However, such facilitation of religious identities is limited by the Union's identification of the autonomy of the public sphere from religious domination and the protection of individual autonomy from the promotion of collective morality as key elements of its public order and prerequisites of EU membership. Religions seen as unable to reconcile themselves to such limitations are regarded as contrary to the Union's public order. Linking religious influence over law to religion's cultural role enables religions which are culturally entrenched at national level to exercise greater influence than outsider religions whose attempts to influence law can be seen as political rather than cultural and therefore as threatening to the principle of balance. The thesis therefore shows that the EU's public order is influenced by a Christian-humanist tradition which facilitates religion's cultural role but restricts its political influence. This distinction between religion's cultural and political roles, though complex and problematic in terms of equal treatment of insider and outsider faiths, represents an attempt to ensure respect for the Union's cultural and legal pluralism while constructing a distinctive public order with identifiable fundamental norms.

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It said that “*Is fada an bóthar nach mbíonn casadh ann*” (“a road without turns in it is a long road”) and while the production of this thesis has had difficult moments, it has been a turning on my journey through life that has on the whole been enjoyable and enriching. This is due in large measure to the support I have received from a number of people.

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Chapter I: Introduction

1. Introduction

2. The Argument

3. Features of the Balance between Religious, Cultural and Humanist Influences

4. Chapters

1. Introduction

Religion has not generally been seen as a central concern of the EU.¹ The Union has no specific policy on religion, nor any explicit competence in relation to religious matters. As a central and sensitive element of national identity and culture, religion would appear to be remote from core Community competences such as the regulation of the Single Market. Indeed, the few direct references to religion in the treaties stress the Union's desire to defer to Member State preferences in this area.² Most of the limited existing literature on the relationship between religion and EU law has focused heavily on the issue of freedom of religion and the degree to which the Union has embraced "positive" religious freedom including active facilitation of the rights of religious institutions.³ This focus on the facilitation of religious freedom tends to underplay the complexity of the broader issues raised by the relationship between religion and the law. In particular, such an approach can fail to acknowledge sufficiently that more religious freedom for some can come at the cost of less freedom for others. In any event, while respect for the fundamental right to religious freedom is, indeed, an important part of the Union's approach, the relationship between EU law and religion is much broader.

The European Union, in exercising its functions and constructing its own identity, is inevitably required to legislate and adjudicate in relation to the claims which religion continues to make in the public and private arenas in

¹ C. Crouch "The Quiet Continent: Religion and Politics in Europe" in D. Marquand and R. L. Netter (eds.) *Religion and Democracy* (Oxford, Blackwell Publishers, 2000).

² See Chapter III.

³ See for example G. Robbers (ed.), *State and Church in the European Union*. (Nomos, Baden-Baden, 2005).

Europe. Religion still influences law at national level through notions of public morality which provide the basis for laws restricting activities which are considered to be undesirable for religious or cultural reasons.⁴ EU law in areas such as the Single Market can impact on such laws by limiting the ability of states to control or suppress certain economic activities. Religion's important institutional role in many Member States means that religious organisations are important employers. EU law in relation to employment must reach decisions which influence the degree to which religious bodies can continue to promote their ethos in these contexts as well as the ability of Member States to reflect religious norms in market structures.⁵ In areas such as broadcasting and trademarks, Community law can affect efforts to protect religious symbols and ideas as well as freedom of expression.⁶ More broadly, the Union's commitments to upholding fundamental rights and liberal democracy are also relevant to religion. While it has recognised that religious freedom must be protected,⁷ the EU has also identified limitations on religious influence as an important principle and has monitored national relationships between religion, the law and the state in order to ensure that those countries which become members uphold the principles of the autonomy of the public sphere from religious domination as well as respect for individual autonomy, including freedom from religion, in the private sphere.⁸ EU law can therefore potentially impact on the role of religion in contemporary Europe. However, the relationship between the Union and religion operates in both directions and Community law is itself shaped by religion. The EU recognises the promotion of public morality as a valid basis of law thus enabling religious norms to influence the content of Community law. Religion is also recognised as part of national cultures which the Union is required to respect. Furthermore, religion has been recognised as a source of the EU's constitutional values while religious organisations have been acknowledged as making a "particular contribution" to the Union's lawmaking process.⁹

⁴ See Chapter II.

⁵ See Chapter V.

⁶ *Ibid.*

⁷ See Chapter IV.

⁸ See Chapter VI.

⁹ See Chapter III.

The public order of the Union is therefore required to develop an approach to religion beyond merely undertaking to respect religious freedom. Indeed, the EU is a particularly interesting context in which to study the issues of competing rights, goals and interests which characterise the increasingly controversial and complex relationship between religion, law and polity in the contemporary world. Most states approach religion in the context of a dense cultural identity which has been heavily influenced by particular religious traditions and where certain views of religion and its role in society are the subject of unspoken shared historical and cultural assumptions.¹⁰ The European Union, by contrast, lacks a strong cultural identity of its own and is still in the process of developing its political institutions. The weakness of its identity means that the Union lacks the authority to effect fundamental change in the relationship between religion, law and the state in Europe. As an independent legal order encompassing 27 states with widely differing approaches to religion, the Community must, in carrying out its functions, devise its own approach to this relationship which synthesises a common framework within which respect for Member State autonomy is reconciled with the need for a coherent EU approach which remains true to the Union's fundamental values. Indeed, although it must be extremely careful not to interfere with Member State autonomy in this sensitive area, the very facts of the weakness of its cultural identity and the newness of its institutions mean that the EU is required to spell out in more explicit terms than most nation states, the relationship between religion, the law and the polity. Issues of religion and identity have come to assume increasing importance in Europe in recent times and, as the controversy in relation to the making of a reference to God in the preamble to the Constitutional and Lisbon treaties showed, the nature of the EU in this regard has become the subject of major dispute and is seen as bearing on fundamental issues in relation to the future of the Union and of Europe in general.

This thesis gives a broader account of the role of religion in public order of the EU and addresses both issue of the relationship of religion to law and politics

¹⁰ See J.T.S. Madeley and Z. Enyedi (eds.), *Church and State in Contemporary Europe: The Chimera of Neutrality* (London, Frank Cass Publishing, 2003).

and the question of nature of the European Union. It analyses the relationship between religion, individual autonomy, the state and the promotion of communal norms in the context of EU law and in doing so sheds light on the nature of the EU as a polity. In particular it assesses the degree to which the Union can be seen as a secular polity or as one which regards religion, or certain versions of religion, as a legitimate basis for the exercise of legal power. Thus, the thesis addresses the controversial issue of the contemporary role and influence of religion in private and public life. This analysis touches on key issues such as the balancing of individual autonomy with the desire of communities to constitute themselves through the promotion through law of particular norms and the reconciliation of the principles of equal treatment and state neutrality with the accommodation of cultural identity and notions of community. It also assesses the degree to which the Union's approach to this issue impacts on the relationship between the law, the state and religion at Member State level as well as the extent to which the public order of the EU can be seen as reflecting a particular, Christian humanist, tradition.

2. The Argument

This thesis argues that the EU integrates religion into its public order and adjudicates upon religion's claims on the basis of a commitment to balancing what it regards as the overlapping and at times, conflicting, religious, cultural and humanist influences underpinning its constitutional tradition and public order. The thesis describes and investigates the features of this balance. It demonstrates how the Union has seen the relationship between religion and identity as key to such balance. The notion of identity operates in two inter-related ways in this regard. The idea of balance between religious, cultural and humanist influences is seen as a part of Europe's ethical inheritance and as a reflection of a predominant contemporary European approach to religion which arises from European history and culture. This principle of balance is regarded both as normatively desirable and as an element of European identity. At the same time, the Union's commitment to balance is seen as requiring that religion be treated primarily as a matter of identity. Balance between religious, humanist and cultural influences within the EU legal order is therefore seen both as an element of European identity in itself and as requiring the treatment

of religion largely as a form of identity. In this way the notions of identity and balance can be seen as mutually reinforcing.

3. Features of the Balance between Religious, Cultural and Humanist Influences

The regulation of religion through the framework of identity raises certain complications. Identity has various forms whose accommodation can, at times, be mutually inconsistent. For instance, the facilitation of collective religious identity through the promotion of communal norms, can be inconsistent with the freedom of individuals to develop their own identity in contravention of such norms.¹¹ On the other hand, protection for individual identity in contexts such as employment may impact on the collective and institutional religious identity of others. The thesis shows how the EU's commitment to balancing cultural, religious and humanist traditions gives scope for the assertion of collective religious identity through its recognition of collective cultural identity rights as including the promotion through law of notions of public morality, of particular religio-cultural practices such as restrictions on Sunday trading and the protection of the national institutional role and status of culturally entrenched faiths. On the other hand, although EU law permits the legal promotion of collective identities, Europe's shared identity has a self-limiting element in this regard as it is seen as also encompassing a strong tradition of respect for individual autonomy which requires the limitation of the imposition of collective identities.¹² The humanist tradition recognised by the Union as part of its ethical inheritance is also hostile to the promotion of religious norms *per se* and resists the promotion of those religious norms which cannot be accommodated under the rubric of cultural identity. The thesis investigates how such conflicts have been regulated by the EU. In doing so it measures the degree to which the Union's public order can be seen as having a particular religious identity, as well as assessing what the EU's approach tells us about its view on key issues such as the balancing of individual and

¹¹ See for example K. Dalacoura, *Islam, Liberalism and Human Rights: Implications for International Relations*, (London and New York, I B Tauris ,1998).

¹² See Chapters III, V and VI.

collective rights and the degree to which the Union impacts on the right of Member States to pursue their own arrangements in relation to religion.

Beyond the potential conflicts between identity's individual and collective elements, treating religion as a form of identity also affects the role it can play within the public order and the influence it can exercise over law. Identities are both attributed and chosen and, in a diverse world, are inevitably heterogeneous. Therefore, linking the legal status and role of religion within the public order to its status as an element of identity, pluralises religion as it inevitably involves the recognition of more than one kind of religious identity. Such an approach also links and values religion's role in public and private life, not on the basis of the truth of religious claims, but as human choices, both collective and individual. Accordingly, such an approach renders it difficult for religions to achieve recognition for claims to a monopoly on truth within the political arena and would appear to regard religion as a voluntary matter, a view which is not shared by all the major religions.¹³ Regarding religion as an element of identity links it to notions of culture and of a way of life. Although culture can be a site of political conflict, it is also a state of affairs rather than inherently normative phenomenon and is seen as in some way separate from the rationalism and ideological nature of the political sphere.¹⁴ Accordingly, this view of religion can depoliticise religion in that it values what religions regard as normative practices and views on the basis of a normatively neutral status, namely that of element of cultural norms and practices. This emphasis on religion as an element of culture and identity also has the effect of linking the role of religion within EU law to the most powerful source of culture within the Union, the nation state. The Union's approach characterises religion not merely as an individual or collective choice but as part of a national way of life which Member States are entitled to uphold. In taking this view, EU law connects the role of religion to ideas of inheritance and enables certain

¹³ See Chapter IV.

¹⁴ See F. Inglis, *Culture* (Cambridge UK and Malden MA, USA Polity Press, 2004) 28-29. See also C. Barker "Culture" in *The SAGE Dictionary of Cultural Studies* Sage. (London, New Dehli, Sage, Thousand Oaks, 2004) 45. In relation to the non-political and non-ideological characterisation of culture see A. Gramsci, *Selections from the Prison Notebooks*, (New York, International Publishers, 1971) 238 and S. Zizek, *In Defence of Lost Causes*, (London, Verso, 2008) 21. See also the discussion in section 4 of Chapter VII.

religious traditions which have achieved elevated status within national cultures to exercise a greater degree of influence and privilege than "outsider" faiths which lack such a national cultural role. Thus, the Union's approach involves the promotion of certain collective identities to a greater degree than others. While it does not require a libertarian approach and envisages the use of the law to promote these national collective identities, such promotion must nevertheless respect the overall notion of balance and the humanist elements thereof.

Many of these features, particularly those of pluralism, the linking of religion to choice and to culture and the restriction of truth claims within in the public sphere, reinforce other elements of the balance between religious, humanist and cultural influences which the Union sees as elements of its heritage and as necessary features of its public order. This enables the accommodation of religion to take place in a manner which does not threaten established political structures and collective identities which have grown from Europe's historical experience of conflict between different religions and between religious and secular powers. In particular, the pluralisation of religion inherent in an identity-based approach helps to secure the autonomy of the public sphere from domination by any single form of religion, particularly at EU level, where no single cultural identity predominates. The focus on individual identity and choice also underlines the commitment to individual choice which underpins the protection of individual autonomy in the private sphere. These two features have been identified by the Union as key elements of its public order whose protection can impinge on the desires of those forms of religion who wish to dominate the public sphere or to use the law to force individuals to adhere to religious teachings in the private arena.¹⁵

As noted above, the degree of separation between the political and religious spheres and the individual-centred notions of personal autonomy this entails, are both results of the historical and cultural events and influences which gave rise to contemporary European culture and can in themselves be seen as

¹⁵ See Chapter VI.

elements of an identity or as the markers of the parameters of acceptable religious identity, which characterise the public order of the Union. The focus on religion as identity as an element of a commitment to balancing religious, humanist and cultural influences, which is itself an aspect of what is thought to be a shared European inheritance and identity, means that there will be forms of religious identity which cannot readily be accommodated within this broader balance-focused approach. Religious identities which are inconsistent with the notion of balance, characterised by the features outlined above, may be seen as threats to the Union's public order and may be restricted on this basis. In particular, approaches to religion which cannot reconcile themselves to accommodation of humanism inherent in this idea of balance, which are unable to make their political contributions on the basis of the implicit acceptance of multiple truth claims inherent in a religiously pluralist public sphere, or whose beliefs and practices are not rooted in, or even clash with, predominant national or European cultural norms, may struggle to achieve influence or even acceptance within such a framework.¹⁶ Conversely, religious identities which are established elements of national identities are not seen as threats to the overall notion of balance and therefore, to the public order, even when they retain political ambitions which may be inconsistent with principles, such as respect for personal autonomy, which the Union has identified as a key element of balance and therefore of its public order.¹⁷ Furthermore, the thesis shows how, in its attempts to protect the public order from forms of religion seen as hostile to the notion of balance, the Union has, at times been willing to curtail principles such as individual autonomy in matters of belief which are themselves regarded as key elements of such balance.¹⁸

4. The Chapters

These features are sketched and analysed in five substantive chapters and a conclusion. As noted above, this thesis argues that the EU approaches religion on the basis of Europe's ethical tradition which it sees as being characterised by balance between what are sometimes competing religious, humanist and

¹⁶ See Chapter V and Chapter VI.

¹⁷ See Chapter V.

¹⁸ See Chapter VI.

cultural influences. Chapter II sets out the factual background to this enquiry by setting out the fundamental elements of contemporary European approaches to the relationship between religion, politics, the law and the state. It notes how European identity originally arose out of a shared commitment to Christianity but how this identity has also been moulded by a strong humanist tradition which owed much to Christianity but which nevertheless played a significant role in the experience of secularisation undergone by most Member States since the 15th century. The Chapter demonstrates that although Europe is relatively a-religious in world terms, religion remains an element of both personal and national identities. Indeed, the chapter shows that strict separation of church and state is rare in Europe and that religion has an important institutional role in many Member States, particularly in relation to healthcare and education. Despite its continued role in individual and collective identities, religion's political influence has waned and, although it retains some influence over law in relation to "moral issues" such as the beginning and end of life, family structures and sexuality, this influence is declining and has given way to humanist notions of individual autonomy to a significant degree. The chapter therefore demonstrates that religion in Europe retains an important role as an element of individual and collective identity. In particular, individual denominations continue to function as parts of the national identity and institutional structures of many European states. Despite this continuing role in identity, religion in Europe is required to compete for influence over law with strong secular and humanist traditions which have resulted in significant restriction of its political role and influence.

Chapter III shows how the tradition outlined in Chapter II has been reflected in the Union's approach to the influence of religion over lawmaking. It reveals how religion is recognised by the Union as an element of its constitutional values but how, at the same time, this role is balanced by the recognition of potentially competing humanist and cultural influences. The limited role played by religion in the political arena shown in Chapter II, is reflected in the Union's approach to the role of religion in law and policy making. Although it recognises the "particular contribution" of religious bodies in this area, EU law requires that this contribution be made in the context of civil society thereby

requiring religious bodies to engage in structures which implicitly recognise the legitimacy of other beliefs and the authority of secular political institutions. Accordingly, the notion of balance between the various elements of the Union's ethical inheritance is preserved by recognising a role for religion in relation to lawmaking while simultaneously making such a role contingent on the limitation of claims on the part of religion to a monopoly on truth or to substantive political power in its own right.

The chapter also shows how religion's role in national identity and culture and its role as a source of communal moral norms, have been accommodated by EU law through the pluralist nature of the Union's public order which enables Member States to reflect particular national and religiously specific visions of public morality in EU law, provided that such states respect the notion of balance between religious, humanist and cultural influences inherent in EU fundamental rights commitments (most notably respect for individual autonomy) as well as the moral pluralism involved in principles such as freedom of movement. This approach has been justified on grounds of cultural autonomy. The EU level of this pluralist public order lacks a strong cultural identity and is therefore marked by a strict adherence to formal neutrality in religious matters and notions of public morality derived from its fundamental rights commitments. Although formally neutral, such commitments have been heavily influenced by the historical and cultural role of particular religious traditions in Europe, most notably that of Christian humanism and can be more restrictive of religions which struggle to accept the limitations on their influence inherent in a balance between religious and humanist values and in respect for Europe's strong cultural tradition of individual autonomy and popular sovereignty.

Chapter IV demonstrates how this same framework fits in with the Union's fundamental rights obligations which also envisage religion exercising influence over law on the basis of its status as an element of individual and collective identities. It analyses the various justifications for religious freedom and notes how respect for individual and collective religious rights can often come into conflict. The chapter shows how, in line with both the pluralist and

humanist elements of its public order, and with its fundamental rights obligations, seen primarily in the requirements of the European Convention on Human Rights (“ECHR”), EU law has recognised individual and collective religious freedom as largely private rights linked to notions of personal autonomy in matters of identity. However, both sets of rights have also been seen as being required to give way to certain public interests in non-private contexts. In particular, the right to develop and adhere to a religious identity has been seen as being legitimately required to yield to the general public interest in the maintenance of a non-theocratic, democratic system, a requirement which can be seen as reflecting the limitations on assertion of religious claims to truth in the public sphere in Chapter III. Furthermore, the ECHR caselaw indicates that respect for religious freedom does not require the accommodation of individual or collective religious choices in non-private contexts such as the labour market when such choices clash with prevailing cultural norms. The chapter therefore suggests that the basic framework provided by the Union’s fundamental rights obligations in relation to religious freedom is one which requires that individual and collective religious identities receive a significant degree of protection in private but which enables Member States to curtail such identity rights in non-private contexts in order to promote either their communal cultural identity or the democratic nature of the public order.

Chapter V addresses the application of the identity-based framework set out in Chapter IV within the context of EU single market law and how the potentially clashing collective and individual identity rights have been reconciled in this area. It notes how the view of religion as an element of personal identity entitled to protection on the basis of respect for individual autonomy, can be seen in the characterisation of religion as an economic choice within Single Market law. The chapter shows how EU law has taken a broader view of the need to protect individual religious identity in non-private contexts than that contained in the minimum standard prescribed by the Court of Human Rights and has legislated in order to require accommodation of individual religious identity in the workplace. The chapter demonstrates how, by embracing the principle of indirect discrimination, EU law not only protects individual

religious identity outside purely private contexts, but also ensures the formal neutrality of the market place, thereby pluralising the workplace in religious terms. On the other hand, such facilitation of religious and individual identity is still required to give way to certain public interests such as the commercial nature of the market economy, the need to protect the non-theocratic nature of the public order and pre-existing religious privileges in the market. The Union has, in fact, shown considerable deference towards existing structures and privileges held by particular denominations in the market place and has exempted such structures from the duty to comply with anti-discrimination measures in order to enable the preservation of the institutional role played by particular religions in individual Member States. Such deference facilitates collective religious identity by enabling religious employers to promote their “ethos” in the workplace. It also, however, restricts individual religious identity rights by permitting discrimination against employees on religious grounds. This facilitation of the collective role of religion is also seen in the Union’s direct recognition of religion as an element of culture. Respect for cultural influences is explicitly recognised as an element of the respect for inheritance and the balance between the religious, humanist and cultural elements underlying its public order which the Union pursues. Chapter V shows how the Union has, in line with its approach in relation to pre-existing religious privilege in the marketplace, recognised particular approaches to individual denominations and institutional arrangements linking such denominations to particular Member States, as parts of national culture. This cultural approach reinforces some of the features of the “balance” pursued by the Union outlined in previous chapters. For instance, given that culture relates to a state of affairs which is not necessarily normative, characterising religion as an element of culture reinforces its status as a human choice or element of identity rather than a claim to truth or ideological matter. Such a view of religion reinforces the limits on the role of explicitly religious claims in the political arena set out in Chapter III. However, the chapter also demonstrates how recognition of particular religions as elements of national culture enables such faiths to access a degree of influence over law which is denied to other faiths. Such status also enables these insider faiths to promote their worldview, or protect their elevated status, through EU law by means of exemptions from

free market rules and public morality clauses which Member States see as necessary to preserve religiously influenced elements of their culture. Furthermore, the chapter shows how such a culturally centred view of religion's relationship to law causes the Union to view as "cultural" and therefore acceptable, demands which, coming from "outsider" religions would be seen as unduly political and threatening to notions such as the pluralism of the public sphere or respect for individual autonomy, which underpin the balance between religious and humanist influences to which the public order of the Union is committed. Moreover, the chapter demonstrates how religions which are regarded as contrary to European culture have received scant recognition of their rights under EU law and have, in some cases, been characterised as contrary to the public order and liable to restriction on that basis.

The Union's regulation of religion in the Single Market therefore demonstrates that while it is committed to facilitating religion as an element of individual, collective and national cultural identity, there are also kinds of identity which, within a framework dedicated to maintenance of the balance between the religious, humanist and cultural influences which forms Europe's ideological inheritance, are considered unacceptable. Chapter V notes how religions falling outside of the protection of national cultural identity and which fail to respect the limitations on religion's political role seen as inherent in this inheritance, are considered to be identities which will not merit protection under the EU law. Chapter VI further investigates this notion of unacceptable religious identities. It analyses how the limitations on the political influence of religion inherent in the vision of balance pursued by the Union have been highlighted in its dealings with outsiders whose religions cannot as readily be accommodated under the rubric of national cultural identity. The chapter assesses the EU's approach to enlargement and the integration of immigrants to demonstrate how religions which attempt to dominate the public sphere have been seen as violating the duty to respect the principle of pluralism while attempts to interfere with private autonomy to impose religious morality similarly breach the requirement that the role of religion respect the notion of balance between religious and humanist influences. Failures on the part of

religion to respect public and private autonomy are therefore viewed as inconsistent with a European identity which the Union regards as encompassing not only a strong (predominantly Christian) religious tradition but also the equally strong traditions of questioning religion, of imposing a degree of separation between the religious and political realms and of respecting individual autonomy. The chapter goes on to show however, that in defending this identity, the Union has been willing to interfere with individual autonomy itself by seeking to regulate private religious identity and that in doing so the Union has implicitly regarded some forms of religion, most notably Islam, as inherently less compatible with Europe's religious inheritance and identity than others. Furthermore, it demonstrates that while the Union has accommodated the reflection in law of norms of religions which are part of national cultures and identities, as elements of "public morality" or national cultural norms, attempts on the part of outsider religions to mould the law to reflect their religious beliefs are seen as political rather than cultural and as representing, on that basis, a threat to the limitations on religious political influence inherent in the Union's interpretation of the requirements of balance between religious, humanist and cultural influences.

The thesis concludes by tying these themes together in Chapter VII which argues that the Union's approach to religion is characterised by a commitment to reconciling the two dominant and partially conflicting approaches to religion which have emerged from European history, namely the tradition of Christian religiosity and the humanist tradition, which partly grew out of Christianity but which also fostered a strong tradition of secularism and of questioning and challenging of religion. These traditions are reconciled by the Union through a commitment to balancing the religious, humanist and cultural influences it sees as marking its religious inheritance. This commitment to balancing a strong religious tradition, which has included promotion of religious goals and norms through law, with a strong humanist tradition stressing individual autonomy, equality and separation between the religious and political realms, is effected by the recognition of religion as an element of identity, both individual and collective. The framework of identity enables religions to pursue their goals in relation to the promotion of communal moral norms through recognition of

religion's status as an element of collective identity and as a contributor to the definition of shared norms. At the same time, viewing religion as a form of identity defines it as an element of human choice, thus pluralising it and limiting its ability to assert a monopoly on truth in the public sphere while also strengthening claims for autonomy in relation to individual identity formation, all of which place limits on religion's ability to dominate the legal and political arenas. The features, sketched out in the chapters discussed above, give the Union a public order which is unambiguously linked to a Christian humanist tradition and which facilitates the, predominantly Christian, cultural role of religion in influencing the law. On the other hand, while not secular, such a public order is avowedly non-theocratic and while recognising religion and privileging certain culturally entrenched forms thereof, the Union also recognises the importance of non-religious perspectives.

The problem of the apparent unequal treatment of insider and outsider religions nevertheless remains. However, in the light of the continuing importance of particular religions in the cultural identity of Member States, the Union's limited powers, its legal pluralism and its commitment to respecting Member State cultural autonomy all mean that a degree of unequal treatment is inevitable. However, although it is not capable of radically reshaping the relationship between religion and law within Member States, the Union does not merely reflect Member State preferences but places limits, albeit limited ones, on such relationships. By treating the influence exercised by insider religions over law as a result of their role in the identities of particular Member State as cultural rather than political or ideological, the Union does exempt the claims made by such religions on this basis from requirements of rational justification and reciprocal respect for other identity claims, despite the political and ideological elements of these cultural demands. The recognition of such claims as cultural is therefore undoubtedly an important source of privilege and influence over law. However, the conclusion argues that, by exempting such cultural claims from requirements of rational justification and reciprocal recognition on the grounds of their ostensibly non-political nature, the Union can impose these very requirements of insider religions when they make demands which are explicitly political in nature or which cannot be

cannot be characterised as a claim for protection of cultural identity. The EU's public order therefore establishes its political sphere as a formally neutral environment in religious terms to which all religious viewpoints may contribute and within which claims to exclusive possession of the truth and a refusal to recognise the validity of other religious identities are not possible. Furthermore, the combination of this protection of the autonomy of the political sphere from religious domination with the Union's requirement that Member States respect the fundamental elements of the Union's own public morality such as respect for the principle of proportionality and fundamental rights including individual private autonomy, non-discrimination and free movement rights, provide an impediment to attempts to expand the influence of particular faiths over law and political life and to the subjugation of individual autonomy to the promotion of collective religious and cultural goals at Member State level,¹⁹ thereby promoting the degree of pluralism necessary for cultural evolution to remain sufficiently open and reflexive to enable groups which are currently outsiders to contribute to the process of cultural evolution.

Accordingly, the thesis will suggest that, while the EU is not secular, if predictions of the return of religion to the political arena²⁰ prove correct, the Union may well provide limitations on the impact of such a return in the coming decades and may play an important role in the evolution of the relationship between the law, politics, the state and religion in Europe. While recognising the serious nature of the issues of equal treatment of differing religions caused by the linking of religion's public role to its cultural status which an identity-focused approach involves, the thesis concludes by suggesting that the Union's attempts to distinguish between this cultural role and explicitly religious claims within the public sphere represent a justifiable balance between ensuring respect for its cultural and legal pluralism while constructing a distinctive public order with identifiable fundamental norms.

¹⁹ See Chapter III, Section 5.

²⁰ P. Berger and G. Weigel (eds.) *The Decsecularization of the Modern World: Resurgent Religion and Modern Politics* (Grand Rapids Michigan, Erdemans Publishing Company and Public Policy Center, 1999).

Chapter II: Europe's Religious Inheritance: Religion, Law and Identity in Contemporary Europe

1. Introduction

2. A Legacy of Christianity and Secularisation

3. The Post-Secularisation Role of Religion in Contemporary Europe:

Theoretical Explanations

3.1 Europe as a Secular Exception

3.2 The Post-Secularisation Political and Legal Role of Religion

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4. Religious Practice, Belief and Influence in Europe: The Current Situation

4.1 Practice and Belief

4.2 Declining Influence over Law and Politics

4.3 Continuing Role in National identity

4.4 Constitutional and Institutional Position

4.5 Service Provision: Healthcare and Education

5. Conclusion

1. Introduction

This thesis suggests that EU law deals with religion largely as a matter of identity and on the basis of what the Union sees as Europe's ethical tradition of a balance between religious, humanist and cultural influences. This chapter sets out the factual background to this analysis by setting out the fundamental elements of contemporary European approaches to the relationship between religion the law and the state. The Union regulates religion in a context in which the majority of political power and religious practice remains within national contexts¹ and through a public order which is committed to respecting pluralism and national cultural autonomy. The approaches of Member States to religion are characterised by Europe's common heritage of Christianity and by humanist and secular influences which have emerged from European

¹ Although international religions such as the Catholic Church are by definition not national bodies, their hierarchies and clergy are nevertheless organised along national lines to a significant extent.

history and which have limited religious influence over law and politics in Europe to a greater degree than elsewhere. However, the balance between these influences is struck differently in differing Member States and arrangements in relation to the official status of religion or religions, the political and legal influence of religion and the cultural and institutional role of religious bodies, vary significantly from state to state. Despite such diversity, this chapter demonstrates how certain common themes and patterns can be identified. All current EU Member States share a Christian past but have also been exposed to humanist and secular influences which have reduced religious influence over law and politics. However, religion has retained a role in both personal and collective identities. Religious institutions retain important roles in areas such as healthcare and education in almost all Member States while many States retain official links to particular Christian denominations which remain an important element of national identity. No EU Member State is a fully-fledged theocracy and limitations on religious influence are a key element of the shared European ethical tradition. On the other hand, religious groups have retained some influence over law and policy in certain areas, albeit to a declining degree. The chapter therefore provides a broad outline of the approach of EU Member States to religion which is characterised by a significant degree of diversity but also by a common view of religion as an important aspect of national, collective and individual identities which has both a particular institutional position and a degree of influence (albeit one which is limited and declining) over law and politics.

The chapter begins by sketching the role played by Christianity in European history and identity before moving on to analyse the theoretical explanations of the secularisation process which has led to the establishment of significant limitations on religious influence over law, politics and society in Europe. It notes how these developments have given rise to competing versions of European identity centred on Christianity and secularism. Section three notes that the degree of secularisation undergone by European societies is rather exceptional in international terms. However, it also demonstrates how recent theories of secularisation accept that, even in secularised societies, religion has not disappeared and continues to exercise influence in certain areas, most

notably issues relating to sexual morality and the beginning and end of life (“lifeworld” issues) as well as questions of communal identity. Section four applies these theoretical findings to contemporary Europe. It notes how religion’s continuing role in individual identity is shown by the high levels of nominal adherence to religion as well as by the widely divergent levels of religious practice shown by the populations of European states. It describes how religious influence over law and politics has declined, even in relation to “lifeworld” issues, but that religious bodies nevertheless retain a degree of influence in these matters. This section also considers the role played by religion in national identity and the constitutional and institutional position of religion in the Member States. It shows how there is a wide degree of divergence between states with options from official embrace of a single religion to official secularism being found amongst EU members. Nevertheless, almost all states provide some degree of recognition or support to religion and religious bodies retain significant roles in the provision of healthcare and education.

The chapter therefore establishes that, while religion exercises a comparatively low level of influence over European societies, attachment to a particular form of religion, or way of dealing with religion, is a key element in the both personal identity and the national identity of many Member States. Furthermore, while religious influence over law and politics has declined, it is not entirely a thing of the past. However, the role played by religion in these areas is counterbalanced by strong humanist and secular influences which have marked European history and the overall picture is therefore one of balance between religious and secular influences which is struck in differing ways in the various Member States. It is in this context that the Union’s regulation of religion and development of its own constitutional approach to religious issues takes place.

2. A Legacy of Christianity and Secularisation

Religion and Western Christianity in particular, have played a foundational role in the establishment of the very ideas of Europe and European identity. Le Goff suggests that “*it was Christianisation above all that brought uniformity*

to the West in the Early Middle Ages."² He notes how the first time medieval chroniclers described an event as "European" was the victory of Christian Frankish forces over a Muslim army at Poitiers in 732³ and how with the crusades of the 11th century, Western Christianity became synonymous with a European identity which defined itself against the Islamic and Byzantine Orthodox Christian civilizations to its South and East, a process which was reinforced with the fall of the Byzantine Empire to the Turks and the military threat posed by Ottoman Empire until the 17th century.⁴ Le Goff also describes how certain features of Western Christianity gave rise to key ideas and distinctions which were to have a profound effect on the political development of Europe. In particular he suggests that the separation of the laity and the clergy by Pope Gregory VII helped to bring about a degree of separation between Caesar and God which distinguished European civilisation from the Caesaro-Papism of the Eastern Orthodox Church and the Islamic approach which did not differentiate between the religious and political domains.⁵ Furthermore, he notes how the emergence during the 11th and 12th centuries of a strong emphasis on the belief that man was made in the image of God gave rise to a strong strain of humanism which was to have important consequences in terms of the importance accorded to the individual in European society in future centuries.

Although Le Goff suggests that these features "*involved the rejection of theocracy [...] and a balance between faith and reason,*"⁶ both he and other authors such as Taylor and Casanova agree that up to the 15th century all areas of European life were dominated by religion and by Western Christianity in particular.⁷ However, beginning in the late 15th century, Europe embarked on a long process of secularisation or what Taylor calls "*disenchantment*" which led to a decline in religious influence over political and ultimately, personal, life that has few parallels elsewhere in the world. Various explanations have

² J. Le Goff *The Birth of Europe* (Malden MA and Oxford UK, Blackwell 2005) 22.

³ *Ibid.* 26.

⁴ *Ibid.* 10.

⁵ *Ibid.* 60.

⁶ *Ibid.* 196.

⁷ n. 2 above 200. See also J. Casanova *Public Religions in the Modern World* (Chicago and London, University of Chicago Press, 1994) 20.

been provided for this development. Casanova argues that this reduction in religious influence was caused by four main factors. The Protestant Reformation undermined the universalist claims of the Catholic Church, the rise of the modern state with its monopolisation of force undermined the compulsory nature of religion, the rise of capitalism and markets removed economic life from the control of religious bodies and ideas and finally, early modern science brought about new and autonomous methods of verifying truth.⁸ This combination of factors eventually brought about a situation in modern Europe where “*the quest for subjective meaning is a strictly personal affair [and] the primary “public” institutions (state, economy) no longer need or are interested in maintaining a sacred cosmos or public religious worldview.*”⁹

Similarly Bruce¹⁰ argues that it was the increase in both individualism and rationality engendered by the Reformation which began the process which was to result in the secularisation of modern Europe. He submitted that “*individualism threatened the communal basis of religious belief and behaviour, while rationality removed many of the purposes of religion and made many of its beliefs implausible*”.¹¹ The decline of religious influence was strengthened by the rise of the nation state in the post Reformation period. In particular, he suggests that the adoption of a policy based on a degree of mutual tolerance following the Treaty of Westphalia as enabling a “*live and let live*” attitude towards religion which came to predominate over the unbending convictions of previous generations. This acceptance of a degree of pluralism eventually brought about a situation where religion (and eventually, even the idea of God) became part of a world of choices and preferences. Previously dominant churches therefore lost the central role they once had in society as an increasingly rational citizenry exercised their choice in religious matters to follow individualistic and subjective forms of religion with a consequent decline in the role and influence of traditional religious denominations.

⁸ J. Casanova *Public Religions in the Modern World* (Chicago and London, University of Chicago Press, 1994) 21-24.

⁹ *Ibid.* 37.

¹⁰ S. Bruce, *From Cathedrals to Cults: Religion in the Modern World* (Oxford, Oxford University Press, 1996).

¹¹ *Ibid.* 230.

Weber and Durkheim both attributed major importance to the emergence of capitalism and saw religious decline as an inevitable by-product of modernity. Weber saw the Industrial Revolution as having encouraged a process of “*capitalist secularisation*” where “*irrational compulsion*” was replaced by “*sober economic virtue*” and utilitarianism.¹² Durkheim, on the other hand, stressed the role of modern industrial society in promoting “*functional differentiation*” under which specialised autonomous professions rather than ecclesiastical institutions became the providers of goods such as healthcare, education and welfare.¹³

Other theorists have focused on internal developments within religion. Stark and Iannaccone put forward what has been called a “*supply side*” theory, arguing that the dominance of single denominations and state subsidy brought about a complacent clergy and unadaptive ecclesiastical environment which depressed levels of belief and practice.¹⁴ Taylor on the other hand emphasises political and moral changes which, he suggests, arose from within Christianity. He suggests that religions reformers such as Luther and Calvin built on the humanistic elements of Christianity and gave new importance and dignity to ordinary human flourishing by abolishing the distinction between sacred and profane activities. Christian humanism, also facilitated the growth of Deism which centred religious belief around personal experience and reason rather than revelation. Such an approach, he suggests, empowered individuals to determine their own relationship to the divine and led to the modern “*age of authenticity*” where individuals are encouraged to develop their own identities and approaches to life.¹⁵

Whatever its origins, the process of secularisation was vigorously resisted by many religious bodies, particularly, the Catholic Church but has nevertheless

¹² M. Weber *The Protestant Ethic and the Spirit of Capitalism* (New York, Scribner’s, 1930 [1904]).

¹³ É. Durkheim *The Elementary Forms of the Religious Life* (Oxford and New York, Oxford World’s Classics, Oxford University Press, 2001).

¹⁴ R. Stark and L.R. Iannaccone “A supply-side reinterpretation of the “secularization” of Europe”, *Journal for the Scientific Study of Religion*, 33(3) (1994), 230-252 at 231.

¹⁵ C. Taylor, *A Secular Age*, (Cambridge MA, Harvard University Press, 2007).

led to a situation where the levels of religious practice, belief and influence over the legal and political domains are weaker in Europe than in any other continent.¹⁶ However, both Taylor and Casanova agree that this process has not resulted in the removal of religious influence from European life. As is shown below, religion continues to seek to influence law and public policy, particularly in relation to “*lifeworld*” issues such as family, sexuality and the beginning and end of life.¹⁷ Furthermore, Taylor argues that, even in secularised societies such as Europe, there is an “*irrepressible desire for the transcendent*”¹⁸ which has been seen in recent centuries in the romantic and nationalist movements as well as in the success of evangelical religious movements and the anti-humanist movements such as fascism, which saw a purely rationally based worldview and the cooperative demands made by such an approach as suffocating the human spirit.¹⁹ Moreover as Davie points out,²⁰ levels of nominal adherence to religion remain high in Europe while Christian religious institutions and symbols remain important elements of national life and identity of most EU member states. This dualism has been highlighted by Olivier Roy who, while agreeing that “*Western secularism actually has a Christian origin*”,²¹ nevertheless notes that secularism and Christianity provide two potentially competing poles around which Western identity can be defined. In this vein he suggests that the West (and therefore also Europe) is defined either:

*“in Christian terms or [...] in reference to the philosophy of the Enlightenment, human rights, and democracy that developed against the Catholic Church through first the Protestant Reformation , then the Enlightenment, and finally the secular and democratic ideal”.*²²

¹⁶ P. Norris and R. Inglehart, *Sacred and Secular: Religion and Politics Worldwide* (Cambridge, Cambridge University Press, 2004).

¹⁷ See sections 3.2 and 4.2 below.

¹⁸ n. 15 above.

¹⁹ *Ibid.*

²⁰ G. Davie *Europe: The Exceptional Case: Parameters of Faith in the Modern World* (London, Darton, Longman Todd, 2002).

²¹ O. Roy *Secularism Confronts Islam* (translated by George Holoch) (New York, Columbia University Press, 2007) Preface, ix.

²² *Ibid.* vii.

3. The Post-Secularisation Role of Religion in Contemporary Europe

3.1 Europe as a Secular Exception

Despite the near-universal acceptance of secularisation theory in academic circles up until the 1960s, religion in the outside world stubbornly refused to wither away as predicted. Furthermore, the persistence of religion was limited to pre-industrial countries in the less developed world. Berger, previously a committed advocate of secularisation theory, recanted and conceded that the non-Western world was “*as furiously religious as ever*” and that evidence of religious decline in the United States was largely absent. The continuing religious vitality of the United States (with its highly developed religious pluralism) called into question the link between pluralism, relativism and secularity.²³

However, although religion remained strong in many areas of the world, in Europe, it was undeniable that a significant degree of secularisation had taken place. In this context, Europe, as a progressively secularising continent, eventually came to be seen as the exception the rule of a persistently religious world rather than the trail blazer to a secular future. Although, as is discussed below, most Europeans retained at least an nominal affiliation to Christianity, as Cox pointed out: “*an unwillingness by most Europeans to declare themselves entirely atheistic, or to abandon irrevocably all hope of life after death, is not persuasive evidence that Berlin and Amsterdam are throbbing with a hidden Durkheimian numinosity*”.²⁴ Furthermore he notes that the fact that “*in large areas of modern Europe, religious men and women who attempt to create new religious institutions run into a brick wall of resistance and indifference*”.²⁵ Attempts to introduce televangelism to Europe for example, have found that that kind of religion simply does not find an appreciative audience in amongst Europeans in the way it clearly does elsewhere.²⁶

²³ P. Berger *A Far Glory: The Quest for Faith in an Age of Credulity*, (New York, Free Press, 1992) at 32.

²⁴ J. Cox “Master Narratives of Long-Term Religious Change” in H. McLeod and W. Ustof (eds.) *The Decline of Christendom in Western Europe, 175-2000* (Cambridge University Press, Cambridge, 2003) 203-204.

²⁵ *Ibid.*

²⁶ G. Davie, *Europe: The Exceptional Case: Parameters of Faith in the Modern World* (London, Darton, Longman Todd, 2002) at 32.

Whatever the merits of their arguments in relation to secularisation theory as it applies to the world in general, attempts to deny Europe's progressive secularisation, like those who used confidently to predict the eventual disappearance of religion altogether, run into what Cox describes as the "*triumphant empirical rebuttal*"²⁷ of a welter of statistics showing a continuing decline in levels of religious practice and belief amongst Europeans in general.

3.2 The Post Secularisation Political and Legal Role of Religion

Nevertheless it was also clear that, although secularisation had occurred, it had not meant that religion had disappeared altogether from European life. Casanova²⁸ has adapted secularization theory to take account of the continuing influence exercised by religious organizations and worldviews over certain areas of law and politics. He agrees that this process has brought about a fundamental change in the role of religion in society but departs more radically from traditional secularisation theories in rejecting the idea that the emancipation of the secular spheres meant that religion would inevitably decline and disappear. He rejects the idea that religion in the modern world has been relegated to the private sphere arguing that religion and politics have a symbiotic relationship and that "*the walls separating church and state continually develop cracks through which they penetrate each other.*"²⁹ Religions, he asserts, have refused to accept the marginal role allocated to them under the liberal state model of separation. The Catholic Church in particular has refused to accept that separation of church and state means the privatization of morality.³⁰ While he agrees that the Churches neither can nor should seek to control the state, Casanova rejects the secularist idea of a neutral public square as damaging to both religion and politics³¹ and as biased against those who have religious faith.³² Accordingly he sees three

²⁷ n. 24 above, 205.

²⁸ n. 8 above.

²⁹ *Ibid.* 41.

³⁰ *Ibid.* 57.

³¹ *Ibid.* 61.

³² *Ibid.* 64.

circumstances under which modern religions should and in fact do intervene in the public square. These are:

1. To protect modern freedoms and rights against an absolutist authoritarian state (such as the ecclesiastical opposition to dictatorship in Brazil and Spain).
2. To contest the absolute lawful autonomy of secular spheres and their claim to be organised according to principles of functional differentiation without regard to extraneous moral/ethical considerations. (Casanova gives the example of the opposition to arms race in the US by the Catholic church in the 1980s, but, in the EU context, a more relevant example may be the consistent warnings of the Catholic hierarchy and clerics of other religions against the absolute primacy of the market in modern society).
3. To protect the what he terms the “traditional life-world” (ie. questions relating to the beginning and end of life (such as euthanasia, bio-ethics and abortion), family policy and sexuality) from administrative or juridical state penetration and in the process to open up issues of norm and will formation to the public and collective self-reflection of modern discursive ethics. Casanova gives the example of the public mobilization of the so-called Moral Majority and the Catholic public stand on abortion in support of “the right to life” in the United States as examples of this third instance.³³ In the European context, the Catholic Church has been equally active in relation to EU policies related to these lifeworld issues.

In summary, Casanova accepts that modernisation has played a key role in bringing about a significant decline in religious influence in modern society. The emancipation of the secular spheres from ecclesiastical control is, he believes “*incontestable and a modern structural trend*”.³⁴ However, he rejects the idea that this process of secularisation will inevitably bring about the disappearance and privatisation of religion, asserting that where churches have avoided excessive entanglement with the state, religion can retain vitality and

³³ *Ibid.* 228-229.

³⁴ *Ibid.* 212.

that in the modern democratic state, religions continue to play a public role in certain areas.

Casanova's adaptation of secularisation theory would appear to account successfully for many (though not all) of the features of the role of religion in contemporary Europe. It is clear that, in European terms at least, processes such as the rise of the nation-state and the capitalist economy, coupled with scientific and educational advances, have brought about a decline in the influence of religion on society. Indeed, even the Catholic Church, having fought the emergence of the secular state for centuries, began in the mid 1960s "*a tortuous process of official aggiornamento to secular modernity [in which it] accepted the legitimacy of the modern age*".³⁵ However this has not meant that religion has disappeared from European life in either its private or public forms.

More importantly, the churches themselves have not abandoned their public, political role. As Casanova pointed out, the Catholic Church in particular, despite its acceptance of the legitimacy of the secular state, has explicitly rejected the notion of religion as a purely private matter and continues to challenge the absolute autonomy of the key secular spheres of the market and the state and to intervene in public affairs on a wide range of issues, particularly those connected to the "lifeworld". In its "*Doctrinal Note on Some Questions Regarding the Participation of Catholics in Political Life*"³⁶ the Vatican authorities stated bluntly that legislators had "*a grave and clear obligation to oppose*" any law that attacks human life and that it was "*impossible*" for any Catholic to vote for such laws.³⁷ More broadly, the same document states that "*a well-formed Christian conscience does not permit one to vote for a political program or an individual law which contradicts the fundamental contents of faith and morals*".³⁸

³⁵ *Ibid.* 9.

³⁶ "*Doctrinal Note on Some Questions Regarding the Participation of Catholics in Political Life* 16 January 2003, issued by the Congregation for the Doctrine of the Faith. Quoted in D. Yamane, *The Catholic Church in State Politics: Negotiating Prophetic Demands and Political Realities* (Lanham, Rowman and Littlefield Publishers, 2005) 151.

³⁷ *Ibid.*

³⁸ *Ibid.*

Support for the argument that the churches do retain an influential public role is provided by Halman and Riis who argue that what they term “*modern people*” are “*less prone to accept the churches as moral authorities though they may still accept them as advisors on a limited range of moral issues.*”³⁹ Thus while religious bodies express views on a wide range of matters, their influence is concentrated on certain issues. This hypothesis is further supported by Procter and Hornsby-Smith’s work which showed that while political values on socio-economic issues could not be predicted on the basis of levels of religious practice and identification, a significant relationship could be shown between the latter and attitudes to questions of “*family values.*”⁴⁰ Thus, even in highly secularised societies such as Europe, churches act most strongly and have most influence in relation to state attempts to regulate the private sphere (namely those areas of policy impinging on the “*lifeworld*” of family policy, the beginning and ending of life, sexuality and bio-ethics). Indeed in a 2006 address to the European People’s Party, Pope Benedict XVI stated that:

*"As far as the Catholic Church is concerned, the principal focus of her interventions in the public arena is the protection and promotion of the dignity of the person, and she is thereby consciously drawing particular attention to principles which are not negotiable."*⁴¹

As to the specific areas of policy related to the dignity of the person, the Pope mentioned three areas upon which the church had focused:

³⁹ L. Halman and O. Riis (eds) *Religion in Secularizing Society: The Europeans’ Religion at the End of the 20th Century* (Brill, Leiden, Boston 2003) 5.

⁴⁰ M. Procter and M. Hornsby-Smith “Individual Context Religiosity, Religious [sic.] and Values in Europe and North America” in L. Halman and O. Riis (eds) *Religion in Secularizing Society: The Europeans’ Religion at the End of the 20th Century* (Brill, Leiden, Boston 2003) at 110-111. Norris and Inglehart also note a weakening in the relationship between a general right political orientation and religiosity over the last twenty years in most industrial and post-industrial societies apart from the United States and Austria (n.16 above, 228). While several commentators note that there continues to be a link between religiosity and support of right wing political parties, the significance of Procter and Hornsby-Smith’s work is that this orientation is influenced to a greater degree by the attitudes of right wing parties to “lifeworld” issues rather than their stances on socio-economic matters.

⁴¹ Address of Pope Benedict XVI to the European People’s Party of 30 March 2006 full text at: http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/march/documents/hf_ben-xvi_spe_20060330_eu-parliamentarians_en.html (last visited 20 June 2008).

“- protection of life in all its stages, from the first moment of conception until natural death;

- recognition and promotion of the natural structure of the family - as a union between a man and a woman based on marriage - and its defence from attempts to make it juridically equivalent to radically different forms of union which in reality harm it and contribute to its destabilization, obscuring its particular character and its irreplaceable social role;

- the protection of the right of parents to educate their children.”⁴²

These issues both are at the forefront of contemporary political debate within Europe⁴³ and at the crux of the value differences separating values of the West from those of less economically developed regions.⁴⁴ Large scale immigration into Europe, particularly from Muslim countries, has given these issues a new lease of life⁴⁵ and has reopened conflicts which the proponents of traditional Christian morality had thought lost for many years. In late 2004 an expert group appointed by the EU issued a report entitled *Islam and Fundamental Rights in Europe* which concluded that:

“the major area of conflict between Islam and Human Rights is not politics but on Civil Law and culture as demonstrated in the debate over secularism and Islam. The highest divergence between Muslims and non-Muslims seem to concern the questions of morality and sexuality as shown in the debate over the headscarf but also on the question of sexual orientation.”⁴⁶

⁴² *Ibid.*

⁴³ See for example, B. Bawer, *While Europe Slept: How Radical Islam Is Destroying the West from Within*, (New York, Doubleday, 2006).

⁴⁴ n. 16 above.

⁴⁵ J. Klausen, *The Islamic Challenge: Politics and Religion in Western Europe*, (Oxford University Press, Oxford and New York, 2005, 15, 16 and 92.

⁴⁶ See J. Césari, A. Caeiro and D. Hussain *Islam and Fundamental Rights in Europe* Final Report, October 2004, European Commission, DG Justice and Home Affairs Centre National de la Recherche Scientifique, Ecole Pratique de Hautes Etudes, Groupe de Sociologie des Religions et de la Laïcité, paragraph 3 of the Executive Summary.

This conclusion was underlined by joint statement condemning homosexuality on the part of leading figures from a range of Islamic organisations in early 2006 which was published in the London *Times* newspaper.⁴⁷

Thus, although significant secularisation has taken place, and although most mainstream European religions have come to accept the legitimacy of secular political authority, this has not meant that religion has been removed from law or political life. Instead, in certain areas, religion continues to seek to play a role in relation to, and to varying degrees, succeeds in influencing, law and politics in the Member States of the European Union.

3.3 Religion and Identity

In addition to its continuing role in the legal and political arenas, theorists have noted the continuing importance of religion in matters of identity in Europe. Davie acknowledges that there has been a striking decline in religious belief and practice in Europe. She argues however, that large numbers of Europeans who do not themselves practice their religion actively, nevertheless retain a religious sensitivity, approve of religion in a general way and are pleased that the smaller number of active religious participants do practice their faith.⁴⁸ This, Davie terms, “*vicarious religion*” and she sees it as representing a uniquely European frame of mind in which the actively religious are seen as carrying out religious activities “*on behalf of*” the non-actively religious. In an approach reminiscent of supply-side theories, she regards such an attitude as springing partly from European attitudes to public utilities which they may never use themselves but whose existence they nevertheless approve of. Churches, Davie argues, have become de facto influential voluntary organisations capable of operating in a variety of ways. As members of civil society, churches are “*central to the structures of a modern democracy and attract more members than almost all of their organisational equivalents*”.⁴⁹ She therefore concludes the Europeans have not become less religious but differently so. They are content for a minority of the

⁴⁷ <http://www.timesonline.co.uk/article/0,,59-1984362,00.html> (accessed 6 October 2006).

⁴⁸ G. Davie, *Religion in Europe: A Memory Mutates* (Oxford University Press, Oxford, 2000).

⁴⁹ *Ibid.* 18.

population to enact their “*religious memory*”⁵⁰ on their behalf with a level of awareness that they may need to draw on such religious facilities at certain times in their lives. In this regard, Davie noted the almost universal take up of religious ceremonies at the time of death, the prominent role accorded to churches in times of national crisis such as the sinking of the ferry *Estonia* in the Baltic Sea in 1994 or after the death of Princess Diana in 1997 and the growth in “New Age” spirituality amongst Europeans in recent times.⁵¹

Hervieu-Léger also focuses on religion’s role in terms of collective identity. She views religion as an aspect of a shared memory, awareness of which is an essential feature of both individual and social identity.⁵² Furthermore it is also an important element of the chain which links past, current and future members of a community. The tradition of collective memory of that community becomes the basis of that community’s existence. Modern societies, by their nature, are less capable of maintaining the communal memory which is central to their religious existence and it is the resultant amnesia rather than increased rationalism that causes the decline in religion. Although she believes that modern societies are corrosive of traditional religion,⁵³ Hervieu-Léger believes that such societies through their emphasis on progress which can only ever be partially attained, also produce “utopian” spaces which can only be filled by religion. This analysis supports Davie’s view of a Europe that has become differently religious rather than secular.

4. Religious Practice, Belief and Influence in Europe: The Current Situation

4.1 Practice and Belief

This theoretical picture of a decline in religious belief, practice and influence over society but the persistence of a religious element to collective and individual identity is borne out by the statistics on religious identity and practice in Europe. According to the *World Values Survey* some 49% of those in agrarian societies reported attendance a religious service at least once a

⁵⁰ n.26 above, 46.

⁵¹ *Ibid.* 19.

⁵² D. Hervieu-Léger, *La Religion pour mémoire* (Paris, Le Cerf, 1993).

⁵³ D. Hervieu-Léger, *Vers un nouveau christianisme* (Paris, Le Cerf, 1993).

week.⁵⁴ In the developed United States, the figure is almost as high at 46%.⁵⁵ The *European Values Survey* by contrast found that in 1999/2000 only 20.5% of Western Europeans reported similar levels of church attendance.⁵⁶ Similarly, in relation to core religious beliefs, only 53.3% of Western Europeans said they believed in life after death,⁵⁷ a figure some 23% lower than that given by respondents in the United States.⁵⁸ Europeans also significantly lower levels of belief in notions such as heaven, hell, sin, and in the existence of a deity than either less developed societies or developed countries such as Canada and the United States.⁵⁹ Furthermore, according to the 2006 Eurobarometer survey, religion is an important source of values for a mere 7% of Europeans. Values such as peace (52%), respect for human life (43%), human rights (41%) democracy (24%) and individual freedom (22%) were viewed as significantly more important in this regard.⁶⁰

The picture across Europe is, however, far from uniform. In Scandinavia for example, levels of weekly church attendance are extremely low with both Denmark and Sweden coming in at under 4% and Finland barely exceeding 5%. In Ireland, by contrast some 56.9% of respondents were weekly churchgoers.⁶¹ Several commentators⁶² argue that, in terms of religion, Europe can be divided into a traditionally Protestant North characterised by low levels of practice and belief, a traditionally Catholic South with higher (though declining) levels and a denominationally mixed zone which is between the

⁵⁴ n. 16 above, 70.

⁵⁵ *Ibid.* 74. The figure in relation to the United States is the figure from the 2001 survey while the figure for agrarian societies represents a composite of the figures for all surveys between 1981 and 2001.

⁵⁶ n.26 above, 6.

⁵⁷ *Ibid.* 7.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.* 6,7. See also data from the Gallup Opinion Index and World Values Survey quoted at page 90 of Norris and Inglehart (n.16 above).

⁶⁰ Eurobarometer 66 (2006) *Standard Eurobarometer: Public Opinion in the European Union* available at: http://ec.europa.eu/public_opinion/archives/eb/eb66/eb66_highlights_en.pdf (last visited 30May 2007).

⁶¹ n. 26 above, 6-7.

⁶² *Ibid.* 11 and L. Halman and T. Pettersson "Differential Patterns of Secularization in Europe: Exploring the Impact of Religion on Social Values" in L. Halman and O. Riis (eds) *Religion in Secularizing Society*, (Leiden, Boston, Brill, 2003) 54.

two.⁶³ Even within these groups there is considerable diversity (traditionally Catholic France for example manifests patterns of belief and practice which are closer to those of the Protestant North) and countries which simply fail to fit the pattern (Ireland which is geographically and culturally part of the North shows a greater resemblance to the its fellow Catholic countries in the South in relation to levels of belief and practice).

The situation is further complicated by the growth of immigrant populations who not only adhere to religions not traditionally present in Europe, but who come from societies where religion and religiously influenced values continue to play a dominant role.⁶⁴ Both France and Germany for instance now have Muslim populations several million strong, while Britain plays host to large numbers of evangelical Christians from its African and Caribbean ex-colonies as well as significant populations of Muslims, Sikhs and Hindus from the Indian sub-continent. In several countries, most notably the Netherlands, Germany and France the persistence and strength of traditional religious values amongst immigrant communities has come to be seen as a problem by a significant section of society and has increased tensions between migrant groups and host populations. Indeed, some of those opposed to further immigration and others who favour immigration but oppose multiculturalism have stressed secularity rather than Christianity as a non-negotiable feature of European identity to which incomers must conform.⁶⁵

Furthermore, despite the sustained secularisation, religion in general and Christianity in particular does continue to exercise an influence over European society. A large (though declining) number of Europeans (77.4%) continue to

⁶³ *Ibid.* 11.

⁶⁴ n. 26 above, 38-39.

⁶⁵ See Chapters IV and V. The rise of the List Pim Fortuyn in the Netherlands was closely connected to a desire to require Muslim immigrants to adopt "European Values", particularly the separation of religious norms from questions of gender equality and sexuality. These arguments have since been incorporated into immigration policy in several countries including the Netherlands. Grace Davie has argued that the difference in attitude to religion of native Europeans and immigrant communities "*has led to persistent and damaging misunderstandings, not least amongst groups whose religious commitments form the very core of their existence and for whom a pick-and-mix, live-and-let-live attitude simply will not do.*" G. Davie, "Religion in Britain: Changing sociological assumptions" *Sociology*, 34/1:113-128. Quoted at n. 26 above, 40.

profess a belief in God⁶⁶ while a significant number continue to use religious services to mark key life events such as marriage or death. Indeed, even in highly secularised Scandinavian countries such as Denmark and Sweden, where levels of belief in key elements of Christian theology such as the existence of a life after death are under 50%, the vast majority of the population continue to belong to the Lutheran state churches (a step which requires them to pay a proportion of their income to those churches). Questions may well be asked as to whether the use of familiar ceremonies to mark life events represents any meaningful level of religious engagement or belief or whether high church membership in Scandinavia is in fact merely an instance of cultural nationalism rather than cultural religiosity, but the fact remains that, despite unprecedented declines in religious belief and practice, European life continues to be marked by certain features which are, at the very least, arguably religious. Furthermore, “alternative” or “new age” spirituality has been growing steadily as mainstream religion has declined enabling some to argue that it is merely the form and not the level of religiosity that has changed.⁶⁷

The overall picture however, particularly in international terms, remains one of a Europe whose people are more secular than either their contemporaries in other continents or their ancestors at any time during the past two millennia. The inhabitants of Europe are, as a whole, less likely than any other people in the world to believe in God, sin, heaven, hell, or life after death than those of any other continent and are even less likely to attend any kind of religious ceremony on a frequent basis. Having dominated the social, political, legal and economic life of Europe for centuries, mainstream Christian denominations now find themselves in a position of weakness that has no parallel either in history or in the rest of the modern world. They have found themselves in this situation precisely at the time when the nation states of Europe have been attempting to create a new and common political community based on common values of which Christianity would once have been the primary source. Indeed, Martin once argued that “*Europe is a unity by virtue of having*

⁶⁶ n.26 above, 7.

⁶⁷ *Ibid.* 19.

one God and one Caesar".⁶⁸ An argument which is given credence by the fact that, historically Catholic and Protestant countries of the former Soviet bloc have found it significantly easier to achieve membership of the Union than their Orthodox equivalents. As the debates around the preamble to the proposed Constitutional Treaty showed⁶⁹ however, the applicability of Martin's assertion to the present day, highly controversial.

4.2 Declining Influence over Law and Politics

Furthermore, while Casanova is correct that religious bodies retain a degree of influence in relation to "lifeworld" issues, this influence is comparatively weak and declining. Not only has the increasing de-ideologisation of politics since the end of the Cold War, with its emphasis on economics as a technocratic sphere subject more to its internal laws than those of any overarching ideology, made it increasingly difficult for organisations such as churches which retain such comprehensive worldviews, to remain relevant in relation to issues of socio-economic policy. Even in relation to lifeworld issues, European religious groups have had far less success than their American counterparts in opposing the liberalization of policy in relation to family structures and sexuality.

The post war period in Europe has been characterised by a steady decline in religious influence in this area. For instance, in 1940, homosexuality was illegal in 17 of the 25 states which were members of the EU in 2004.⁷⁰ Only two of states had decriminalised homosexuality since 1822 with Portugal having reintroduced its ban in 1912. However, beginning with Sweden in 1944 states began to remove the criminal law from this area. The process was quite gradual at first with Portugal (1945) and Greece (1951) being the only countries to change their policy between the end of the war and the beginning of the 1960s. The next two decades saw this trend increase with 9 states

⁶⁸ D. Martin, *A General Theory of Secularisation*, (Oxford, Blackwell, 1978) 100.

⁶⁹ See Chapter II.

⁷⁰ See: The International Lesbian and Gay Association, World Legal Survey, available at: http://www.ilga.info/Information/Legal_survey/europe/world_legal_survey_europe.htm (last visited 9 November 2006).

wholly or partially decriminalising homosexual conduct by 1980.⁷¹ By 1993, Ireland found itself to be the only then member of the Union to maintain a policy of complete criminalisation and reformed its laws later that year. The countries of central and Eastern Europe which sought to join the Union following the fall of the Iron Curtain all decriminalised before accession (though, in the case of Romania and Cyprus, only as a result of pressure from European institutions).⁷² The Catholic and Orthodox churches in particular were opposed to this process.⁷³

The law in relation to abortion was subject to a similar process.⁷⁴ By the end of the Second World War only Sweden had legalised the practice. During the 1950s Hungary (1956), Poland (1956), the USSR (which contained the Baltic Republics at the time)(1955) and Denmark (1956) all decriminalised abortion in certain circumstances. During this time, the Netherlands also introduced a policy of de facto toleration although the relevant legislation was not passed until 1981. The United Kingdom (apart from Northern Ireland where religious feelings ran much more strongly) passed legislation providing for a liberal abortion regime in 1967. During the 1970s and despite the fervent opposition of religious figures in general (and the Catholic Church in particular), bans on abortion were relaxed or abolished in Finland (1970), East Germany (1972), France (1975) and West Germany (1976). This trend continued throughout the 1980s with Portugal (1984), Spain (1985) and Greece (1986) liberalising their legislation in this area. A notable exception to this trend was Ireland where following a campaign in which the Catholic Church was heavily involved, the constitution was amended in 1983 to grant the unborn an equal

⁷¹ Decriminalisation occurred in the following order: Hungary (1961), Czechoslovakia (1961), England and Wales (1967 though the law was not changed in Scotland until 1980 and Northern Ireland until 1982) and Germany (1968 in the East and 1969 in the West), Austria (1971), Finland (1971), Malta 1973, Slovenia (1977).

⁷² The Baltic states decriminalized in 1992 (Latvia and Estonia) and 1993 (Lithuania) with Romania and Cyprus doing so in the year 2000).

⁷³ For an account of the opposition of the Irish Catholic Church to reform of the Irish law see K. Rose in "Equality for Lesbians and Gay Men, A Report of ILGA Europe" June 1998 available at: <http://www.steff.suite.dk/report.htm> (last visited 8 November 2006). It is perhaps noteworthy that this document was financially supported by the European Commission. For an account of the opposition of the Cypriot and Romanian Orthodox Churches and the attitude of the EU to this process see Chapter IV.

⁷⁴ See the Childbirth by Choice Trust Report "Abortion Law, History and Religion" available at: http://www.cbctrust.com/history_law_religion.php#7 (last visited 8 November 2006).

right to life to that of the mother. Similarly, following the removal of restrictions on religious influence on public life which resulted from the overthrow of communism in Poland, the previously liberal abortion law was significantly tightened in 1993.

The law in relation to other “lifeworld” issues such as adultery and divorce has also been subject to a decreasing degree of religious influence. Adultery, for instance, was considered a crime in several European countries until the 1970s all of which subsequently decriminalised the practice while divorce was finally legalised in Ireland in 1997.⁷⁵ On the other hand, traditional attitudes towards lifeworld issues persist in many Member States, particularly those which have joined since 2004.⁷⁶ Furthermore, laws in relation to issues such as euthanasia and same-sex marriage continue to be influenced, at least partially, by religious teachings and in all Member States religious figures are prominent participants in debate on such matters. Therefore, although the ability of religious organisations to influence law in this area has steeply declined since the end of the Second World War, there is considerable diversity between Member States and a degree of religious influence remains. Nevertheless, in world terms, the balance struck in Europe between the promotion of traditional religious morality and humanist notions of individual autonomy favours the latter to a notable degree.

4.3 Continuing Role in National identity

The religious history and background of Member States continues to exercise an influence, even following intensive secularisation. As Norris and Inglehart put it:

⁷⁵ Irish law criminalised adultery until 1981, French law until 1975 and Austrian law until 1997. See K. Gajendra Singh, “EU-Turkish Engagement: A Must for Stability of the Region”, South Asia Analysis Group Papers <http://www.saag.org/papers12/paper1127.html> (last visited 19 June 2006).

⁷⁶ Eurobarometer 66 (2006) *Standard Eurobarometer: Public Opinion in the European Union* available at: http://ec.europa.eu/public_opinion/archives/eb/eb66/eb66_highlights_en.pdf (last visited 30 May 2007).

“the distinctive world views that were originally linked with religious traditions have shaped the cultures of each nation in an enduring fashion; today, these distinctive values are transmitted to the citizens even if they never set foot in a church, temple or mosque.”⁷⁷

They argue that Sweden, for example, continues to manifest a distinctive Protestant value system although less than 5% of the population attends church on a weekly basis.⁷⁸ To a degree therefore, religions continue to influence the values of very secularized societies with Norris and Inglehart noting the particular relevance of orientations towards work ethic, sexual liberalization and democracy in Catholic and Protestant societies. There are, it is therefore argued, “*Lutheran atheists*” and “*Catholic atheists*” with religious influence on values continuing after actual belief and practice have fallen away.⁷⁹ Of course, the secularization of European society has had a significant impact on the potency of these religious values. This is something which is recognized by Norris and Inglehart who argue that:

“Today, these values are not transmitted primarily by the church, but by the educational system and the mass media, with the result that although the value systems of historically Protestant countries differ markedly and consistently from those of historically Catholic countries – the values of Dutch Catholics are much more similar to those of Dutch Protestants than to those of French, Italian or Spanish Catholics.”⁸⁰

Even amongst the secular therefore, religion continues to play a values-forming role. However, as the level of contact with purely religious institutions falls, this role is, increasing mediated through state institutions and national cultures.

Furthermore, state identity and state institutions continue to maintain links to particular religious traditions in many Member States. Davie has pointed out

⁷⁷ n.16 above, 17.

⁷⁸ *Ibid.* 17-18.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

that the “vicarious” European approach to religion means that the attitude of Europeans towards traditional churches is akin to their attitude to public services in general in that they have a benign attitude towards their existence and activities but are not actively involved with them, other than at times of particular personal or communal significance or crisis (such as birth, death, state occasions).⁸¹ In fact this idea of publicized religion (or even the “socialized religion” of the supply side theorists) does fit with the legal and institutional reality of European church-state relations. True separation of church and state is in fact, extremely rare in Europe. European religions retain a prominent role in both member state constitutions and as key elements of national education and (to a lesser extent) healthcare provision.⁸² Indeed Norris and Inglehart’s attribution of a key role to national educational systems in the propagation of religious values in secular society is mirrored by the strenuous efforts made by traditional churches to retain and enhance their role in educational systems and to defend this role from any interference from EU institutions. The same churches have been equally keen to ensure that the prominent role of religion as a source of underlying constitutional values in several member states has been similarly insulated from challenges at European level.⁸³

4.4 Constitutional and Institutional Position

Given that the idea of state neutrality in relation to religion has been “*a central plank of liberal thinking about the state and its ethical dimensions*”⁸⁴ the most striking feature of church-state relations in Europe is the almost total absence of such neutrality. While many commentators such as Jones have seen religious neutrality as a *defining* characteristic of the liberal state arguing that “*a liberal state is a state which imposes no conception of the good upon its*

⁸¹ G. Davie *Religion in Europe: A Memory Mutates* (Oxford University Press, Oxford, 2000) 44.

⁸² J.T.S. Madeley, “European Liberal Democracy and the Principle of State Religious Neutrality” in J.T.S. Madeley and Z. Enyedi (eds.), *Church and State in Contemporary Europe: The Chimera of Neutrality* (London, Frank Cass Publishing, 2003).

⁸³ See for instance protocol 11 of the Amsterdam Treaty guaranteeing the status of national churches in national law and the watering down of the Employment Discrimination directive to allow discrimination in order to maintain the ethos of religious institutions discussed in Chapter V.

⁸⁴ n.82 above.

citizens but which allows individuals to pursue their own good in their own way”,⁸⁵ other commentators have suggested that “arrangements based on Enlightenment liberal assumptions actually offend against the principle of governmental religious neutrality because they privilege secular liberal beliefs over religious ones and consign religion to the margins of social life.”⁸⁶ The latter group argue that true freedom of religion requires active facilitation by the state of religion and religious practice.

Ironically, in the highly religious United States, the constitutional prohibition on the establishment of any religion has led to the imposition of far more strictly secular standards of state neutrality than in secular Europe with state funding and endorsement of religion strictly prohibited under the jurisprudence of the US Supreme Court.⁸⁷ In Europe, by contrast, although the legislative imposition of religious views of the good life on individuals has been significantly curtailed by secularisation, church and state are, in general, both financially and legally intertwined. In his 1982 survey of church–state relations in the world, Barrett found that of the 35 sovereign territories in Europe, only five could be termed secular in the sense that the State neither promoted neither religion nor irreligion. Nine communist countries were Atheistic, fourteen were associate with a single confessional tradition while Finland supported two (state Russian orthodox and Lutheran). Six states were committed to the support of a plurality of religious organisations with Belgium for example paying salaries the clergy of six different denominations.⁸⁸ Furthermore, as Madeley points out, even the five states classified as secular had arrangements which would fall foul of the version of non-establishment developed by the United States Supreme Court (with even famously secular France falling short of the ideal of strict neutrality in several respects). Indeed,

⁸⁵ P. Jones, “The Ideal of the Neutral State” in R. Goodin and A. Reeve (eds.) *Liberal Neutrality* (London: Routledge 1989) quoted in Madeley, n.82 above, 5.

⁸⁶ S. Monsma and C. Soper, *The Challenges of Pluralism; Church and State in Five Democracies* (Oxford: Rowman and Littlefield, 1997) quoted in Madeley, n.82 above, 5.

⁸⁷ See for example *Zobrest v. Catalina Foothills School District* 509 US 1 (1997) where the Supreme Court held that governmental action which supported religion must have a secular purpose and avoid “an excessive governmental entanglement with religion” to pass constitutional muster.

⁸⁸ D. Barrett (ed.), *World Christian Encyclopedia: A Comparative Study of Churches and Religions in the Modern World AD 1900-2000* (New York, Oxford University Press, 1982). Quoted in Madeley, above n. 82, 13.

when de facto circumstances were taken into account, no European state could be said to have a fully neutral approach by the state towards religion with most states offering large-scale subsidies to certain denominations.⁸⁹ A review of the situation in the year 2000 showed that there had been no large scale shift towards state neutrality. Despite the large increase in the number of cases (there were 47 independent states, some 12 more than in 1980), only Sweden and newly reunified Germany had moved towards a greater degree of neutrality (though both still provided large subsidies to religious organizations). By far the largest trend was towards the removal of previous restrictions on religious life (a relic of the communist era) and their replacement with state support for recognized denominations (either through the taxation system or through direct state funding of church buildings and facilities).⁹⁰

A second striking feature of European church-state relations is the sheer diversity of arrangements amongst member states. Indeed, Massignon argues that within Europe, “*attachment to a specific model of church-state relations is one of the elements of identity and national political culture*”⁹¹ while Meny and Knapp suggest that there is a European tradition of a dominant church or religion which continues to mark the political systems of Italy and the UK.⁹² Both this specificity and the close relationship between the church and state, are reinforced by the fact very few countries are divided anywhere close to equally along religious lines. In fact most countries are either overwhelmingly of one denomination.⁹³ Furthermore, adherence to particular religions has been a central feature of the identity of states such as Ireland, Belgium and the United Kingdom while relationships to particular religions were key elements in the foundation of the modern French, Spanish, Italian and German States.

⁸⁹ n.82 above, 15.

⁹⁰ *Ibid.* 17.

⁹¹ See B. Massignon, “Les relations des organismes Européens religieux et humanistes avec les institutions de l’Union Européenne: Logiques nationales et confessionnelles et dynamiques d’européanisation” in *Croyances religieuses, morales et éthiques dans le processus de construction européenne*, Commissariat General du Plan, (Institut Universitaire de Florence, Chaire Jean Monnet d’études Européennes, 2002), my own translation.

⁹² Y. Meny and A. Knapp, *Government and Politics in Western Europe* (Oxford, Oxford University Press, 1998) 26.

⁹³ n.82 above, 15.

Thus, particularly where a single denomination has traditionally made up a large majority of the population (a situation which applies to 23 of 27 EU member states), it was natural that the welfare of the relevant church (which would have been an important part of the communal identity of a the dominant ethnic group in that nation state), came to be seen as a proper task for organs of that state. Therefore, despite the great diversity and national particularity of church-state arrangements in Europe, an amount of state aid for recognized denominations, either direct or indirect, is a common thread in almost all countries.

Almost all member states of the EU have a constitutional guarantee of freedom of religion and all are, in any event, required to uphold the freedom to practice one's religion by the provisions of the European Convention on Human Rights.⁹⁴ Beyond this minimum, diversity reigns. However, despite this diversity of constitutional arrangements, relatively similar approaches are adopted by several groups of Member States. The Nordic countries for instance were, until very recently, characterized by officially established Lutheran state churches. Part I §4 of the Danish Constitution states "*The Evangelical Lutheran Church shall be the Established Church of Denmark, and as such shall be supported by the State*"⁹⁵. Part II §6 of the Constitution also lays down a requirement that the monarch "*be a member of the Evangelical Lutheran Church*".⁹⁶ In Finland, the Evangelical Lutheran Church is also established by law (the Finnish Orthodox Church is also established).⁹⁷ In both countries the vast majority of citizens are members of the established (Lutheran) churches with 83.1% of Finns and 84.3% of Danes being members

⁹⁴ This has not prevented the suppression of several new religions such as Scientology in many member states. The Greek State has made efforts to restrict the ability of religions other than Greek Orthodoxy to recruit new members and has found itself before the Strasbourg Court on this basis. These questions will be dealt with in greater detail in Chapter III.

⁹⁵ See: The Constitutional Act of Denmark of June 5 1953, English Translation, Fact Sheet/Denmark (010279/7) of the Royal Danish Ministry of Foreign Affairs <http://www.folketinget.dk/pdf/constitution.pdf> accessed 16 April 2008.

⁹⁶ *Ibid.*

⁹⁷ Section 76 of the Finnish Constitution provides that "Provisions on the organisation and administration of the Evangelical Lutheran Church are laid down in the Church Act." See: The Constitution of Finland, 11 June 1999 (731/1999) <http://evl.fi/EVLUutiset.nsf/Documents/F322C5D68B64DB62C225728700454792?OpenDocument&lang=FI> accessed 16 April 2008.

despite low and falling rates of belief and practice.⁹⁸ In 2000, Sweden formally disestablished the Church of Sweden motivated by a feeling that the existence of a state church was no longer appropriate in a pluralist society. However, in all three countries, the State continues to collect a religious tax from those who are members of the established (and formerly established) churches. The funds from these taxes are passed on to the denominations in question which are therefore amongst the richest and best funded churches in Europe despite the tiny and shrinking nature of their active congregations.

The Greek model represents a very different version of establishment. Article 3 of the Greek Constitution recognizes the Greek Orthodox Church as “*the prevailing religion in Greece*”. The same article states that “*The text of the Holy Scripture shall be maintained unaltered*” and prohibits “*Official translation of the text into any other form of language, without prior sanction by the Autocephalous Church of Greece and the Great Church of Christ in Constantinople*”.⁹⁹ Article 14.3 also permits an exception to the prohibition on the seizure of newspapers and other publications in cases of “*an offence against the Christian or any other known religion*”. Indeed, membership of the Orthodox Church is seen as being inseparable from Greek identity (97% of Greeks are members of the Orthodox Church) and during the most recent revision of the Constitution completed in April 2001, the main parties of left and right agreed that the issue of the amending the status of the Orthodox Church would not even be raised.¹⁰⁰ The constitutional primacy of the Orthodox Church in Greece is an entirely different phenomenon from that of established Scandinavian churches, having a much more concrete impact on religious life. The Constitution lays down that church administration is to be regulated by state law. Orthodox clergy are paid by the State and the Archbishop of Athens receives the same honours as a Head of State. More

⁹⁸ Source: Danish Ministry for Church Affairs <http://www.kirkeministeriet.dk/kirkestatistik.html> and the Evangelical Lutheran Church of Finland. <http://evl.fi/EVLUutiset.nsf/Documents/F322C5D68B64DB62C225728700454792?OpenDocument&lang=FI> accessed 16 April 2008.

⁹⁹ The Constitution of Greece, Articles 3.1 and 3.3.

¹⁰⁰ See G.Th. Mavrogordatos, “Orthodoxy and Nationalism in the Greek Case” in J.T.S. Madeley and Z. Enyedi (eds.) *Church and State in Contemporary Europe: The Chimera of Neutrality* (London, Frank Cass Publishing, 2003) 120.

importantly, the construction of any religious buildings requires the permission of the local Orthodox bishop, a rule which has severely restricted the provision of mosques outside of Thrace (home to an indigenous Muslim minority). Both proselytism and blasphemy are criminal offences (though rarely invoked) and in 1998 the Council of State ruled unconstitutional a reduction in the hours of religious instruction (which relates exclusively to Greek Orthodoxy) in schools. An earlier decision of the same court required parents who wished their children to withdraw from such classes to make a formal request citing specifically different religious beliefs for them to do so.¹⁰¹ The Greek State does recognize other religions, namely the Muslims of Thrace and the Jews whose clergy are employed by the state and who are regulated by state law. However, as Mavrogordatos points out “*to speak of “plural establishment” (...) would be misleading, since no equal treatment is implied.*”¹⁰² Other faiths are generally treated as private associations (though the status of the Catholic Church as a legal person was subject to dispute until relatively recently).¹⁰³ The Greek model of church-state relations is therefore, somewhat removed from the European mainstream and aspects of these arrangements have been challenged several times before the European Court of Human Rights.¹⁰⁴

Although it is the major Christian denomination in Europe, full establishment of the Catholic Church is rare. In fact, tiny Malta, provides the sole example amongst all 27 member states of full establishment of the Roman Catholic Church. Article 2(1) of the Maltese Constitution declares that “*The religion of Malta is the Roman Catholic Apostolic Religion*”.¹⁰⁵ The Constitution explicitly envisages a prominent role for the Catholic Church in the public life of the country in Article 2(2) which states “*The authorities of the Roman Catholic Apostolic Church have the duty and the right to teach which*

¹⁰¹ *Ibid.* 121.

¹⁰² *Ibid.* 123.

¹⁰³ *Ibid.*

¹⁰⁴ See for example: *Kokkinakis v Greece* Judgment of 25.5.1993 Case 14307/88.

¹⁰⁵ Constitution of Malta, Ministry of Justice of the Republic of Malta, http://docs.justice.gov.mt/lom/legislation/english/leg/vol_1/chapt0.pdf (last visited 16 April 2008).

*principles are right and which principles are wrong.*¹⁰⁶ Article 2(3) provides constitutional status for compulsory religious education stating “*Religious teaching of the Roman Catholic Apostolic Faith shall be provided in all State schools as part of compulsory education*”.¹⁰⁷ This rather uncompromising approach does not however, typify the approach of most largely Catholic member states. The Slovenian and Lithuanian constitutions both declare that there is to be no state church¹⁰⁸ while 41(4) of the Portuguese Constitution states that “*The churches and religious communities are separate from the State*”.¹⁰⁹ The Slovenian document also includes a guarantee of equal treatment of religious denominations. Other countries such as Luxembourg, Austria and Slovakia make no reference to any specific denomination (in contrast to his Danish counterpart, the Grand Duke of Luxembourg appears to be free to belong to the religion of his choice). Several traditionally Catholic states do make limited special provision for the Catholic religion in their constitutions. Article 16.3 of the 1978 Spanish Constitution for example, states that “*The public authorities shall take the religious beliefs of Spanish society into account and shall in consequence maintain appropriate co-operation with the Catholic Church and the other confessions.*”¹¹⁰ However, the same article also states in unequivocal terms that “*There shall be no State religion*”. The Irish Constitution accords religion in general a more prominent role. Although it guarantees not to endow any religion and despite the removal of an article referring to the “*special position*” of the Catholic Church” by referendum in 1972, the Constitution as a whole retains a strikingly religious air. The Preamble to the Constitution begins “*In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We, the people of Éire, Humbly acknowledging our obligations to our Divine Lord, Jesus Christ.....*”.¹¹¹ The religious influence is not restricted to mere declarations. The oaths of office for the President and Judiciary are couched in religious terms with no secular

¹⁰⁶ Constitution of Malta, Article 2.

¹⁰⁷ *Ibid.*

¹⁰⁸ Article 7(1) of the Constitution of Slovenia and 43(7) of the Constitution of Lithuania.

¹⁰⁹ Constitution of the Portuguese Republic, Article 41.

¹¹⁰ Constitution of Spain, Article 16.3.

¹¹¹ Bunreacht na h-Éireann, Preamble.

alternatives provided.¹¹² More importantly, such religious rhetoric has had concrete effects on the interpretation of the constitution with the Supreme Court invoking the terms of the preamble as a ground for its refusal to strike down as unconstitutional a ban on homosexual intercourse.¹¹³ Blasphemy is declared by Article 40.6.1.i to be a criminal offence and Catholic teaching in relation to abortion, divorce and the authority of the family in matters of education were all given constitutional status.¹¹⁴ While this constitutional model may appear to be closer to that contained in the Greek Constitution (with the enshrining of privilege for a single denomination), the Irish Constitution does contain provisions which moderate the heavily Catholic influence on much of the document. For instance, discrimination on religious grounds is forbidden by Article 44.2.3 while Article 44.2.2 contains a prohibition on state endowment of any religion. In a similar vein, the Italian Constitution states that “*State and Catholic Church are, each within their own reign, independent and sovereign*”(Article 7(1)).¹¹⁵ Article 8(1) provides that “*Religious denominations are equally free before the law*”.¹¹⁶ In practice however, Italy recognizes only certain denominations such as the Jews and the Waldensians with many other religious groups, including Muslims being excluded from significant privileges.¹¹⁷ Like the Irish Constitution, the preamble to the Polish Constitution speaks of a “*culture rooted in the Christian heritage of the nation*” but also contains some concessions towards secularists in that it is enacted in the name of “*those who believe in God as the*

¹¹² *Ibid.* Articles 12.8 and 34.5.1.

¹¹³ *Norris v AG* [1984] IR 36 where O’Higgins CJ for a majority of the court stated: “*The preamble to the Constitution proudly asserts the existence of God in the Most Holy Trinity and recites that the people of Ireland humbly acknowledge their obligation to “our Divine Lord, Jesus Christ.” It cannot be doubted that the people, so asserting and acknowledging their obligations to our Divine Lord Jesus Christ, were proclaiming a deep religious conviction and faith and an intention to adopt a Constitution consistent with that conviction and faith and with Christian beliefs. Yet it is suggested that, in the very act of so doing, the people rendered inoperative laws which had existed for hundreds of years prohibiting unnatural sexual conduct which Christian teaching held to be gravely sinful. It would require very clear and express provisions in the Constitution itself to convince me that such took place. When one considers that the conduct in question had been condemned consistently in the name of Christ for almost two thousand [...], the suggestion becomes more incomprehensible and difficult of acceptance*”.

¹¹⁴ See Articles 40.3.3 (abortion), 41.3.2 (previously prohibited divorce, this was repealed by a wafer-thin majority in a referendum in 1995) and 41.1.1, 41.1.2, 42.1, 42.3.1 (family authority in education).

¹¹⁵ Constitution of the Italian Republic, Article 7(1).

¹¹⁶ *Ibid.* Article 8.

¹¹⁷ n. 48 above, 17 -21.

*source of truth, justice good and beauty, as well as those not sharing such a faith but respecting those universal values as arising from other sources*¹¹⁸ and of “*recognizing our responsibility before God or our own consciences*”.¹¹⁹ It also states in Article 25.2 that the public authorities “*shall be impartial in matters of public conviction, whether religious or philosophical*”.¹²⁰ Significantly, both the Italian and Polish constitutions make provision for relations with the Catholic Church to be regulated by means of a concordat.¹²¹ These concordats have been a source of fierce controversy in many countries including Poland, Hungary and Slovakia where critics charged that they institutionalized preferential treatment for the Catholic Church in key areas such as healthcare and education with negative consequences for non-Catholics using such services.

Catholic countries have adopted equally diverse approaches to state-financing. Spain and Italy operate a church tax system where taxpayers can opt to contribute a proportion of their income to the religious bodies. In both cases existing arrangements favour the Catholic Church although the Socialist government elected in Spain in 2004 has begun a process of removing such privileges.¹²² It is perhaps notable that, though levels of belief and practice are much higher than in Scandinavian countries, levels of payment of the voluntary church tax is much lower in both Spain and Italy. In Portugal no direct subsidies are provided but indirect aid is generous. The concordat arrangements agreed between the Vatican and several Eastern European countries have also tended to provide a degree of state funding of religious institutions, either directly or indirectly. In Ireland, by contrast, under-provision of social services by the State led, until relatively recently, to the provision of such services by the Churches. As the ability of the State to fund such services increased it took over the financing of these activities but allowed the churches to retain control meaning that a degree of indirect financial support was given. There extent of direct financial help is however,

¹¹⁸ Constitution of the Republic of Poland, Preamble.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.* Article 25.2.

¹²¹ Article 7(2) of the Constitution of the Italian Republic and Article 25.4 Constitution of the Republic of Poland.

¹²² n. 48 above, 39-41.

extremely limited. Catholic Belgium on the other hand, while eschewing the idea of a state church, does play the salaries of Catholic priests along with the ministers of other religions.

Religiously mixed countries such as Germany and the Netherlands do not have state churches. In the Netherlands the constitution is largely silent on the question of religion other than brief provisions providing freedom from discrimination and for respect for religious preferences in education. Direct subvention of religion is not a feature of the Dutch system though some indirect aid is provided. In Germany the constitution embodies the model of “positive neutrality” towards religion where the state does not establish or privilege any denomination but nevertheless actively facilitates institutional religion. The Basic Law carries over the provisions relating to religion from the Weimar Constitution which provide for “*a constitutionally structured form of cooperation between the state and churches structured around the principles of neutrality, tolerance and parity.*”¹²³ Article 137(1) provides that there is to be no state church but Articles 137(6) and 138(1) establish the right of churches to levy religious taxes on their members and the right to public subsidies from the Länder. In Germany, the major religions denominations are considered to be public corporations and taxes are levied on their behalf by the State and the churches are heavily involved in the provision of state-funded social services. Other religiously mixed countries such as Hungary have also established a degree of state funding for religious denominations (with funding of the Catholic Church regulated by a concordat). The level of financial support has however fluctuated with changes in government (the left being more parsimonious in relation to religious funding). A voluntary church tax system has also failed to attract more than 20% of taxpayers.¹²⁴

Finally, France is unique in that its constitution does not merely fail to establish a state church, instead it establishes the secular (“*laïque*”) nature of the Republic under which the state is meant to have a strictly neutral public

¹²³ *Ibid.* 17-21.

¹²⁴ Z. Enyedi, “The Contested Politics of Positive Neutrality in Hungary” In: John Madeley and Zsolt Enyedi (eds.) *Church and State in Contemporary Europe. The Chimera of Neutrality.* (London: Frank Cass, 2003) 157-176.

sphere from which religion is excluded altogether. However, even famously secular France does not achieve total separation. The province of Alsace was not part of France at the time of the separation of church and state in 1905 and, to this day church state relations in the region are governed by the concordat in force prior to that date under which Catholicism was officially recognized. This proved controversial when in 1997 gay rights protesters were fined for protesting against the Archbishop of Strasbourg outside Strasbourg Cathedral as under the relevant legislation (Article 167 of the Prussian Penal Code of 1871!) any offence against the church under canon law was punishable as a breach of the criminal law.¹²⁵ Furthermore, even beyond Alsace, the French State remains responsible for the upkeep of all pre-1905 church buildings. It also pays the salaries of chaplains in military and penal institutions as well as limited financial support for religious schools. The requirement of secularity is however, rigorously enforced in other arenas, most notably and controversially in relation to the wearing of religious clothing such as headscarves or turbans in public schools. This robust secularity is by no means typical of the educational systems of member states in general. However, education is a key arena within which the battle for the hearts and minds of the next generation is being fought and which, insofar as religious educational institutions act as employers and providers of services, may fall within EU law. It is for these reasons, that it deserves separate consideration.

4.5 Service Provision: Religion and Education

As both Davie and Casanova point out, education, like healthcare and welfare was part of the domain of the churches for centuries. However, as Davie also says “*the emergence of a discrete and autonomous educational sector is an almost universal characteristic of modernization; it is part of the undisputed structural differentiation of modern societies*”¹²⁶ which Casanova sees at the still valid core of secularization theory.¹²⁷ In modern day Europe, the state has assumed a responsibility for ensuring that citizens have access to adequate educational facilities. However, in the context of falling levels of belief and

¹²⁵ See the newspaper report in *Dernieres Nouvelles d'Alsace*, 20 October 1996.

¹²⁶ 48 above, 84.

¹²⁷ n. 8 above, 84.

practice, church involvement in education represents perhaps the best opportunity for religions to pass on the “*religious memory*” identified as vital by Davie and Hervieu-Léger. Indeed Davie argues that, in France the exclusion of religion from the state school system along with the decline in religious practice means that the younger generation are experiencing “*religious illiteracy*” with negative consequences for their ability to understand European culture and history.¹²⁸ Accordingly, religious denominations have fought particularly hard to maintain their role within education systems. Almost all member state constitutions as well as the European Convention on Human Rights protect the right to some form of denominational education or, at least, to a degree of respect for parental preferences in the carrying out of education by the state.¹²⁹

In all member states therefore, the religion plays a role in education, either where religious denominations own and manage schools or through the provision of religious education in state schools. The precise nature of the role played varies greatly between states. In Greece and Italy the religious instruction that is provided in state schools is almost entirely specific to Greek Orthodoxy and Roman Catholicism respectively with a prominent role being given to the clerical authorities in the selection of textbooks and design of curricula.¹³⁰ In France by contrast, religion is entirely excluded from the public school system. Somewhere in the middle are found pluralist countries such as the Netherlands however, where the state system provides a form of religious instruction which consists of what Davie calls the “*conscious preparation of children for a world where a variety of religious ideas forms a significant part of cultural exchange*”.¹³¹ While the overall trend across Europe appears to be one of growing pluralism, Davie is concerned that “A so-

¹²⁸ n.48 above, 93. The phrase “religious illiteracy” is a translation of the phrase “*analphabétisme religieux*” popularised by Henri Tincq, the religious correspondent of the *Le Monde* newspaper.

¹²⁹ Article 2 of Protocol I of the ECHR states that “*In the exercise of any functions which it assumes in relation to education and teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions*”. See also for example Article 23(3) of the Dutch Constitution, Article 24(1) of the Belgian Constitution, Article 42 of the Irish Constitution, Article 27(3) of the Spanish Constitution.

¹³⁰ n.48 above, 91.

¹³¹ *Ibid.* 95.

called multi-faith education can end up respecting the faith of no-one and devaluing the concept of religion altogether."¹³² Individual denominations have therefore been keen to retain control of their own schools in which their individual ethos can be imparted to pupils. The extent to which they have been able to do so while retaining state funding varies across Europe.

The role of religious education in schools can be seen as a reflection of its wider constitutional status. In Finland for example, where the Lutheran religion is the established faith, religious instruction remains central to primary and secondary curricula. There is some provision for minorities (notably the Orthodox Community which also has official status) but in 1992 (despite very low levels of practice and belief in the main tenets of the Lutheran faith) 97% of Pupils followed the courses related to the Lutheran Church.¹³³ This underlines not only the dominance of the state church but the significant social aspect of its nature as well as its formative influence in national identity. Although alternative courses can be provided at parental request, the Lutheran Church course is seen as such a non-threatening, national-identity-related phenomenon that parents who are not church members, are happy for their children to take part. In religiously plural countries like Germany and the Netherlands, separate types of education are provided for the respective denominations. In Germany, though the individual Länder have a great deal of power over education, the system reflects the historically bi-confessional nature of the country and the Basic Law lays down that religious education must be a regular subject in the public school system.¹³⁴ In general two types of religious education are provided, one Lutheran and one Catholic. The curriculum and textbooks used are formally scrutinized by the state and churches and include a mixture of confessional teaching alongside more general philosophical themes such as social issues, church history and world religions. The state of Brandenburg which is particularly secular given its history as part of the formerly Communist East,

¹³² *Ibid.*

¹³³ *Ibid.* 90-91.

¹³⁴ M. Minkenberg, "The Policy Impact of Church-State Relations: Family Policy and Abortion in Britain, France and Germany" in J.T.S. Madeley and Z. Enyedi (eds.) *Church and State in Contemporary Europe: The Chimera of Neutrality* (London, Frank Cass Publishing, 2003) 202.

considered the introduction of a non-confessional ethics course to replace religious instruction.¹³⁵ This move was strongly resisted by the historic churches. Overall the German system reflects the tension (inherent in the approach of the Basic Law to the question of religion in general) between religious tolerance and pluralism and a wish to inculcate Christian moral values which were seen by the founders of the Federal Republic as a bulwark against fascism and communism. The system does permit pupils to withdraw from religious education with the written permission of their parents. Regional differences have also placed this system under strain with the more secular East manifesting discontent with the overtly religious nature of the system and Catholic Bavaria resenting prohibitions on the placing of crucifixes in the classroom imposed by the Constitutional Court.¹³⁶ Furthermore, the essentially bi-confessional nature of the system does not adequately accommodate the needs of the large Turkish minority.¹³⁷

Similarly in France, despite the denominationally-neutral secular state school system the large Muslim minority find that their needs are catered for to a significantly lesser degree than Christians. A relatively large network of private Catholic schools continues to exist alongside the state system. Though the status of these schools has been a source of friction, the Loi Debré of 1959 which regulates their status provides them with a degree of state funding. There is no similar network of Muslim schools leaving Muslim parents without the same choice extended to their Catholic fellow citizens. This disparity in treatment became more controversial when the French government decided to ban the wearing of conspicuous religious symbols including the hijab in state schools in 2004. The British system has grappled with similar issues. It contains a network of denominational but state-funded schools which make up approximately 25% of the state system. These schools have traditionally been exclusively Christian but other denominations are now seeking to open their own schools. In recent years, both Muslims and Seventh Day Adventists have received permission to open state funded schools. This

¹³⁵ n.48 above, 90-91.

¹³⁶ BverfGE 93, 1 (1995).

¹³⁷ n.48 above, 90-91.

has proved controversial despite the fact that the state retains the power to supervise the teaching and curricula offered in such institutions.¹³⁸

Education remains a key issue for the churches. The Vatican has made it a key priority in its negotiations of concordats with Eastern European countries such as Poland, Hungary and Slovakia (where the issue of the concordat brought down the government in early 2006).¹³⁹ Indeed Crouch notes that the issue of education has been one of the few issues in relation to which European churches have retained a capacity to act as rallying points for political and moral claims, with attempts to undermine the place of church schools in France and Spain having generated mass protests in recent times.¹⁴⁰ At member state level, the churches have been extremely successful in acquiring and protecting a state-funded role for religion in national educational systems, even in supposedly robustly secular France. The churches have been keen to protect this role from challenge at European level lobbying to have their status under national law recognized under the Amsterdam Treaty as well as to protect their right to discriminate in order to maintain the ethos of their educational and healthcare institutions.¹⁴¹ This activity is not restricted to the Catholic Church with Council of the Evangelical Church in Germany having described this “*public mandate*” of religion as “*indispensable*” in 1997.¹⁴² This role is often very specific to the individual member state and can be closely linked to an individual denomination’s role as part of the national identity of the state in question. It is therefore an area which is particularly sensitive for a supranational organism such as the EU.

¹³⁸ *Ibid.* 87.

¹³⁹ See: “Slovak Government Falls over Concordat with Vatican” *Conscience*, June 2006, http://findarticles.com/p/articles/mi_hb064 (last visited 18 April 2008).

¹⁴⁰ C. Crouch “The Quiet Continent: Religion and Politics in Europe” in D. Marquand and R. L. Nettler (eds.) *Religion and Democracy* (Oxford, Blackwell Publishers, 2000).

¹⁴¹ The churches are also involved in healthcare provision in many member states. Their profile in this area is however much lower than in education. It is also of less significance in sociological and constitutional terms than education and will not therefore be addressed in detail. The right of the Catholic Church to fire employees of its medical facilities who publicly dissent from its core teachings was upheld by the European Commission on Human Rights in *Rommelfanger v. Federal Republic of Germany*, Decision of 6.9.1989.

¹⁴² n. 134 above, 202.

5. Conclusion

The relationship between religion, politics, the law and the state in EU Member States is therefore characterised by a significant degree of diversity. Europe as a whole is marked by a common heritage of Christianity which formed the basis for the emergence of a common European identity. However, full scale theocracy is entirely absent from the European scene and this Christian-influenced common identity has been moulded by other shared experiences such as the Reformation and the Enlightenment which have brought about a reduction in the influence of religion over the law and the state. These experiences and the secularisation they brought about, do owe much to Christianity and in particular to its strong humanist tradition. Nevertheless, they have served to limit the public ambitions of Christian religions as well as those of other faiths whose presence in Europe has increased in recent years. This is particularly notable in relation to “lifeworld” issues where the large scale enforcement of traditional Christian morality in relation to matters of sexuality and family has been replaced by an approach which places much greater emphasis on individual autonomy and equality. Nevertheless, the approach of Member States in this area is by no means uniform. Religious ideas continue to influence the law in relation to issues such as marriage, abortion and euthanasia in many Member States. Furthermore, religion remains a strong element of communal identity and culture and maintains a strong institutional presence in many Member States, particularly in the area of healthcare and education. Thus, despite its continuing role, religion must compete for influence with strong secular and humanist traditions. The relationship between religion, the state and the law in contemporary Europe is therefore characterised by a balance between religious (largely Christian) and secular influences albeit a balance that has shifted notably in a secularist direction and which varies from state to state.

These features of the European approach to religion are all potentially relevant to EU law. Given that the balance between religious and secular/humanist influences is struck differently in each Member State, the balance struck by the Union in its own public order may conflict with the approaches of individual states. Furthermore, in developing a common European identity, it must take

account of both the formative influence of Christianity on European identity as well as the difficult relationship that has existed between Christianity and the humanist notions which have led to the reduction of Christian influence over law and politics. Furthermore, while freedom of religion is recognized by all Member States, the contours of such a right, particularly in its collective and institutional forms, are the subject of dispute. The Union's embrace of the principles of equal treatment and gender equality can impinge on the role played by religious bodies in the provision of healthcare and educational services. In particular EU legal norms in relation to anti-discrimination in employment may impede the ability of religious bodies to promote their religious beliefs and identity through their employment practices. The Union must also decide whether, in exercising its regulatory functions (most notably in relation to the Single Market) its duties to respect religious freedom require it merely to adopt a neutral approach or whether active facilitation of religious practice is needed. Overhanging all of these issues is the question of the relative powers of the Union and its Member States. As the EU's competences expand, the potential for EU law and policy to interfere with the ability of individual Member States to uphold the religiously specific element of their communal identities increases. Thus, the approach adopted by Community law to these issues may also have to take account of the need to avoid interfering with sensitive issues of identity, particularly in the light of the rather weak democratic legitimacy of the Union itself. On the other hand, the status of EU law as the autonomous constitutional order of a "*Community of Values*" may also impel it towards interfering with the religious particularities of Member States in so far as such particularities are inconsistent with the values to which the Union has declared itself to be committed.

Chapter III: Balance, Inheritance and Religion as a Basis of Law in the Public Order of the European Union

1. Introduction

2. Religion as a Source of the Union's Constitutional Values

3. Recognition of the Role of Religion in Lawmaking

4. The Pluralist Public Morality of EU Law

5. Limitations on Public Morality within EU Law

5.1 Consistency with a Common Ethical Template

5.2 The Importance of Balance

5.3 "Fair Balance" and the Autonomy and Equality of the Individual

5.4 Public Morality and Perspectives Contrary to Common European Norms

6. Conclusion

1. Introduction

This chapter examines the use of religion as a basis of law within the public order of the EU. Religion plays this role by virtue of its recognition as part of the Union's ethical inheritance, as a phenomenon which has a particular contribution to make to lawmaking and as part of a wider public morality which the Union and its Member States are entitled to legislate to uphold. However, although religion is recognised as part of the Union's constitutional order, this order is characterised by a balance between religious, humanist and cultural elements all of which can both reinforce or restrict each other's influence. The Union has attached significant importance both to this notion of balance of conflicting influences and to that of respect for the ethical "inheritance" of Europe. This approach has permitted those religions with significant cultural roots in Europe and which are capable of reconciling themselves to humanist influences, to exercise greater influence over EU law than those faiths which lack such characteristics.

Religion's role as a basis of law in the EU legal order operates at three levels. The first section of the Chapter analyses how the notion of an ethical inheritance characterised by a balance between religious, cultural and

humanist influences has been recognised as a source of the Union's constitutional values. The next section examines how religious institutions have been recognised as playing a particularly important and privileged role in the lawmaking process. However, it also shows how this role has conformed to the notions of balance and inheritance by showing how the recognition of religions as part of Civil Society has been linked to their role at national level and has required them to relativise, and therefore partly secularise, their perspectives.

Finally, the Chapter addresses the role played by religion in the substantive law of the Union. It demonstrates how religious perspectives have been recognised as a valid basis for EU legislation and for derogation by Member States from EU law duties, on the basis of the status of such perspectives as part of a broader public morality which Member States and the Union may use to promote particular communal norms and visions of the nature of a community. Under the EU's public order, this public morality is pluralist and accommodates religion's role in national cultural identities in that it encompasses divergent Member State moralities as well as a common European element. The common European element both restricts and reflects the pluralism of EU public morality in that, in addition to facilitating Member State moral decisions, it requires that such decisions respect certain values such as pluralism, the rule of law and the fundamental rights commitments of the Union. These fundamental rights principles provide a broad ethical framework which is marked by Europe's ethical inheritance and accommodates only those moral goals which are compatible with the notion of balance between religion and humanism and with certain common European cultural norms which have emerged from the balance between Christian and humanist influences which has characterised European history. Perspectives which are contrary to these norms are not recognised as valid elements of EU public morality. Thus, EU law protects, through its promotion of a particular public morality, the broad outlines of the settlement between religious and secular influences in Europe and the "way of life" it represents. Therefore, although the Union has adhered to strict formal neutrality in religious matters, faiths which lack cultural roots in Europe or which are incapable of

reconciling themselves to the limitations on religious influence inherent in the notion of balance between religion and humanism will have a more limited influence over EU law and are implicitly characterised as contrary to the public morality of the Union.

2. Religion as a Source of the Union's Constitutional Values

As noted in Chapter II, European identity has been notably marked by both Christianity and humanism and there is no consensus in relation to the relationship between religion and the state at Member State level.¹ Indeed, as Roy has stated, secularism and Christianity each provide a competing pole around which European identity can be defined.² The tensions in this dual approach to religion and European identity became a major feature of the negotiations relating to the drafting of the Constitutional Treaty in 2003 and focused on the issue of whether the preamble to the Treaty would contain a specific reference to either God or Christianity as a source of the Union's constitutional values. The Catholic Church was particularly vocal on this issue. Pope John Paul II repeatedly called for the inclusion of "*a reference to the religious and in particular the Christian heritage of Europe.*"³ These requests were forcefully pursued by COMECE,⁴ the organisation representing the Catholic Bishops to the European Union. The Bishops argued that the Union's values and its Charter of Fundamental Rights in particular were:

"inspired by the Judaeo-Christian image of mankind"

and that:

¹ See Chapter II

² O. Roy *Secularism Confronts Islam* (translated by George Holoch) (New York, Columbia University Press, 2007).

³ Paragraph 114, "Post-Synodal Apostolic Exhortation *Ecclesia in Europa* of His Holiness Pope John Paul II to the Bishops, Men and Women in the Consecrated Life and All the Lay Faithful on Jesus Christ Alive in His Church the Source of Hope for Europe", 28 June 2003 quoted in *The Treaty Establishing a Constitution for Europe: Elements for an Evaluation*, COMECE, 11 March 2005, http://www.comece.org/upload/pdf/pub_const_treaty_050311_EN.pdf (last visited 2 March 2008).

⁴ COMECE stands for 'Commission des Episcopats de la Communauté Européenne'.

*“in order therefore to facilitate citizens’ identification with the values of the European Union, and to acknowledge that public power is not absolute, the COMECE secretariat recommends that a future Constitutional Treaty of the European Union should recognise the openness and ultimate otherness associated with the name of God. An inclusive reference to the transcendent provides a guarantee for the freedom of the human person.”*⁵

The making of such a reference was actively opposed by secularist groups and states such as France with its strong separation of church and state.⁶ The initial draft proposed by the Constitutional Convention President Valéry Giscard-d’Estaing suggested the following formulation:

*“Conscious that Europe is a continent that has brought forth civilisation; that its inhabitants, arriving in successive waves since the first ages of mankind, have gradually developed the values underlying humanism: equality of persons, freedom, respect for reason, Drawing inspiration from the cultural, religious and humanist inheritance of Europe, which, nourished first by the civilisations of Greece and Rome, characterised by spiritual impulse always present in its heritage and later by the philosophical currents of the Enlightenment,”*⁷

This reference to a “*spiritual impulse*” and the failure to refer explicitly to religion in general or to Christianity in particular was heavily criticised by religious groups and significant sections of the Convention which was tasked with drawing up the Treaty. The Catholic Church and several Member States argued that it was historically inaccurate to refer to the Enlightenment but not Christianity as a source of European values while a slew of amendments referring to either the Christian or Judaeo-Christian roots of such values were

⁵ *The Future of Europe, Political Commitment, Values and Religion: Contribution of the COMECE Secretariat to the Debate on the Future of the European Union in the European Convention*, COMECE, Brussels, 21 May 2002.

⁶ See “God Missing from EU Constitution” BBC News, 6 February 2003, <http://news.bbc.co.uk/2/hi/europe/2734345.stm> (last visited 2 April 2008).

⁷ Draft Treaty Establishing a Constitution for Europe, OJ C 169, 18.7.2003, p. 1-150

put down by Convention members.⁸ The representative of the Polish Government to the Convention argued that “*Religions and Christianity among them have been part and parcel of our continent’s history*”⁹ while a Hungarian representative argued that “*We Europeans know it very well that the Judeo-Christian culture is at the very foundation of our idea of a common Europe*”.¹⁰ On the other hand those whose views fell on the opposite side of Roy’s dual characterisation of the role of religion in European identity argued as Socialist MEP Josep Borrell argued that:

*“a lot of our values have been forged against the Church or the churches. If we are to celebrate historical heritages we should remember the whole story: with its religious wars, the massacres of the Crusades; the nights of Saint Bartholomew and the Inquisition’s autos-da-fe; Galileo and the forced evangelisations; the pogroms and the turning of a blind eye to fascism.[...] when it comes to democracy, human rights and equality, God is a recent convert.”*¹¹

The final version of the Constitutional Treaty agreed by the Member States, amended the relevant section of the Preamble so that it read as follows:

“Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and

⁸ See for example Suggestion for amendment of title by Mr Brok on behalf of the EPP Convention Group co signed by Antonio Tajani, member, and Mr Martikonis, member, available at: http://european-convention.eu.int/Docs/Treaty/pdf/1000/1000_Pre%20Brok%20EN.pdf (accessed 2 April 2008). Other similar amendments are available at: <http://european-convention.eu.int/amendments.asp?content=1000&lang=EN> (last visited 2 April 2008).

⁹ See “Personal Remarks by Professor Danuta Hubner, Representative of the Government of Poland to the European Convention Plenary Session, 27-28 February 2003” available at: <http://european-convention.eu.int/docs/speeches/7171.pdf> (last visited 5 April 2008).

¹⁰ See “Speech Delivered by Jozsef Szajer, Hungary, at the European Convention, 27 February 2007, available at: <http://european-convention.eu.int/docs/speeches/9468.pdf> (last visited 5 April 2008).

¹¹ See “Contribution submitted by Mr Joseph Borrell Fontelles, member of the Convention: “Let’s Leave God Out of This” Brussels, 22 January 2003, CONV 501/03 available at: <http://register.consilium.europa.eu/pdf/en/03/cv00/cv00501en03.pdf> (last visited 5 April 2008).

inalienable rights of the human person, freedom, democracy, equality and the rule of law."¹²

This formula was retained in the Lisbon Treaty¹³ and, irrespective of whether it is ultimately ratified, represents that consensus view of the Member States in relation to the role of religion in the Union's constitutional order. The Preamble characterises the constitutional values of the Union as deriving from a balance of religious, humanist and cultural influences. These three influences both reinforce, and are inconsistent with, each other. For instance, humanist influences can compliment religious influences due to the strong humanist tradition within Christianity which has also been reflected in European culture. On the other hand, the secularist elements of the humanist tradition, with its emphasis on human self-government, can also be restrictive of the influence which religious organisations, including Christian ones, may seek to assert over law and politics.

This approach involves, in contrast to strictly secular public orders, the recognition of a religious element to the Union's constitutional values and public morality. On the other hand, the reference to religion is balanced by references to cultural and humanist influences, the latter of which have, as Taylor has argued,¹⁴ functioned so as to reduce the influence of religion over public life in Europe. Furthermore, these religious and humanist influences are recognised in their instrumental capacity as contributors to the emergence of values such as respect for individual rights, democracy, equality etc. Thus, the balance struck by the Union in this area grants humanist ideas significant influence by defining the various influences on the Union's public morality as valuable by virtue of their contribution to certain forms of human government. In contrast to religiously based constitutions such as the Irish Constitution which defines its ultimate notion of the good in explicitly religious terms,¹⁵ the Preamble to the Lisbon Treaty portrays democracy and respect for individual

¹² Council of the European Union, Brussels, Consolidated versions of the Treaty on European Union and the Treaty on the functioning of the European Union, 15 April 2008, 6655/08

¹³ *Ibid.* Preamble.

¹⁴ C. Taylor, *A Secular Age*, (Cambridge MA, Harvard University Press, 2007).

¹⁵ See Bunreacht na h-Éireann, Preamble.

rights as the ultimate good to which Europe's cultural, religious and humanist influences have contributed. Thus, the role accorded to Europe's religious inheritance is substantially counterbalanced by ideas which owe much to humanist notions of human self-government.

As the text of the Preamble makes clear, this balance between religious and humanist influences is also influenced by cultural factors. The predominant contemporary view of culture is of a broad ethnographic or anthropological state of affairs which represents a broad "way of life" encompassing established patterns in relation to both values and beliefs and matters such as food, clothing or leisure activities.¹⁶ The invocation of cultural influences themselves and the notion of the importance of Europe's "*cultural, religious and humanist inheritance*" (emphasis added) imply that the fundamental constitutional norms of the Union are influenced by and therefore reinforce, a shared European way of life. Such an approach entails greater recognition of those forms of religion which have been historically predominant in Europe, which have left a greater mark on national cultures and which are therefore compatible with established European cultural norms. Indeed, as is shown in Chapters III and V, the Union has been at pains to ensure that EU law does not undermine the cultural or institutional role of particular religions at Member State level, including, for instance the arrangement of leisure periods around particular religious patterns or the role of particular religions as sources of national identity.¹⁷ This approach achieved explicit recognition in Article 17(1) which states that:

"The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States".¹⁸

¹⁶ See F. Inglis, *Culture* (Cambridge UK and Malden MA, USA Polity Press, 2004), 28-29 also C. Barker, "Culture" in *The SAGE Dictionary of Cultural Studies*, (London, Thousand Oaks, New Delhi Sage 2004) 45.

¹⁷ See Chapters III and V.

¹⁸ Article 17(1), Consolidated Version of the Treaty on the Functioning of the European Union, OJ C 115/47 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF>

The importance attached to culture and to the notion of inheritance can therefore be seen as granting certain forms of religion greater influence over the Union's public morality than others. In particular, as Europe's "*religious inheritance*" is overwhelmingly Christian, Christianity is likely to exercise a greater influence than other faiths over a public morality which draws on a mixture of Europe's "*cultural, humanist and religious inheritance*". This was the view of the Catholic Bishops who regarded the Preamble as "*implicitly referring to the centre of this [religious] tradition, which is Christianity.*"¹⁹ Indeed, the importance of balancing religious influences with those of the humanist tradition and cultural norms can be seen as implicitly categorising forms of religion which are anti-humanist or which contravene other European cultural values as contrary to European public morality.

This balancing of religious, humanist and cultural elements was criticised from both religious and secular perspectives. Although, as noted above, the Catholic Bishops welcomed what they regarded as an implicit reference to Christianity, they nevertheless stated that:

*"An explicit mentioning of God or Christianity would have been a strong signal supporting the identity of Europe. It is therefore regrettable that neither the European Convention nor the Intergovernmental Conference agreed to the inclusion of such a reference. As a matter of historical fact, it is Christianity and the Christian message that have built the 'inheritance of Europe' from which have developed the universal values of the inviolable and inalienable rights of the human person, democracy, equality and the rule of law."*²⁰

On the other hand, a group of secularist Convention members argued that:

¹⁹ The Treaty Establishing a Constitution for Europe: Elements for an Evaluation, COMECE, 11 March 2005, http://www.comece.org/upload/pdf/pub_const_treaty_050311_EN.pdf (last visited 5 May 2008).

²⁰ *Ibid.*

*“the wording of the Preamble was already stretching the tolerance of non-Christians to the limit [and that] religion has not always been an unqualified blessing for Europe.”*²¹

The balance struck by the Preamble is, indeed, in some ways intellectually unsatisfying in that it is neither clearly secularist nor fully endorses the theory of the religious basis of European public morality. The academic debate has reflected this lack of clarity. On the one hand, some have argued that the Preamble’s failure to grant specific recognition to Christianity as the source of Europe’s common moral and political norms is unduly secularist and misleading. Weigel for instance argues that the Preamble presents a “*false and distorting*” view on the basis that “*Christianity is the story that has arguably had more to do with constituting Europe than anything else.*”²² The Treaty, he suggests, embodies a secular view of Europe which “*cannot identify with precision and accuracy, the sources of Europe’s commitments to human rights, democracy and the rule of law.*”²³ Weigel’s critique draws heavily on Weiler’s *Un’Europa Cristiana*²⁴ which is equally critical. Weiler argues that the failure to mention God or Christianity in the Preamble represented, according to Weiler, an “*EU-enforced laicité on European public life.*”²⁵ The approach embodied in the Constitutional and Lisbon Treaties, he suggests, endorses the right to freedom from religion which he sees as partisan and less desirable than freedom of religion.

This approach has rightly been criticised for failing to take account of the full picture of the relationship between Christianity and liberalism which has often been characterised by conflict. As Cvijic and Zucca note, Weiler’s

²¹ Convention Meeting of 5-6 June 2003, Reform of Institutions and Revisions of Parts I and IV of the Draft. Comments of members Borrell, Duhamel and Abitol. <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+PRESS+BI-20030606-1+0+DOC+XML+V0//EN> (last visited 2 April 2008).

²² G. Weigel *The Cube and the Cathedral: Europe, America and Politics without God* (New York, Basic Books, 2005) 70.

²³ *Ibid.* 85.

²⁴ J.H.H. Weiler, *Un’Europa Cristiana: Un saggio esplorativo*, (Milan, BUR Saggi, 2003).

²⁵ See discussion in A.J. Menendez, “Review of A Christian Europe”, *European Law Review*, 30, No. 1, February 2005, 133.

*“claim that the liberal ideal derives directly from Christian philosophy and that it is accordingly illogical that the Preamble of the European Constitution invokes humanist values but refuses to make a direct allusion to Christian values, fails to give due recognition to the full picture of the relationship between humanism and Christianity.”*²⁶

Indeed, although Christian thought and Christian humanism in particular, played an influential and perhaps indispensable role in the development of principles such as individual autonomy and equality, such principles have also on occasion come into conflict with Christian teachings and in particular, the desire of many Christian Churches to have religious teachings in areas such as the family and sexuality, reflected in the law of the land. The Catholic Church has, in the past, explicitly rejected notions such as freedom of religion²⁷ and even today has endorsed the use of the criminal law to promote and enforce adherence to biblical standards of sexual behaviour. Although it has come to accept the legitimacy of the secular state and to actively embrace liberal democracy, such acceptance has, as Roy points out,²⁸ on occasion, been prompted by considerations of realpolitik rather than theological reform. Furthermore, Weigel’s complaint that the Preamble does not identify the source of Europe’s commitments to democracy and human rights not only appears to assume a congruent relationship between these principles and Christianity but also fails to take into account that such commitments can arise from multiple sources, or as Dershowitz suggests, from historical experience of injustice and oppression rather than from religious worldviews.²⁹

On the other hand, secularist critiques have failed to note the degree to which religion (and, implicitly Christianity), is in fact recognised as part of European

²⁶ S. Cvijic and L. Zucca, “Does the European Constitution need Christian Values?” OJLS Vol. 24, No. 4 (2004), 744.

²⁷ Propositions 15 and 78, *The Syllabus of Errors*, The Holy See, 8 December 1864 (H. Dezinger (ed.) *The Sources of Catholic Dogma*, (B. Herder Book Company 1957). See also the Papal Encyclical *Quanta Curat* 1864 in Carlen (ed.), *The Papal Encyclicals, Vol. I 1740-1878* at 382.

²⁸ O. Roy *Secularism Confronts Islam* (translated by George Holoch) (New York, Columbia University Press, 2007), 21-22.

²⁹ A. Dershowitz, *Rights from Wrongs: A Secular Theory of the Origins of Rights* (New York, Basic Books, 2004).

public morality and is accorded special treatment by EU law in other areas.³⁰
Thus, Menendez's defence of the Preamble on the basis that:

*“defining constitutional ethics in Christian terms may obstruct the integration of those with other or no religious beliefs who face other barriers to full membership of our society”*³¹

fails to give adequate recognition to the fact that by recognising Europe's religious and cultural “*inheritance*” as part of European public morality, the Treaty does in fact, recognise that Christian perspectives partly constitute the Union's constitutional ethics, albeit that such recognition is implicit and balanced by the simultaneous recognition of humanist influences.

The fact that neither those who see European identity as secular nor those who see it as Christian were satisfied by the approach adopted in Lisbon Treaty, underlines the fact that the Union has identified as balance between these two influences rather an outright preference for one or the other as characteristic of its public morality. The Preamble recognises religion and religious values as a part of the mix of influences which constitute the values which underpin the Union's constitutional order. In this way the EU's constitutional values reflect what MacCormick calls “*value pluralism*” under which conflicts between differing rights or approaches are seen as the norm and are resolved through balancing conflicting elements rather than through according priority to one over another in a hierarchical fashion.³² Thus, religion is not entirely excluded from a public role and the Union does not follow a strictly secular approach under which religious norms and ideas are by definition excluded from influence over public life. However, it is true that the recognition of religion is limited and, at least formally, denomination-neutral. Although the notion of inheritance and the influence of cultural matters do mean that forms of religion which were historically dominant in Europe are likely to exercise greater

³⁰ See Chapter V and in particular the discussion of the Framework Directive.

³¹ See Menendez, above n. 25.

³² J. Bengoetxea, N. MacCormick and L. Moral Soriano, “Integration and Integrity in the Legal Reasoning of the European Court of Justice” in G. de Burca and J.H.H. Weiler (eds.) *The European Court of Justice*, (The Academy of European Law, European University Institute, Oxford, Oxford University Press, 2001), 64-65.

influence over the EU's public morality, the Union has pointedly refused to associate explicitly itself with a particular religion. Indeed the EU has repeatedly indicated its rhetorical commitment to the equality of religious and other forms of belief or philosophy, for example in relation to the privileges of religious bodies in the Framework Directive³³ or in the Declaration on the Status of Churches³⁴ both of which conferred equal recognition on other forms of belief or philosophy. It is this formal neutrality which religious groups, most notably the Catholic Church, have found objectionable.

Beyond the formal neutrality of its provisions, what is notable about the approach reflected in the Preamble to the Constitutional and Lisbon Treaties is that while religion is recognised and may therefore play some role in the determination of public policy, recognition is also granted to other influences such as humanism which may limit the realisation of the ambitions of religions in the political and legal arenas. Furthermore, both religious and humanist values are seen in the Preamble as instruments leading to the recognition of values such as equality and respect for individual rights which have, as some contributors to the debate surrounding the Preamble pointed out, had complex and sometimes antagonistic relationships to certain forms of religion, including Christianity. Thus, while recognition is granted to religion, such recognition is counterbalanced by humanist values which emphasise notions of human autonomy and self-government independent of any appeal to the divine.

This notion of a public morality characterised by a partly-contested balance between religious, humanist and cultural influences is repeated in other areas of EU law. Religions which lack deep cultural roots in Europe or which are

³³ Article 4(2) of the Directive states: "*churches and other public or private organisations the ethos of which is based on religion or belief*" (Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation Article 2(5) *OJ L 303*, 2.12.2000).

³⁴ *Declaration on the status of churches and non-confessional organisations*, Declaration No.11 to the last act of the Treaty of Amsterdam, Official Journal C 340, 10/11/1997 P. 0133 provides that:
"*The European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States. The European Union equally respects the status of philosophical and non-confessional organisations*"

incapable of reconciling themselves to the accommodation of humanist influences, will struggle to achieve influence under such a public morality. Indeed, such religions can even be seen as contrary to the public morality espoused by the Union. Thus, the EU has a preference for those forms of religion which are compatible with the accommodation of the humanist and secular elements of European culture. Such compatibility is not an easy matter for all religions as the accommodation of humanist influences can require significant limitation of the influence of religion over law and political life. Such approaches have been criticised as a violation of the duty of neutrality towards religion. Modood argues that it is “*a contradiction to require both that the state be neutral about religion and that the state should require religions with public ambitions to give them up.*”³⁵ However, it is unclear how a polity which is committed to values such as individual autonomy and gender equality could possibly uphold such values while simultaneously refusing to limit the realisation of the desires of forms of religion which, for instance, desire to mould law and policy in line with patriarchal religious teachings in relation to sexuality and gender. Certain limitations on the political and legal ambitions of religion are an indispensable element of liberal democracy. The fact that they impinge to a greater degree on forms of religion which reject aspects of key liberal values does not mean that such limitations violate the religious neutrality of the polity in question. It is true that, had the EU chosen merely to affirm its commitment to democracy and individual rights and had remained silent on the sources of its commitments to such principles, the issue of religious neutrality need not have arisen. However, by choosing to open up the contentious issue of the source of its ethical commitments and recognising an instrumental role for religion in the determination of their content, the Union does implicitly associate itself with certain religious traditions.

This approach underlines that importance attached to the notion of balance between religious and humanist influences within the public morality of the Union. Preserving such balance means that approaches which involve a negation of any of the elements will be contrary to the Union’s notions of

³⁵ T. Modood, ‘Anti-Essentialism, Multiculturalism and the ‘Recognition’ of Religious Groups’ *Journal of Political Philosophy*, 6, (1998), 378 at 393.

public morality. This principle, which will be discussed in more detail below, can cut both ways. Just as an attempt to introduce Sharia as the basis of a legal system has been identified as unacceptable on grounds of its failure to respect the autonomy of the public sphere and individual autonomy in the private sphere,³⁶ approaches which are particularly restrictive of religion, such as France's approach to religious clothing in public places, have also been seen as potentially problematic in the light of the Union's commitments to religious freedom.³⁷

3. Recognition of the Role of Religion in Lawmaking

Religious influence over EU law is not restricted to acting a source of constitutional values. Religious perspectives have also been recognised as having a special and privileged role to play in lawmaking. This section analyses the approach adopted by the Union in this field and suggests that, in common with the role of religion in the constitutional values of the Union outlined above, the role granted to religious bodies in lawmaking is characterised by a balance between religious, humanist and cultural influences. It begins with an analysis of the informal links between religious bodies and EU institutions before considering the status granted to such bodies by the Treaty. It notes how religious perspectives have been recognised as a necessary and uniquely important element of lawmaking but concludes by showing how, on the other hand, the Union's recognition of the religious contribution to lawmaking in the context of Civil Society has the effect of relativising and, thereby partly secularising, religious perspectives.

Recognition that churches and religious organisations are, by virtue of their religious nature and perspective, valid contributors to policy formation and law-making implies, at least in theory, that religious perspectives may form part of law and public policy. This is an approach which deviates from secular notions of the state. For instance, theorists such as Rawls and Habermas have argued that the justification of law or policy on religious grounds is inconsistent with a liberal constitutional order. Rawls suggests that

³⁶ See the discussion of *Refah Partisi v. Turkey* in Chapter VI.

³⁷ See section 5.2 below.

*“the self-understanding of the constitutional state has developed within the framework of a contractualist tradition that relies on ‘natural’ reason, in other words solely public arguments to which supposedly all persons have equal access. The assumption of a common human reason forms the basis of justification for a secular state that no longer depends on religious legitimation.”*³⁸

Similarly, Habermas advocates that state officials (including politicians) must *“justify their political statements independently of their religious convictions or world views”*³⁹ and that

*“Majority rule turns into oppression if the majority deploys religious arguments in the process of political opinion and will formation and refuses to offer those publicly accessible justifications which the losing minority be it secular or of a different faith, is able to follow.”*⁴⁰

However, in line with its rejection of purely secular notions of Europe’s constitutional ethics, the EU does recognise the validity, importance and particular nature of the contribution of religious bodies to lawmaking and would therefore seem, at least in theory, to accept the notion that the law may, at least in part, be based on religious arguments. Religious bodies have had informal links to European Institutions for many years.⁴¹ The Catholic Church (COMECE), the Protestant Churches (KEK-CEC) and Jewish, Muslim, Orthodox and Humanist groups all have full time representation in Brussels.⁴² These informal links to European institutions were largely developed at the behest of religious groups themselves,⁴³ however, the European Commission

³⁸ J. Habermas, “Religion in the Public Sphere” *European Journal of Philosophy*, 14:1 1-25 (2006), 4 referring to J. Rawls, *Political Liberalism*, New York, Columbia University Press, 1993.

³⁹ *Ibid.* 9.

⁴⁰ *Ibid.* 12.

⁴¹ See T. Jansen, “Europe and Religions: the Dialogue between the European Commission and Churches or Religious Communities”, *Social Compass* 47(1), 2000, 103-112.

⁴² M. Rynkowski “Remarks on Art. I-52 of the Constitutional Treaty: new Aspects of the European Ecclesiastical Law?” *German Law Journal* Vol. 6 No. 11, 1 November 2005.

⁴³ n.41 above.

in particular has come to see such links as potential contributors to the attainment of its broader political goals. Links between religious bodies and the Union were placed on a more formal basis in 1992 when Commission President Jacques Delors established a programme called “*A Soul for Europe*” whose aim was described by the Commission as “*giving a spiritual and ethical dimension to the European Union*”.⁴⁴ The facilitation of religious contributions to policy making was not merely a result of a desire to accommodate religious perspectives within EU law and policy but was also seen as an opportunity to use religious organisations to develop the European Civil Society which was regarded as necessary to sustain European integration. Commission President Delors made this point explicitly in an address to the “*Soul for Europe*” initiative in which he stated that:

*“We won't succeed with Europe solely on the basis of legal expertise or economic know-how. [...] If in the next ten years we have not managed to give a soul to Europe, to give it spirituality and meaning, the game will be up”*⁴⁵

thus explicitly linking the participation of religious bodies in European public life and the accommodation of religious perspectives in the EU's activities, to the sustainability of the Union as a political project. Subsequently, the Bureau of European Policy Advisors (BEPA),⁴⁶ which reported to the Commission President, became responsible for what was described at “*Dialogue with Religions, Churches, Humanisms*.”⁴⁷ This process of dialogue consisted mainly of a series of seminars and discussion groups on the role of religious

⁴⁴ See European Commission, Archives of GOPA, Dialogue with Religions, Churches and Humanisms –Issues: A Soul for Europe.
http://www.ec.europa.eu/dgs/policy_advisers/archives/activities/dialogue_religions_humanisms/index_en.htm (last visited 6 May 2008).

⁴⁵ Quoted in H. Alfeyev ‘Christian Witness to Uniting Europe: A View from a Representative of the Russian Orthodox Church’ *The Ecumenical Review*, January 2003. See also European Commission, Archives of GOPA, Dialogue with Religions, Churches and Humanisms – Issues: A Soul for Europe.
http://www.ec.europa.eu/dgs/policy_advisers/archives/activities/dialogue_religions_humanisms/index_en.htm (last visited 7 May 2008).

⁴⁶ This organisation was previously known as the Forward Studies Unit and the Group of Policy Advisors.

⁴⁷ Rynkowski, n. 42 above.

bodies in the Union.⁴⁸ The fact the EU institutions reached out to religious bodies in this way underlines the degree to which the Union has recognised religious bodies as playing a particularly important role in policy making. The contributions of other elements of Civil Society have not been sought out or recognised in this way.

The specific recognition of “*churches*” in the context of this “*Dialogue with Religions, Churches, Humanisms*” also provides some indication of the influence of cultural and historical factors. Although the term has been applied to certain newer religious movements such as Scientology, churches are a Christian concept which is generally still taken to refer to the organisational structure or branches of the Christian religion. Christian religious structures also fall within the term “*religions*” so the singling out of churches can be seen as indicative of the prominent role European institutions expected the religious institutions of traditionally dominant Christian churches to play in this dialogue. Indeed, the importance of cultural matters in the Union’s approach to religion and in particular its desire to respect the public role of traditionally dominant Christian denominations at Member State level is seen elsewhere in EU law. The 1998 *Declaration on the Status of Churches*⁴⁹ appended to the Amsterdam Treaty also signified a formalisation of the Union’s relationship to religious bodies in that it stated that the Union “*respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States*” thus recognising the status of such bodies at national level in a formal way. Indeed, as is shown in Chapter Three, this deference towards the cultural role of religion in Member States has also been reflected in the Union’s substantive legislation, most notably in relation to employment law and religiously managed healthcare and educational institutions.⁵⁰

The Commission White Paper on Governance of 2001 also indicated the openness of the Union to the recognition of the role of religious perspectives

⁴⁸ See Bureau of European Policy Advisers, http://ec.europa.eu/dgs/policy_advisers/index_en.htm (last visited 18 May 2008).

⁴⁹ n.34 above.

⁵⁰ See Chapter V.

in policy making by recognising the “*particular contribution*” of “*churches and religious communities*” to policy making.⁵¹ Thus, not only did the Commission recognise religious bodies as particularly important elements of Civil Society, it also recognised the particular nature of their contribution. Such recognition indicates a view that religious bodies have particular qualifications or that they bring perspectives to lawmaking which other institutions are not capable of providing to the same degree. The combination of the recognition of both the importance and the particular nature of religious contributions by the Commission underlines the notion of religious bodies as particularly important and privileged players in the articulation of Europe’s public morality by Civil Society. Thus, the Union appears to recognise to some degree the historic role of churches and religions as moral guardians with a special authority on moral matters. Of course, morality is not the sole preserve of religious bodies, however the Union’s explicit references to churches along with its identification of the “*particular contribution*” of religious bodies in this regard would appear to defer to the historic role played by religions in relation to notions of morality, a role which, as noted in Chapter II, is consistent with the continuing public role of religion in Western society identified by theorists such as Casanova.⁵²

This identification of religious perspectives as necessary and particularly important elements of lawmaking was reflected in the Constitutional and Lisbon Treaties which explicitly recognised this “*particular contribution*” by according (following a strenuous campaign on the part of the Catholic Church)⁵³ a privileged consultative status to religious groups. While Article 11(2) of the Lisbon Treaty commits the Union to maintaining an “*an open, transparent and regular dialogue with representative associations and Civil Society*”⁵⁴ Article 17 singles out religious bodies and specifically undertakes to

⁵¹ European Governance: A White Paper COM (2001) 428 final, Brussels 25.7.2001.

⁵² J. Casanova *Public Religions in the Modern World* (University of Chicago Press, Chicago and London, 1994).

⁵³ See “The Future of Europe: Political Commitment, Values and Religion: Contribution of the COMECE Secretariat to the Debate on the Future of the European Union in the European Convention” COMECE, Brussels, 21 May 2002.

⁵⁴ n. 18 above, Article 11(2).

maintain a dialogue with them. The Article, which also incorporates the 1998 Declaration on the Status of Churches, reads:

“1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.

2. The Union equally respects the status under national law of philosophical and non-confessional organisations.

3. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations.”⁵⁵

The granting of this special status was strenuously opposed by secularist organisations which characterised the Article as “*incompatible with secularism*”⁵⁶ as challenging “*the principle of separation of church and state*”⁵⁷ and as granting religion “*a privileged status in European public policy making*”.⁵⁸ Although the dialogue is open to all religions, the combination in the same Article of the recognition of the national status of churches with the recognition of the special importance of religious contributions to policy making, links the recognition accorded to and role played by, religious bodies at EU level with the national status of such bodies as the identity and contribution of such bodies will be influenced by their role in the lives of particular Member States.

The Union does therefore seem to accord religious perspectives a particular degree of recognition and facilitation in policymaking. Religious bodies are recognised as elements of Civil Society with which the Union will maintain a dialogue. However, such bodies are seen as making a “*specific contribution*” and as representing a particularly important part of Civil Society which is

⁵⁵ *Ibid.* Article 17.

⁵⁶ See “Catholics Join European NGOs in Coalition in Appeal to Convention Not to Give Religion Unfair Influence in Constitutional Treaty” *U.S. Newswire*, 22 May 2003, <http://www.forf.org/news/2003/cje.html> (last visited 15 March 2008).

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

accorded specific and explicit recognition. By recognising the specificity of the contribution of religious bodies to law making, the Union implicitly identifies religious perspectives as a legitimate and necessary element of policy formation. Furthermore, the recognition of the right of religious bodies to be consulted by lawmaking institutions in a separate article from that dedicated to Civil Society in general, characterises this religious contribution to lawmaking as particularly important.

Nevertheless, in line with the Union's approach in other areas, this facilitation of religious influence in lawmaking is balanced by other influences which draw on the humanist and secular influences within the EU public order. First, Article 17 itself also recognises the equal status of "*philosophical and non-confessional organisations*". One of the most prominent of these is the International Humanist and Ethical Union which has been part of the dialogue with European institutions and which has a vigorously secular outlook. Furthermore the fact that, even in an article dedicated to the facilitation of religions, the Union felt constrained to provide equal recognition to non-confessional groups, indicates that, although religion is recognised within the legal and political arenas, such perspectives will not necessarily be predominant. Indeed, the importance of religious bodies is seen in line with humanist approaches, as deriving, to a significant degree, from their human dimensions and the attachment of individuals to religious organisations. This approach is echoed in the Commission's documents in relation to the dialogue with "*Religions Churches and Humanisms*" which stresses the status of religious bodies as part of Civil Society and which justifies dialogue with such bodies on the grounds that:

"They are representatives of European citizens. In this respect, Community law protects the churches and religious communities, as they would any other partner in Civil Society".⁵⁹

⁵⁹ See: "Commission Document on Dialogue with Religions, Churches and Humanisms: Introduction to the legal aspects of the relations between the European Union and the communities of faith and conviction." Group of Policy Advisers, available at: http://ec.europa.dgs/policy_advisers/archives/activities/dialogue_religions_humanisms/legal_en.htm (accessed 5 April 2008).

Thus, while the historical and cultural role of religions in Europe as moral guardians means that the “*specific contribution*” of churches and religious communities is recognised by the Union, and while this contribution is seen as representing a particularly important perspective, the right of such bodies to play a part in the lawmaking process is seen as deriving from their historic role as moral guardians and from their status as representative organisations, rather than from the inherent truth of their message or the importance of ensuring compliance with divine mandates. Indeed it is simply inconceivable that EU legislation would explicitly base itself on revelation or seek to justify itself on the basis of its compatibility with a religious text. EU legislation is not justified in theological terms and one does not, for example find biblical justifications in the preambles of Directives and Regulations which instead rely on what might be termed generally accessible justifications. Even legislation such as the Preamble to the Framework Directive, a piece of legislation which touches on religious issues to a significant degree, justifies the measures contained therein on the basis of non-religious goals such as their contribution to the “*attainment of a high level of employment and social protection, raising the standard of living and quality of life, economic and social cohesion and solidarity.*”⁶⁰ Indeed, as is shown in Chapter VI, the statements of the Commission, the rulings of the European Court of Human Rights and EU Enlargement policy have all indicated that the a failure to maintain limits on religious influence over the political and legal domains is incompatible with membership of the Union.⁶¹ In fact, the Union’s approach in relation to the role of religion in lawmaking can be seen as reflecting the notion of balance between religious worldviews and humanist perspectives which stress human autonomy and reject use of the idea of law as subordinate to, or merely a means to promote, divine authority on earth.

Furthermore, the Union also balances this religious influence and relativises religious perspectives by providing such recognition in the context of Civil

⁶⁰ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303/16 2.12.2000, Paragraph 11.

⁶¹ See Chapter VI.

Society. The manner in which the dialogue with religious bodies has operated demonstrates that the Union has refused to associate itself explicitly with particular religious viewpoints and has instead operated a process in which differing religious, and even non-religious, perspectives have been accorded equal recognition. As noted above, Article 17 specifically recognises the equal status of “*philosophical and non-confessional organisations*”, thus recognising the legitimacy of non-religious world views. Not only have avowedly secularist and atheist groups taken part in the dialogue, new religious movements, which have received little protection in other areas of EU law, have also been permitted to participate. Rynkowski notes that members of what he calls “*sects*”: “*are present during meetings, even those concerning combating the illegal activities of sects*”⁶² He argues that their presence is “*inappropriate*” and that the Commission “*is a hostage of political correctness*”.⁶³ Whatever the merits of these arguments (and neither reasons supporting the inappropriateness of their presence nor indeed a method of distinguishing “*sects*” from bona fide religions, are provided), the denomination-neutral approach adopted by the Commission highlights both the conspicuous reluctance of the Union to grant recognition to, or associate itself officially with, any individual religious denomination and the commitment to balancing religious and humanist perspectives seen in the Union’s public morality.

Thus, the Union does recognise and privilege religious bodies as particularly important articulators of, and contributors to, European public morality and on this basis, acknowledges them as important contributors to law and policy making. However, the fact that such recognition is provided within the context of Civil Society (albeit with privileged status therein), requires that religious bodies exercise the rights attached to such recognition in the context of a process which relativises their claims. Furthermore, by participating in a process in which religious bodies are required to persuade lawmakers and to articulate their religious contribution in a forum which equally recognises different religious, or anti-religious perspectives, religious bodies implicitly

⁶² n. 42 above.

⁶³ *Ibid.*

accept that legitimacy of secular political institutions along with the reality that the ultimate decision in relation to matters of law lies with such institutions. Indeed, as the justifications provided by Commission President Delors for the original dialogue with religious groups made clear, the Union's engagement with religious groups has been partly related to efforts to create a European public sphere and to enhance the legitimacy and sustainability of the political institutions of the Union.⁶⁴ Thus, the Union's approach to the facilitation of religious contributions to lawmaking can be seen as balancing religious and humanist influences by recognising religion as one influence amongst many in the process of law making. Engagement in such a process requires religious groups to acknowledge the legitimacy of other religious and non-religious worldviews. Such acceptance is not an easy matter for all religions. As Habermas points out:

*“missionary doctrines such as Christianity or Islam are intrinsically intolerant of other beliefs. Love of your neighbour includes active care for his or her salvation. And because, -as Thomas Aquinas, among others, argued –eternal salvation has absolute priority over all goods, care for the salvation of others does not per se exclude the application of force to convert someone to the right faith or to protect them against heresy.”*⁶⁵

The recognition of such groups within the context of Civil Society is therefore based on certain prerequisites, thus:

*“The liberal state expects that the religious consciousness of the faithful will become modernised by way of cognitive adaptation to the individualistic and egalitarian nature of the laws of the secular community”*⁶⁶

⁶⁴ See “The New Crusade; Fighting for God in a Secular Europe, Conservative Christians, the Vatican and Islamic Militants”, *Newsweek*, 1 November 2004.
http://www.religiousconsultation.org/News_Tracker/the_new_crusade_fighting_for_God_in_a_secular_Europe.htm (last visited 18 June 2008).

⁶⁵ J. Habermas “Intolerance and Discrimination” I.CON, Volume 1, Number 1, 2003, pp2-12, 7.

⁶⁶ *Ibid.* 6.

Thus recognition of religious communities in this way can be seen as encouraging a process where each religious body “locks the moral and legal principles of secular society onto its own ethos”⁶⁷ and where religious bodies in general “have to make the civic principle of equal inclusion their own.”⁶⁸ As Habermas acknowledges, such a process means “accepting mutually exclusive validity claims”⁶⁹ which requires a neutralisation of the “practical impact of the cognitive dissonance”⁷⁰ this produces.

Indeed, it is notable how recognition of religion in the context of a pluralist Civil Society linked to secular political institutions has pushed religious bodies to phrase their contributions in precisely the kind of generally accessible reasons required by theorists such as Rawls and which appeal to views of “the good life” which are not necessarily religious. For instance COMECE justified its calls for the recognition of the specific contribution of Churches and religious organisations on the basis that churches:

*“are committed to serve society –inter alia, in the fields of education, culture, media and social work – and they play an important role in promoting mutual respect, participation, citizenship, dialogue and reconciliation between the peoples of Europe, East and West”*⁷¹

Their campaign in favour of the making of a reference to Christianity in the Preamble was justified on similarly generally accessible grounds, with the Bishops stressing Christianity’s role in developing human rights and democracy and suggesting that such a reference “would have been a strong signal supporting the identity of Europe”.⁷² Similarly, Pope John II also declared that the Church was committed to “fully respecting the secular nature

⁶⁷ *Ibid.* 8.

⁶⁸ *Ibid.* 10.

⁶⁹ *Ibid.* 12.

⁷⁰ *Ibid.*

⁷¹ *The Future of Europe, Political Commitment, Values and Religion: Contribution of the COMECE Secretariat to the Debate on the Future of the European Union in the European Convention*, COMECE, Brussels, 21 May 2002.

http://www.comece.org/upload/pdf/secret_conv1_020521_en.pdf (last visited 18 June 2008).

⁷² *The Treaty Establishing a Constitution for Europe: Elements for an Evaluation*, COMECE, 11 March 2005, http://www.comece.org/upload/pdf/pub_const_treaty_050311_EN.pdf (last visited 18 June 2008).

of the institutions”⁷³ of the Union thus acknowledging the legitimacy and contribution of secular political institutions.

The Church’s invocation of European identity not only underlines the instrumental polity building aspects of the process, it also demonstrates, along with the reliance on the facilitative role of religion in relation to religiously neutral civic activities and values, how in engaging in the lawmaking process at EU level, religious bodies have internalised what Habermas termed “*civic principles*” and “*the moral and legal principles of secular society.*” Thus, while religion is recognised by the Union, this recognition of religious influence is balanced by the nature of the forum in which such recognition is granted which requires religions to relativise their claims and accept the legitimacy of other worldviews.

The Union’s Treaty commitment to engagement with Civil Society show that it recognises that its law and policy making must be informed by diverse perspectives and views of the good life from across Europe. Thus, Civil Society plays a role in forming a European public morality which informs the Union’s lawmaking. Religion, as noted above, has been recognised by the Union as a particularly important contributor to this public morality. This public morality enables certain religious traditions to exercise greater influence than others. The explicit recognition of the status and role of national churches in Article 17 encourages the according of greater weight to the contributions of religions which are culturally and institutionally entrenched at national level. Furthermore, as was the case in relation to the influence of religion in relation to the constitutional values of the Union set out in the Preamble to the Lisbon Treaty, the recognition of religion’s role in lawmaking in the context of Civil Society renders those forms of religion which can reconcile themselves to the notion of balance between humanist and religious influences and to the European cultural norms, more capable of exercising influence than religions which lack such characteristics and which

⁷³ Paragraph 114, Post-Synodal Apostolic Exhortation *Ecclesia In Europa* Of His Holiness Pope John Paul II To The Bishops Men And Women In The Consecrated Life And All The Lay Faithful On Jesus Christ Alive In His Church The Source Of Hope For Europe, 28 June 2003.

are, for instance, anti-humanist in nature or which cannot acknowledge the legitimacy of secular political institutions. Thus, the cultural influence and long (though still contested) tradition of humanism within the historically dominant Christian churches render them more able to exert influence within the structures established by the Union to engage with religious perspectives than outsider religions such as Islam which have had less cultural impact on Europe or which may have more antagonistic attitudes to humanist principles.

4. The Pluralist Public Morality of EU Law

The recognition of religious perspectives within EU law is not restricted to institutional and symbolic roles. In contrast to libertarian views of the relationship between law and morality which stress the idea of morality as a largely private matter and see the promotion of communal moral standards by the law as legitimate only when necessary to prevent harm to others,⁷⁴ EU law does permit the promotion of certain communal, moral or cultural norms through law, provided that such promotion can be reconciled with the balance between religious, humanist and cultural elements that underpin the Union's public morality and, in particular, its commitments to individual autonomy and equality which are reflected in the Charter of Fundamental Rights. Thus, the right of Member States to promote a particular way of life or view of the good life through law is, within certain boundaries, recognised by EU law. Indeed, as is shown below, the Union has repeatedly and explicitly recognised that notions of "*morality*", "*ordre public*" and "*public policy*" as valid grounds for legislation.⁷⁵ Given its explicit recognition as part of the Union's constitutional values in the Lisbon Treaty and in the light of its heavy influence over national cultures and views of morality, religion plays an important part of these notions of public policy and morality. Thus, while the public morality is not explicitly or exclusively religious, as Davies notes, in relation to issues such as sexual morality, bio-ethics, gambling, or alcohol consumption, people's views:

⁷⁴ E. P. Foley, *Liberty for All: Reclaiming Individual Privacy in a New Era of Public Morality*, (New Haven, CT, Yale University Press, 2006).

⁷⁵ See below.

*“do derive directly or indirectly –via modern secular philosophies that have been influenced by religion – from religious values that pervade societies.”*⁷⁶

Thus, he argues that morality clauses in trade law both *“have a clear and traditional link with conventional interpretations of major religions”*⁷⁷ and facilitate the recognition of such religious perspectives in trade agreements. The same is true of the of morality clauses in EU law which enable Member States, notwithstanding their EU law duties, to promote particular communal cultural or religious norms. For instance, in assessing the compatibility with EU law of Member State restrictions on gambling in the *Schindler* case, the Court of Justice stated that it was *“not possible to disregard the moral, religious or cultural aspects of lotteries, like other types of gambling in Member States”*⁷⁸ which were held to grant the Member State in question a *“degree of latitude”* entitling it to restrict gambling notwithstanding the EU law duty to respect the freedom to provide services.⁷⁹ The Treaty also makes room for Member States to derogate from EU legal duties in order to promote certain communal cultural, religious or moral norms. Articles 30 and 55 recognise *“public morality”*⁸⁰ and *“public policy”*⁸¹ as legitimate grounds for the derogation from the duty of Member States to permit the free movement of goods and services.

Not only is religion recognised, as a basis for derogation from EU law duties, it is also a valid element of EU legislation itself. Community legislation

⁷⁶ G. Davies “Morality Clauses and Decision Making in Situations of Scientific Uncertainty: the Case of GMOs”, *World Trade Review* (2007), 6:2, 249-263.

⁷⁷ *Ibid.*

⁷⁸ *Her Majesty’s Customs and Excise v Schindler* Case C-275/92 ECR [1994] I-01039, paragraph 60.

⁷⁹ *Ibid.* para. 61.

⁸⁰ Article 30 provides that: *“The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.”*, Consolidated Version of the Treaty Establishing the European Community OJ C321, Article 30.

⁸¹ Consolidated Version of the Treaty Establishing the European Community OJ C321, Article 55.

repeatedly refers to notions of ordre public or morality. In *Netherlands v Council*⁸² Advocate General Jacobs cited several examples of the recognition of notions of morality in EU legislation noting that:

“The Community Trade Mark Regulation⁸³ and the Trade Marks Directive⁸⁴ both provide for the refusal of registration or invalidity of a mark which is contrary to public policy or to accepted principles of morality (contraire à l'ordre public ou aux bonnes moeurs).⁸⁵ The Community Plant Variety Rights Regulation⁸⁶ provides that there is an impediment to the designation of a variety denomination where it is liable to give offence in one of the Member States or is contrary to public policy (est susceptible de contrevenir aux bonnes moeurs dans un des États membres ou est contraire à l'ordre public).⁸⁷ Directive 98/71 on the legal protection of designs⁸⁸ provides that a design right shall not subsist in a design which is contrary to public policy or to accepted principles of morality (contraire à l'ordre public ou à la moralité publique).⁸⁹ The amended proposal for a European Parliament and Council Directive approximating the legal arrangements for the protection of inventions by utility model⁹⁰ provides that utility models shall not be granted in respect of inventions the exploitation of which would be contrary to public policy or morality (contraire à l'ordre public ou aux bonnes moeurs).”⁹¹

Thus, “public morality” and therefore religion, is well recognised as a permissible basis for legal and policy choices in Community law and as a

⁸² *Netherlands v Council* Case C-377/98 [2001] ECR I-7079.

⁸³ Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, OJ 1994 L 11, p. 1.

⁸⁴ First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, OJ 1989 L 40, p. 1.

⁸⁵ Article 7(1)(f) of the Regulation and Article 3(1)(f) of the Directive. It may be noted that in his Opinion delivered on 23 January 2001 in Case C-299/99 *Philips Electronics*, at paragraph 18, Advocate General Ruiz-Jarabo Colomer gave as an example of a trade mark registration of which would be barred because it was contrary to public policy the mark Babykiller for a pharmaceutical abortifacient.

⁸⁶ OJ 1994 L 227, p. 1

⁸⁷ Article 63(3)(e).

⁸⁸ Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998, OJ 1998 L 289, p. 28.

⁸⁹ Article 8.

⁹⁰ OJ 2000 C 248E, p. 56.

⁹¹ Article 4(a).

permissible basis for Member States to derogate from the EU law duties. Individual autonomy is an important principle in the EU legal order and, as is shown in Chapter VI, the Union requires that the accommodation of religious influence over law, and the promotion of communal moral standards which this may involve, not be such as to unduly curtail such autonomy. Nevertheless, as the acceptance of restrictions on gambling in *Schindler* on the basis of its particular “*moral, religious or cultural aspects*” shows, the Court accepts that EU law does, in certain circumstances, permit such moral notions to be invoked to restrict the autonomy of individuals to engage in activities regarded as damaging or sinful for cultural or religious reasons in order to allow Member States to promote their own collective vision of the good life and morality. Thus, although the Union has consistently required that the autonomy of public sphere institutions to legislate for that which contravenes religious morality be respected,⁹² it does permit some restriction of individual autonomy in the private sphere on religious grounds.

EU public morality is also inherently pluralist in that it encompasses both a shared European, and differing national, ethical frameworks. This pluralism is further reflected in the Union’s acceptance that most ethical choices are to be taken at national level and upheld as part of EU law, provided they are compatible within the broad parameters of an independent European public morality.⁹³ These aspects of EU public morality were seen in the *Schindler* case where the Court of Justice recognised that particular national religious and cultural notions of morality in relation to gambling were a valid basis for the restriction of the freedom to provide gambling services.⁹⁴ This focus on the recognition within EU law of the individual public moralities of the Member States and the consequent prioritisation of Member State ethical choices is shown even more markedly in cases such as *Grogan*⁹⁵ and *Jany*.⁹⁶ In these

⁹² See Chapter VI.

⁹³ For a discussion of constitutional pluralism and the development of heterarchic rather than hierarchical interaction of legal orders see N. Walker, “The Idea of Constitutional Pluralism” EUI Working Papers, Law 2002/1 <http://cadmus.iue.it/dspace/bitstream/1814/179/1/law02-1.pdf> (last visited 31 July 2008).

⁹⁴ n. 78 above.

⁹⁵ Case C-159/90 *SPUC v. Grogan* [1991] ECR I-4685.

⁹⁶ Case C-268/99 *Jany and Others v. Staatssecretaris van Justitie* [2001] ECR I-8615.

cases the Court of Justice was faced with differing Member State regulation of the morally and religiously sensitive issues of abortion and prostitution. In *Grogan* the Court was faced with a situation where the combination of the differing moral judgments of Ireland and other Member States in relation to abortion and the EU law principle of free movement of services, threatened to undermine the ability of the Irish authorities to give effect to that moral judgment in a domestic context. In this case student groups facing prosecution for distributing information in relation to abortion services abroad in violation of the Irish Constitution's protection of the life of the unborn, argued that such restrictions violated the freedom to provide services under EU law. The Court found that the lack of commercial links between the student organisations and the abortion providers in question precluded the invocation of Community law. Nevertheless, its judgment threw significant light on the pluralistic nature of public morality within EU law. The Society for the Protection of Unborn Children ("SPUC") had argued that abortion should not be recognised as a service under EU law on grounds of what they saw as its grossly immoral nature. The Court's decision on this point was as follows:

*"Whatever the merits of those arguments on the moral plane, they cannot influence the answer to the national court's first question. It is not for the Court to substitute its assessment for that of the legislature in those Member States where the activities in question are practised legally."*⁹⁷

The Court therefore explicitly refused to come to a "one size fits all" conclusion in relation to the morality of abortion in EU law and stated that it would not second guess the decision of the legislatures of Member State which had decided that abortion was legally acceptable. On the other hand, although its decision in relation to the lack of commercial links meant that the Court did not address the issue of the curtailment of the freedom to provide services on the basis of the differing moral choice of the Irish authorities, this issue was dealt with by Advocate General Van Gerven in his opinion. Having concluded that the provision of information in relation to abortion services in other

⁹⁷ n. 95 above, paragraphs 19 and 20.

Member States was covered by the principle of free movement of services, he held that restriction of such information was permissible on the basis that Ireland's anti-abortion laws represented "*a policy choice of a moral and philosophical nature the assessment of which is a matter for the Member States and in respect of which they are entitled to invoke the ground of public policy.*"⁹⁸ As this moral choice in relation to abortion was, in the view of the Member State, "*a genuinely and sufficiently serious threat public policy affecting one of the fundamental interests of society*"⁹⁹ and in the light of "*the area of discretion within the limits imposed by the Treaty*"¹⁰⁰ which Community law provided the national authorities, Advocate General Van Gerven was prepared to uphold the restriction in question as a proportionate derogation from the free movement of services on grounds of public policy.¹⁰¹

Thus, in deciding what would qualify as a service for the purposes of EU law, the Court indicated that it would respect the moral pluralism of the Union by refusing to second guess the decision of those Member States for whom abortion was acceptable. On the other hand, in relation to the impact the decision of certain Member States to tolerate abortion and its consequent recognition as a service under Community law, could have on the enforcement within Ireland of anti-abortion laws, EU law, according to Advocate General Van Gerven, was equally willing to recognise a public morality derogation by the Irish authorities from freedom of movement of services in order to uphold Ireland's different moral conclusions in relation to this issue.

A similar commitment to the value of pluralism and a consequent desire to enable the notion of public morality within Community law to accommodate differing moral perspectives of Member States, was seen in *Jany* where the Court assessed whether prostitution could be categorised as a service under Community law and again based its affirmative decision on the basis that:

⁹⁸ n. 95 above, Opinion of Advocate General Van Gerven, para. 26.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.* para. 29.

“So far as concerns [sic] the question of the immorality of that activity, raised by the referring court, it must be borne in mind that, as the Court has already held, it is not for the Court to substitute its own assessment for that of the legislatures of the Member States where an allegedly immoral activity is practised legally”.¹⁰²

The approach of the Court in *Grogan* and *Jany* underlines the importance of pluralism in the public morality of the EU. In both cases the Court stressed that the primary forum within which the ethical choices which influence the content of the public morality recognised and operationalised within EU law, is the individual Member States which are permitted to come to differing moral conclusions in relation to issues and to have these differing conclusions reflected in EU law. The deference to Member State ethical and cultural choices inherent in this endorsement of pluralism was further noted by the French *Conseil constitutionnel* in its 2004 decision in relation to the constitutionality of the Constitutional Treaty where, in discussing the compatibility of the French approach to secularism with EU human rights norms, in it noted the “considerable leeway” granted to Member States “to define the most appropriate measures, taking into account their national traditions”.¹⁰³

However, the commitment to pluralism cuts both ways. Just as EU law is required to respect the principle of pluralism by accommodating divergent Member State moral choices, the moral choices of Member States themselves must respect the moral pluralism inherent in the notion of free movement guaranteed by Community law. Free movement rights enable individuals to place themselves under differing ethical regimes and therefore permit them to carry out activities which may be prohibited for reasons of public morality in their home country. EU law requires that Member State laws which reflect particular moral choices must be compatible with the right of individuals to choose, by means of free movement rights, to be bound by the moral choices

¹⁰² n. 96 above, para. 56.

¹⁰³ Decision n° 2004-505 DC of November 19th 2004, The Treaty establishing a Constitution for Europe <http://www.conseil-constitutionnel.fr/decision/2004/2004505/eng.htm>, paragraph 18.

of other Member States. Such a right can contribute significantly to individual autonomy by enabling, for example, those who wish to provide or use the services of prostitutes, to do so in another Member State despite the prohibition on doing so in their own country. The right to move across European borders is a fundamental right under EU law whose violation is particularly likely to be characterised as disproportionate. The requirement of respect for the moral pluralism engendered by free movement rights can therefore be said to be a feature of the European element of the EU's public morality. Thus, the plural nature of EU public morality which finds its expression in the reflection of Member State moral choices in EU law is itself restricted by the requirement of respect for the moral pluralism inherent in the free movement rights guaranteed by the Union.

This requirement that Member State public morality take account of this right of individuals to access different ethical regimes in other Member States was seen in Advocate General Van Gerven's opinion in *Grogan* where, as noted above, he suggested that, while measures restricting abortion information were acceptable within EU law:

*"a ban on pregnant women going abroad or a rule under which they would be subjected to unsolicited examinations upon their return from abroad" (...) would be disproportionate [and] would excessively impede the freedom to provide services."*¹⁰⁴

Similarly, in *R. v Human Fertilisation and Embryology Authority, ex parte Blood*,¹⁰⁵ the UK Court of Appeal found, in a judgment which explicitly referred to the opinion in *Grogan*, that, in principle, EU law gives the right to receive medical treatment in another Member State and that moral choices in national law must take account of this right. In this case, a widow who was prevented from using her husband's sperm for the purposes of artificial insemination due to a requirement in British legislation that he have given his written consent for its use, sought the right to bring the sperm to Belgium

¹⁰⁴ n. 98 above, para. 29.

¹⁰⁵ [1997] 2 All ER 687.

which had no such requirement. The Court of Appeal held that the medical treatment in question was insemination with her husband's sperm rather than insemination in general and consequently a refusal to permit the export of his sperm amounted to an interference with her EU law rights.¹⁰⁶ The judgment noted that, as the Court of Justice had held in *Schindler*, Member States had “a sufficient degree of latitude to determine the moral or religious or ethical values which it regards as appropriate in its territory”.¹⁰⁷ Thus, provided that the interference in question was proportionate and justified by “some imperative requirement in the public interest” EU law could “not be relied upon as preventing [the British authorities] from imposing any restriction on the export of sperm”.¹⁰⁸ However, the UK's Human Fertilisation and Embryology Authority, which had taken the decision to refuse had a degree of discretion under the relevant legislation and, in coming to its decision, it was obliged to “balance Mrs Blood's cross border rights as a Community citizen” against the United Kingdom's ethical decision to “attach great importance to consent, the quality of that consent and the certainty of it”.¹⁰⁹ Although the Court of Appeal was clear that it was “not possible to say, even taking into account E.C. law that the authority are bound to come to a decision in Mrs Blood's favour” the failure to take her Community law rights into account and to “provide reasons which meet the standards set by European law”¹¹⁰ led to the quashing of the decision to prevent export.¹¹¹ Accordingly, the Court of Appeal recognised that the right of EU citizens to travel between Member States in order to be bound by the differing ethical choices of another Member State must be taken into account in relation to the implementation of British public morality based policies. The United Kingdom authorities were therefore required to respect the pluralism inherent in the Single Market by countenancing the removal of sperm from the UK in order that it be used according to Belgian norms for purposes which the British authorities had held to be illegal on moral grounds.

¹⁰⁶ *Ibid.* 698-700.

¹⁰⁷ *Ibid.* 700.

¹⁰⁸ *Ibid.* 701.

¹⁰⁹ *Ibid.* 702.

¹¹⁰ *Ibid.* 703.

¹¹¹ *Ibid.*

This notion of respect for the moral pluralism inherent in the notion of free movement and access for individuals to the differing ethical regimes of the Member States is also seen in cases such as *Jany* where, as noted above, the Court held that the status of prostitution as legal under Dutch law prevented the invocation of public morality as a reason to refuse the registration of Polish prostitutes as “*self-employed*” for the purposes of the Pre-Accession Agreement. Issues of discrimination on grounds of nationality were obviously also an important factor in the decision, nevertheless, by ensuring that non-nationals could not be subjected to more rigorous standards than those imposed on nationals, the ruling also underlines the right of individuals under EU law to access, by means of free movement, the opportunity to be bound by the ethical decisions of another Member State.

The judgment in *Blood*, where the issue of moving between ethical frameworks was complicated by the impact on domestic moral choices of the issue of the export of sperm, made it clear that the right to access services in another Member State may not always override the right of individual Member States to enforce collective moral preferences. Nevertheless, Advocate General Van Gerven’s statement in *Grogan* that attempts to prevent pregnant women from travelling to other Member States to have abortions would be unacceptable under EU law despite what he recognised as the grave importance of the moral principle which such a ban would be seeking to uphold,¹¹² indicates that the right to move between Member States is taken extremely seriously by EU law and represents a real limitation on the ability of Member States to legislate so as to enforce particular moral, religious or cultural norms. Thus, the reflection by a particular Member State of communal religious norms in its legislation is required by EU law to take account of the overall pluralism inherent in the European project which has opened up ethical horizons beyond the nation state to individual Europeans, thereby limiting the degree to which the such communal moral norms can be imposed on

¹¹² n. 98 above.

individuals who, in Hirschman's terms¹¹³ have the right of exit in addition to the voice with which domestic democratic structures provide them.

5. Limitations on Public Morality within EU Law

However, to suggest that this pluralism is such as to exclude any independent moral judgment of the substance of Member State public morality derogations at the European level is mistaken. EU public morality is both national *and* European, and the requirements of this independent, European element of EU public morality can be such as to provide limitations on the reflection of Member State moral choices. Becoming and remaining a Member State of the European Union involves moral commitments to certain notions of the good beyond respect for pluralism. These notions have been linked by the Union to respect for fundamental rights and democracy. At least as a matter of politics, this duty applies to Member States even when they act outside of the Union's areas of competence. The 1993 Copenhagen Criteria explicitly established respect for fundamental rights as an explicit criterion for membership of the Union.¹¹⁴ The Nice and Lisbon Treaties also reiterated the Member States' :

“attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law”¹¹⁵

and laid down respect for such principles as an ongoing duty of membership through Article 7 which envisaged the removal of voting rights from Member States which is in *“serious and persistent breach”* of this obligation.¹¹⁶ Furthermore, the adoption of the Charter of Fundamental Rights has committed both the Union and the Member States to upholding, within the sphere of operation of EU law, a certain view of the good, albeit one which preserves a significant degree of latitude for Member States. This view does,

¹¹³ A.O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States*, (Cambridge, MA: Harvard University Press, 1970).

¹¹⁴ European Council in Copenhagen, 21-22 June 1993, Conclusions of the Presidency, SN 180/1/93 REV 1. Available at http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/ec/72921.pdf (last visited 20 June 2008).

¹¹⁵ n.12 above, Preamble to the Consolidated Treaty on European Union. See also the Preamble to the Treaty on the functioning of the European Union. (also n.12 above).

¹¹⁶ Article 7 TEU as amended (see n. 12 above).

however, encompass certain principles such as privacy and equality which embody notions of the good which would preclude attempts to enshrine in law certain moral or religious notions inconsistent with such principles.

These duties have been used as a basis to restrict the ability of Applicant States and Member States to use their legal systems to reflect religious and moral perspectives in a way which is inconsistent with notions of equality and individual autonomy, even in areas which lie outside of the scope of the Treaties. As is shown in Chapter VI, Romania and Turkey were required by the Union not to criminalise homosexuality and adultery respectively as conditions of membership,¹¹⁷ while in 2005 Poland's newly elected conservative government was warned by the Commission that it risked losing voting rights in EU institutions if it failed to respect gay rights.¹¹⁸

These obligations are not merely political and the European element of EU public morality can act as a legal limitation on the accommodation of Member State moral choices in EU law. Contrary to some readings of the judgments in *Grogan and Jany*,¹¹⁹ the Court's conclusion that "*arguments on the moral plane cannot influence the answer*" in relation to the status of abortion of prostitution as a service does not mean that EU law is merely a passive reflector of Member State public moralities. In addition to the political and legal commitments to fundamental rights, EU legislation includes numerous morality clauses such as those noted by Advocate General Jacobs above in *Netherlands v Council*. Not all of these clauses deal with the issue of Member State derogations on morality grounds but also refer to the notion of public morality within EU law, independent of the status of such notions at Member State level. Advocate General Ruiz-Jarabo Colomer gave an example of the operation of the notion of morality within Community law in the *Phillips Electronics*¹²⁰ case where he suggested by way of example that the registration

¹¹⁷ See Chapter VI.

¹¹⁸ *Ibid.*

¹¹⁹ D.R. Phelan 'The Right to Life of the Unborn v the Promotion of Trade in Services', (1992) 55 MLR 670.

¹²⁰ Case C-299/99 *Koninklijke Philips Electronics NV v Remington Consumer Products Ltd*. ECR [2002] I-05475.

Opinion of Advocate General Ruiz-Jarabo Colomer.

of an abortifacient under the trade mark “*Babykiller*” would be barred under Community law on the grounds that to do so would be contrary to public policy.¹²¹

In relation to derogations from EU law on the basis of Member State moral choices, the Court has repeatedly made it clear that “*concept of public policy cannot be unilaterally decided by each Member State without being subject to control by the institutions of the Community.*”¹²² Thus, rather than demonstrating that EU law merely reflects and does not independently assess the moral nature of such derogations, cases such as *Grogan* merely show that such assessments take very seriously the need to respect the inherent pluralism of the EU’s public morality and also therefore, the autonomy of Member States in moral matters. This reading of *Grogan* is supported by the fact that the jurisprudence of the Court has made it clear that it will assess Member State moral choices for compliance with the Community moral norms which make up a European element of the Union’s public morality and may intervene when such moral choices are divergent to too great a degree from these Community moral norms. This Community morality, as will be shown below, is rather thin but does, in addition to the principle of pluralism discussed above, encompass to the notion of balance between religious, cultural and humanist elements reflected in requirements of respect for the idea of the individual as an autonomous and equal actor and for certain communal European norms, all of which are assessed in relation to the broad notion of the good reflected in the Union’s commitments to fundamental rights.

5.1 Consistency with a Common Ethical Template

The caselaw of the Court of Justice has also appeared to suggest that Member State derogations from EU norms on grounds of public morality will be accepted only where they in some way echo, or are congruent with, an independent set of EU moral norms. The limitation on Member State moral choices imposed in this regard requires that the moral choice in question fall

¹²¹ *Ibid.* para. 18

¹²² See *Bouchereau* [1977] ECR [1999] paragraphs 33 and 34.

within the broad definition of the good seen in the fundamental principles of EU law (most notably in relation to fundamental rights).

In *Omega Spielhallen*¹²³ the Court explicitly looked to find echoes in the Union's legal order for the moral value which the German authorities relied upon in order to prohibit a game which was alleged to contravene public morality. Here, the provider of a game which was alleged to allow players to simulate killing by shooting lasers at one another challenged the action of the German authorities who had prohibited the game on the grounds that it "*was contrary to fundamental values prevailing in public opinion*",¹²⁴ in particular the respect for human dignity required by the German Constitution. The Applicant alleged that the prohibition in question violated the freedom to provide services guaranteed by the EC Treaty. The German authorities argued that their actions were protected by the public policy and public morality exceptions recognised by EU law.

In assessing the German derogation, the Court recognised that Member States had a margin of discretion in relation to the concept of public policy and that the restrictive measures in question did not need "*to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected.*"¹²⁵ Nevertheless, the Court explicitly assessed whether the fundamental value invoked by the Member State was also reflected in the autonomous values of the Community legal order. In paragraphs 34 and 35 it held that:

"the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law. There can therefore be no doubt that the objective of protecting human dignity is compatible with Community law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right.

¹²³ Case C-36/02 *Omega* [2004] ECR I-9609.

¹²⁴ *Ibid.* para. 7.

¹²⁵ *Ibid.* para. 37.

*Since both the Community and its Member-States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law,*¹²⁶

The conclusion that human dignity was a general principle of EU law was based on the analysis of Advocate General Stix-Hackl who noted in her opinion that “*a variety of religious, philosophical and ideological reasoning could be given as the basis of this analysis*”¹²⁷ before noting the recognition of the right in various international Human Rights treaties,¹²⁸ Member State constitutions,¹²⁹ Directives and Regulations¹³⁰ and decisions of the Court of Justice.¹³¹ In other words, the accommodation within EU law of the German public morality exception in respect of the dignity of the human being, was dependent on the recognition of a similar moral value by the Community legal order, which, as the Court noted in paragraph 33 and in cases such as *Hauer*¹³² draws on, but is independent of, the common constitutional traditions of the Member States. This is in line with Advocate General Stix-Hackl’s conclusion that the assessment of Member State derogations on grounds of public morality includes review of “*appropriateness*” in addition to proportionality.¹³³

The notion of assessing the “*appropriateness*” of such derogations would seem to imply that national moral judgments are to be assessed for their compatibility with an independent set of standards within EU law. Indeed in the case of *Netherlands v Council*¹³⁴ which involved a challenge, inter alia, on public morality grounds, to the 1998 Biotechnology Directive, Advocate General Jacobs implied that the scope of common EU morality may evolve

¹²⁶ *Ibid.* para. 34 and 35

¹²⁷ *Ibid.* Opinion of Advocate-General Stix-Hackl, paragraph 78.

¹²⁸ *Ibid.* para. 82.

¹²⁹ *Ibid.* para. 83.

¹³⁰ *Ibid.* para. 87.

¹³¹ *Ibid.* paras. 88, 89 and 90.

¹³² Judgment of 13/12/1979, *Hauer v. Land Rheinland-Pfalz* (Rec.1979,p.3727).

¹³³ n. 127 above, para. 103.

¹³⁴ *Netherlands v Council* Case C-377/98 [2001] ECR I-7079.

and come to cover an increasingly broad range of areas, arguing, in relation to Member State morality derogations in the area of biotechnology that:

*“the discretion of a Member State to determine the scope of the concept of public morality in accordance with its own scale of values, so defined by the Court more than 20 years ago, should perhaps now be read with some caution. In this area, as in many others, common standards evolve over the years. It may be that the ethical dimension of some of the basic issues within the scope of the Directive is now more appropriately regarded as governed by common standards.”*¹³⁵

The progressive embrace by the Union of shared fundamental values as an element of its identity and legal order may therefore be increasing the degree to which the that legal order reflects and upholds an independent framework of moral values. This potentially limits the pluralism of the EU’s public morality in that the emergence of common standards, on Advocate General Jacobs’ analysis, results in the restriction of the discretion of Member States to pursue approaches which differ from such standards.

The development of the fundamental rights obligations of the Union have had a notable impact in this regard. In the *ERT*¹³⁶ case it was held that all Member State derogations from EU law duties (therefore including those based on public morality) are subject to compliance with the common commitment of all Members States of the Union to comply with fundamental rights obligations. Furthermore, given their fundamental status in the ethical and legal order of the Union, the fundamental rights recognised by EU law must have a major impact on the content of EU public morality as well as on the limitations imposed on the reflection of the particular public moralities of individual states within the Union’s legal order. This analysis is further underlined by the fact that in *Omega*, the inquiry into the legitimacy of a derogation from the freedom to provide services on the basis of the need to protect human dignity was regarded by both the Court and Advocate General

¹³⁵ *Ibid.* Opinion of Advocate General Jacobs, para. 102.

¹³⁶ *ERT* Case C-260/89 ECR [1991] I-02925.

as conclusively resolved (although issues of proportionality remained outstanding) by the identification of this principle as one of the general principles of law protected by the Community legal order.¹³⁷ In other words, once the protection of human dignity had been categorised as part of the general principles of law through which fundamental rights are protected within EU law, a derogation based thereon was in principle acceptable and no further identification of the source or broader significance of the relevant principle was required.

The reflection of Member State moral choices in the public morality of the EU is therefore dependent on the compatibility of such moral choices with the Union's fundamental rights obligations and general principles of law, which are now given expression in the Union's Charter of Fundamental Rights which acts to "reaffirm" the fundamental rights resulting from the common constitutional traditions of the Member States. As Foley has suggested, all constitutions depend on a failure to definitively resolve certain fraught issues and contain unwritten, tacit "*abeyances*" which enable such constitutions to survive by fulfilling the need for "*protective obscurity*" around certain issues.¹³⁸ In line with this approach and in common with the Lisbon Treaty, the Charter of Fundamental Rights does not explicitly identify itself with any particular religious worldview. Neither does it claim that the rights it contains derive from any particular religious tradition or divine authority. This, as Weiler notes,¹³⁹ is in contrast to the constitutions of several EU Member States which, as shown in Chapter II, specifically invoke either God or the Christian Trinity or which recognise a particular religion as underpinning their constitutional order.¹⁴⁰ However, the Charter does invoke Europe's "*spiritual and moral heritage*"¹⁴¹ and undertakes to respect:

¹³⁷ n. 126 above.

¹³⁸ M. Foley, *The Silence of Constitutions*, (London, Routledge, 1989) 81.

¹³⁹ n. 24 above.

¹⁴⁰ See Chapter II.

¹⁴¹ n. 12 above, Preamble to the Treaty on the Functioning of the European Union.

*“the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States”*¹⁴²

Thus, the rights contained in the Charter are seen as emerging from a particular religious and moral heritage which, as noted above, has been heavily marked by Christian and humanist influences. The interpretation of these rights is, therefore, likely to reflect and accommodate established European ways of life and to prove less challenging to the ambitions and public role of culturally entrenched religions or religions which can reconcile themselves to humanist influences than to religions which lack such characteristics. Indeed, the influence of humanist principles is clearly seen in the Preamble to the Charter which speaks of *“universal values of human dignity, freedom, equality and solidarity”*¹⁴³ and of the Union’s commitment to place *“the individual at the heart of its activities”*.¹⁴⁴ The importance of individual human as an equal and autonomous agent is also recognised in Articles 3, 5, 6, 7, 11 and 21 which protect the rights to bodily integrity, liberty of the person, freedom from slavery, privacy, freedom of expression and equality.¹⁴⁵ On the other hand, the Charter also recognises religion and religious freedom as another “good” while the Preamble and Article 17 of the Lisbon Treaty specifically endorse the notion of at least some religious influence over law. Furthermore, the national cultures and identities which the Charter undertakes to respect may themselves involve the promotion of religiously influenced communal moral standards. Thus, the notion of the good with which Member State moral choices must be compatible is rather broad and offers significant scope for the maintenance of the pluralism of EU public morality. The Court of Justice has not identified any overarching worldview within which its general principles and defence of human rights are based and thus has not required the Member State public moralities fall in line with any such worldview. The ethical template which is laid down in the Charter does reflect the influence of the Christian and humanist traditions in

¹⁴² Preamble, Charter of Fundamental Rights of the European Union, 2007/C 303/01, 14.12.2007.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

Europe to some degree but is at the same time is relatively broad and flexible and therefore gives Member States significant leeway to pursue their particular collective moral goals.

5.2 The Importance of Balance

Despite the relatively broad and flexible nature of the ethical template set out in the Charter, there are aspects of the Union's approach, which can potentially restrict Member State autonomy in moral and religious matters to significant degree. Indeed, the very pluralism that is the source of Member State autonomy in moral matters itself operates so as to restrict this autonomy. EU public morality is characterised by a commitment to balancing what are seen as the potentially conflicting "goods" of Europe's religious, humanist and cultural inheritance. EU law requires that Member States respect this element of European public morality and that, in seeking to promote their own versions of public morality, they respect this notion of balance and do not accord absolute priority to any single element. The notion of balance between conflicting good has been a central concern of the jurisprudence of the Court of Justice. In contrast to the almost absolutist approach adopted by US constitutional law, for example in relation to freedom of speech, EU law has tended to seek to balance conflicting rights. As noted above, MacCormick and others have noted how when faced with clashes of two "goods"¹⁴⁶ the Court has not sought to establish a "*hierarchical structure among these values*" but has instead its decisions "*are a matter of weighing and balancing*".¹⁴⁷

The Court has followed the same approach in relation to fundamental rights. In *Promusciae* the Court of Justice assessed the implementation of EU copyright legislation by Spain in the light of a request by an organisation representing the owners of intellectual property rights to an internet provider to disclose the identities of internet users who had violated such rights using filesharing software. It held that:

¹⁴⁶ J. Bengoetxea, N. MacCormick and L. Moral Soriano, "Integration and Integrity in the Legal Reasoning of the European Court of Justice" in G. de Burca and J.H.H. Weiler (eds.) *The European Court of Justice*, The Academy of European Law, European University Institute, Oxford University Press, Oxford, 2001. In this instance the authours were discussing the clash between the goals of market freedoms and environmental protection.

¹⁴⁷ *Ibid.* 65.

“the Member States must, when transposing the directives mentioned above, take care to rely on an interpretation of the directives which allows fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with other general principles of Community law such as the principle of proportionality.”¹⁴⁸
(emphasis added).

Thus, faced with a clash between the “goods” of privacy and property rights, the Court did not assign priority to one over the other but required that that the Member State in question strike a “*fair balance*” between them.

MacCormick et al. note that an approach centred on balancing reflects a “*value pluralism*” where “*values and principles cannot be reduced to a single value or coherent set of values, nor should conflicts between reasons be interpreted as a sign of imperfection, but rather as the normal state for human beings.*”¹⁴⁹ The Court’s focus on notions of balance reflects the value pluralism of EU public morality in that it does not require uniform moral outcomes in each Member State but permits differing national conclusions in relation to moral issues provided that such conclusions respect the concept of “*fair balance*”. This concept grants Member States a considerable degree of latitude and thereby may grant a degree of what Foley would term “*protective obscurity*” to the EU legal order. On this view, EU law does not seek perfection or pursue a single outcome of the reconciliation of conflicting rights but embraces the notion of pragmatic reconciliation of rights rather than more doctrinaire according of priority to one set of rights over another. On the other hand this balance-centred approach does not give Member States an entirely

¹⁴⁸ Case C-275/06 *Promusicae v Telefónica de España SAU*, Judgment of the Court (Grand Chamber) of 29 January 2008, para. 68.

¹⁴⁹ n. 146 above, 64.

free hand in that it also implies that certain approaches which, for example fail to give any or adequate weight to principles identified as “goods” by the Community legal order will fall foul of EU law.

Given that, religion, the protection of national culture and identity and the rights to individual autonomy and equality (which can be threatened by the imposition of communal religious or cultural standards) have been identified as “goods” by Community law, Member States must ensure that the moral choices they make which impinge on these goods do not fail to respect the duty of maintaining balance between them. This commitment to a balance between religious, cultural and humanist influences is seen in EU anti-discrimination legislation which, as discussed in Chapter V, attempts to balance the institutional rights of religious bodies and the cultural role of religious institutions in many Member States with the right of individuals to privacy and equal treatment.¹⁵⁰ A concern that a failure to maintain such a balance between these elements could invite the intervention of EU law was seen in relation to the concerns in France that the incorporation of the Charter of Fundamental Rights into the Constitutional Treaty might, due to its commitments to religious freedom, compromise the France’s strictly secular approach to the wearing of religious clothing in schools. This was referred to by the *Conseil constitutionnel* in its decision on the Constitutional Treaty¹⁵¹ in which it held that the French approach to this issue was not imperilled by the Treaty. It came to this conclusion on the basis that the French approach was in fact characterised by a degree of balance between the competing goods of religion, the secular identity of the French state and the protection of individual rights inherent in this secularist approach. The *Conseil* held that the relevant French laws had “reconcile[d] the principle of freedom of religion and that of secularism”¹⁵² and that given that the Court of Human Rights had given individual states “considerable leeway to define the most appropriate

¹⁵⁰ See Chapter V, in particular sections 2 and 3.

¹⁵¹ Decision n° 2004-505 DC of November 19th 2004, The Treaty establishing a Constitution for Europe available at: <http://www.conseil-constitutionnel.fr/decision/2004/2004505/eng.htm> (last visited 20 June 2008).

¹⁵² *Ibid.* para.h 18.

measures, taking into account their national traditions”,¹⁵³ the French approach was not endangered by the Constitutional Treaty’s recognition of the Charter of Fundamental Rights. Thus, the *Conseil* did not simply conclude that Member States had the sufficient cultural autonomy to define an approach to these issues without European interference but rather held that the French approach, in the light of both the considerable autonomy retained by Member States in this area *and* the fact that it balanced the relevant rights, would not trigger European intervention.

5.3 Fair Balance and the Autonomy and Equality of the Individual

Although an approach which leaves it to Member States to strike a fair balance between rights does grant significant leeway to national authorities, the notion of what is “fair” is influenced by certain fundamental shared European norms which restrict Member State autonomy in this area. Legislation, on the part of either the Union or its Member States, which seeks to promote notions of public morality, is required to respect certain key principles such as coherence, proportionality and non-discrimination which is centred on the strong tradition of individual liberty within Western liberal thought. Thus, while a margin of discretion in relation to public policy is provided by the willingness of the Courts to permit public policy derogations to be assessed “*in accordance with [a Member State’s] own scale of values and in the form selected by it,*”¹⁵⁴ the Court has repeatedly affirmed that, as Advocate General Van Gerven stated in *Grogan* this margin of discretion is subject to “*the limits set by Community law*” which includes a proportionality test requiring that the derogation:

*“be justified by some imperative requirement in the general interest, (...) be suitable for securing the attainment of the objects which it pursues and (...) must not go beyond what is necessary to attain that objective.”*¹⁵⁵

Member State morality based derogations which are held by the Court to interfere in a disproportionate way with Community law rights will, therefore,

¹⁵³ *Ibid.*

¹⁵⁴ Case 121/85 *Conegate Limited v. HM Customs and Excise* ECR [1986] 01007.

¹⁵⁵ As summarised in *Blood*, n. 105 above, 700.

not be accepted in EU law. Advocate General Van Gerven, for example, suggested in *Grogan* that a ban on pregnant women travelling or mandatory pregnancy tests on women on departure from or return to Ireland would fail this test.¹⁵⁶

The Court has also been clear that derogations on grounds of the need to promote public morality must also respect the principle of non-discrimination between nationals and citizens of other Member States. In both *Jany*¹⁵⁷ and *Adoui and Cornouaille*¹⁵⁸ the Court refused to accept attempts to curtail, on grounds of public morality, the Community law rights of non-national prostitutes to work in Member States on the basis that:

*“Although Community law does not impose on Member States a uniform scale of values as regards the assessment of conduct which may be considered to be contrary to public policy, conduct may not be considered to be of a sufficiently serious nature to justify restrictions on entry to, or residence within, the territory of a Member State of a national of another Member State where the former Member State does not adopt, with respect to the same conduct on the part of its own nationals, repressive measures or other genuine and effective measures intended to combat such conduct”*¹⁵⁹

As discussed above, this principle is also linked to the moral pluralism inherent in the European project which confers on those individuals with the abilities, resources and skills to do so, the right to choose, by exercising freedom of movement, to be bound by the ethical choices of different Member States. In addition, it is connected to the broader requirement that Member State derogations be coherent and internally consistent in order to achieve acceptance within EU law. This was seen most notably in the *Conagate*¹⁶⁰ case where a challenge was brought to the refusal of the British authorities to permit the import of certain pornographic items on the basis that domestic law

¹⁵⁶ n. 98 above, para. 29.

¹⁵⁷ Case C-268/99 *Jany and Others v. Staatssecretaris van Justitie* [2001] ECR I-8615.

¹⁵⁸ Joined Cases 115 and 116/81 *Adoui and Cornouaille v. Belgian State* ECR [1982] 01665.

¹⁵⁹ *Ibid.* para. 60.

¹⁶⁰ n. 154 above.

permitted their domestic manufacture and sale (subject to a ban on sending them through the post). The Court upheld the challenge on the basis that:

*“A Member State may not rely on grounds of public morality in order to prohibit the importation of goods from other Member States when its legislation contains no prohibition on the manufacture or marketing of the same goods on its territory”*¹⁶¹

It further stated that:

*“It must at least be possible to conclude from the applicable rules, taken as a whole that their purpose is, in substance, to prohibit the manufacture and marketing of those products”*¹⁶²

The decision in *Conegate* clearly has much in common with the approach adopted in *Jany* and *Adoui and Cornouaille* which precluded the imposition of stricter moral standards on outsiders than a Member State’s own nationals. However, as the above paragraph shows, it also underlines a second aspect of the approach of EU law to public morality in that the Court also made it clear that Member State derogations on grounds of public morality would also be assessed for their internal coherence and that measures which fail to indicate the requisite degree of coherence would not be accepted in EU law. The importance attached by the Court to the coherence of Member State morality derogations reflects Fuller’s notion of the “internal morality” of law which requires that laws be sufficiently general, intelligible and free of contradictions.¹⁶³ As MacCormick and others have pointed out, the notion of coherence has been an important element in the jurisprudence of the Court of Justice and derives from “*the idea crucial to the rule of law that the different parts of the whole legal order should hang together and make sense as a whole,*”¹⁶⁴ or, at the very least, should not actively contradict each other. Such

¹⁶¹ *Ibid.* para. 16.

¹⁶² *Ibid.* para. 17.

¹⁶³ L. Fuller *The Morality of Law* (New Haven, Yale University Press, 1969).

¹⁶⁴ J. Bengoetxea, N. MacCormick and L. Moral Soriano, “Integration and Integrity in the Legal Reasoning of the European Court of Justice” in G. de Burca and J.H.H. Weiler (eds.)

ideas are central to the principle of the rule of law which the Union has explicitly embraced as part of the Copenhagen Criteria setting out the prerequisites of membership¹⁶⁵ and as one of the EU's fundamental constitutional values which finds expression in general terms in the Preamble to the Charter of Fundamental Rights¹⁶⁶ as well as more concrete expression in the prohibition of retroactive or extra legal punishment in Article 49.1.¹⁶⁷

These requirements establish a broad framework which is centred on individual liberty. The Union's approach implicitly distinguishes between law and morality, regards individual freedom to act as the default position and requires that all curtailments of such freedom be coherent and as narrowly tailored as possible. These notions of the centrality of individual autonomy and the view of morality as a largely private matter whose enforcement by law must be limited and specifically justified are have a long history in Western liberal thought but have been less influential in other contexts, most notably in largely Muslim societies.¹⁶⁸ Combined with the emphasis placed on non-discrimination in *Jany, Conegate and Adoui*, the requirements of coherence and proportionality underline the importance placed by the EU legal order of the individual as an equal and autonomous actor whose ability to take decisions and plan his or her own life must be respected. Thus, the promotion of public morality by law takes place in a context which places significant emphasis on individual liberty against which the promotion of communal moral standards must be balanced and which may therefore prove less

The European Court of Justice, The Academy of European Law, European University Institute, Oxford University Press, Oxford, 2001, 47.

¹⁶⁵ The Copenhagen Criteria provide that: "Membership requires that candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and, protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union "See: European Council in Copenhagen, 21-22 June 1993, Conclusions of the Presidency, SN 180/1/93 REV 1. Available at http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/ec/72921.pdf (last visited 20 June 2008).

¹⁶⁶ Preamble, Charter of Fundamental Rights of the European Union, 2007/C 303/01, 14.12.2007.

¹⁶⁷ Article 49.1, Charter of Fundamental Rights of the European Union, 2007/C 303/01, 14.12.2007.

¹⁶⁸ See T. Gabriel "Is Islam against the West?" in R. Geaves, T. Gabriel, Y. Haddad and J. Idleman Smith (eds.) *Islam and the West Post 9/11* (Aldershot, Hants, England, Ashgate, 2004) at 15). See also P. Norris and R. Inglehart *Sacred and Secular: Religion and Politics Worldwide* Cambridge University Press, Cambridge, 2004.

challenging for religions which have reconciled themselves to the emphasis placed on human autonomy within Western societies.

5.4 Public Morality and Perspectives Contrary to Common European Norms

The importance attached to individual autonomy by EU law can be seen as merely indicative of a wider point, namely, that certain norms, which for cultural and historical reasons have come to be widely shared in Europe influence the kind of moral goals which can validly be pursued by legislative means under EU law. As both Advocate General Jacobs' point in relation to the restriction of Member State autonomy in moral matters through the emergence of common European standards,¹⁶⁹ and the notion of assessing the "appropriateness" of the moral goal pursued by the Member State in question in *Omega*,¹⁷⁰ suggest, certain moral goals which run counter to the notion of the good reflected in the Charter which, as noted above, is broad but nevertheless influenced by common European inheritance of Christian, humanist and cultural influences, are seen as illegitimate and unacceptable within EU law, even if balanced against other countervailing influences.

To take an example, the emergence of a common European norm of gender equality may operate so as to reduce the ability of Member States to make differing moral choices in this area. For instance, Article 41.2 of the Irish constitution provides that:

"1. In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

*2. The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home."*¹⁷¹

¹⁶⁹ n. 135 above.

¹⁷⁰ n. 127 above.

¹⁷¹ Bunreacht na h-Éireann, Articles 41.2.1 and 41.2.2.

This article could be seen as representing a deeply held religiously-influenced moral notion in relation to the upholding of differences between the sexes and the role of women and mothers in family life. Should the Irish authorities introduce, legislation which discouraged mothers of young children from taking paid employment, such measures would fall foul of the principle of gender equality in the workplace enshrined in EU law. Even if the Irish government were to demonstrate that the measure in question was very limited and attempted to balance the rights of individuals to equal treatment against the religious and moral imperative to maintain traditional gender roles, it is difficult to imagine that such a choice could be categorised as, to use the language of Advocate General Stix-Hackl in *Omega*, “appropriate” by the Court in the light of the emphasis placed by Community law on gender equality in the workplace and the principle of equal treatment in general. Indeed, in *Kreil* the Court was willing to interfere with an explicit constitutional mandate in the extremely sensitive area of military policy when the policy in question violated the norm of gender equality.¹⁷² On the other hand, where common standards have not yet emerged to the same degree, as for example is the case in relation to sexual orientation discrimination, compromises on the principle of equal treatment on the basis of respect for religious and cultural norms have been accepted by EU law, most notably in relation to the Framework Directive which has explicitly permitted discrimination in employment on grounds of sexual orientation in organisations which have a religious ethos on the ground that the limited exemptions achieved a balance between the rights of religious bodies and those of individuals.¹⁷³

Notions of religious morality which deviate from established European cultural norms are, of course, more likely to come into conflict with “*common standards*.” Thus, notions of European public morality are, to a degree linked to the promotion of a common European way of life or ways of life which are respectful of the balance between largely Christian religious influences and

¹⁷² Case C-285/98 *Kreil v. Germany* [2000] ECR I-69.

¹⁷³ *R. (Amicus and others) v. The Secretary of State for Trade and Industry* [2004] EWHC 860.

humanist influences which characterise European history, in addition to cultural norms, in relation, for instance, to gender equality which have emerged from this history. Therefore, common European norms around the mixing of the genders may prevent the recognition on public morality grounds of a Member State law which sought to enforce in the workplace Islamic notions of the separation of the genders. Similarly, it is interesting to consider how the Court of Justice would react to notions of morality deriving from religions such as Scientology which have little cultural purchase in Europe. A law passed by a Member State at the instigation of Scientologists which for instance, banned the practice of psychiatry (towards which the Church of Scientology is very hostile) and placed the kind of restrictions on the advertising of psychiatric services which Ireland had placed on abortion services in *Grogan* would present the Court of Justice with the prospect of recognising as part of European public morality a moral stance rejected by the overwhelming majority of Europeans.

Were such laws passed by the Union's own legislature there is, I would suggest, little likelihood that they would survive review by the Court. However, the pluralism of the EU's public morality means that when Member States seek to make such choices, difficulties arise. The Union's commitment to certain values means that it must place some limits on what can be accepted as part of the public morality recognised by EU law. Notions of proportionality, coherence and a duty to respect rights to move between countries do provide some such limits. However, the judgment in *Omega* and the importance placed by the Union on compliance with fundamental rights, particularly in the *ERT* judgment, means that certain religious and moral viewpoints which contradict the balance between religion and humanism inherent in the Union's public morality (seen particularly in its fundamental rights instruments) may simply not be capable of being accommodated by European public morality or, therefore, EU law. Indeed, such an approach is arguably implicit in Articles 6 and 7 TEU which require Member States to uphold human rights and democracy on pain of loss of voting rights in the Council and thereby stress the notion of EU membership as involving a commitment to a certain shared European notion of the good.

Therefore, if the Union is to be a “Community of Values” and its commitments to fundamental rights and shared norms are to have any meaning, certain moral or religious goals which deviate from established European cultural norms or common standards will not be capable of being accommodated within EU public morality and will be held to be contrary to European public morality even before issues of balance or coherence arise. On this view, particular historical and cultural experiences such as Europe’s collective guilt in relation to the holocaust or its long experience of Christianity and humanism will influence the Union’s view of what can “count” as valid religious or cultural aims in the striking of a balance between religious cultural and humanist influences. From such a viewpoint, when the Court of Justice, as it did in *Omega*, investigates the appropriateness of a moral choice which a Member State is seeking to have recognised within EU law, or when the special contribution of religious bodies to policy formation is being sought by EU institutions, all forms of religious morality may for cultural, historic, moral or other reasons, not “count” in striking a fair balance between religious influences and humanist influenced notions of individual autonomy. Rather, as in *Promusicae*, the Court will assess the balance, only in relation to forms of religion whose influence *can* be balanced against humanist influences or established European cultural norms. Approaches which, like radical Islam, are radically opposed to key influences such as humanism or which, by promoting racist ideas, clash with the legacy of key cultural and historical experiences such as the holocaust simply will not be recognised for the purposes of such balancing exercises.

Therefore, perhaps unsurprisingly, the reflection of religion in EU law by means of the recognition of public morality, is likely to favour those forms of religion which can reconcile themselves to the balance between religious and humanist influences which has emerged from European history and which characterises much of European culture. As Taylor and LeGoff have pointed out, humanism’s success in Europe occurred partly because of the humanistic elements of Europe’s historically dominant religion, Christian religions. As noted in Chapter I, many have suggested that many of the fundamental values

of the Union such as democracy equality and individual autonomy have roots in Christianity. Thus, it is not unreasonable to conclude that given its enormous cultural influence and its links to humanism, Christianity may exercise a greater influence over European public morality (and thereby EU law) than other faiths. Nevertheless, the humanist influences over European culture which gave rise to the secularisation of Europe, have, despite the religious roots they may have had, have served to limit religious influence over law and politics. This has been particularly true in relation to what Casanova termed “lifeworld” issues of family, sexuality and the beginning and end of life in relation to which mainstream Christian denominations have continued to attempt to influence law so that it conforms to their moral teachings. Thus, even if liberal notions such as autonomy and equality can be seen as the offspring of Christianity, they represent rather rebellious offspring which, as adults, have come to clash with their “parents” in the legal and political arenas. The Union’s commitment to balancing religious and humanist influences therefore restricts all religions, including those with deep roots in national and European culture.

6. Conclusion

The notions of pluralism, balance and inheritance are key features of the recognition of religion as a basis of law in the EU public order. The legitimacy of religious input into law is recognised at a symbolic level through the recognition of religion as an element of the Union’s constitutional values, at an institutional level in the recognition of religious bodies in the lawmaking process and in substantive law through the recognition of religion as part of a public morality which the Union and Member States may legislate to protect.

However, in all three areas in which religion is recognised it must share its role as an element of public morality with cultural and humanist influences which are similarly recognised. Although these elements can reinforce each other (as in the case of the Christian influence on Member State cultures) they can also be in conflict (as when humanism’s stress on individual autonomy clashes with religious desires to promote communal morality). Thus, the overall public morality through which religion influences EU law is

characterised by a balance between these religious, cultural and humanist elements. These features are seen in relation to religion's institutional position where the recognition of the special importance and contribution of religious institutions to lawmaking is balanced by the secularising effect of providing such recognition in the context of a pluralist civil society.

In relation to substantive EU law, religion exercises influence by means of morality clauses which allow both the Union and its Member States to promote communal moral standards by means of law. This EU public morality is pluralist in that it recognises that the primary forum within which ethical choices are made is still the individual Member State and therefore permits the recognition of differing national religious, cultural and moral viewpoints within EU law. However, membership of the Union also involves certain moral commitments and a degree of common agreement around fundamental political and legal values. Thus, an autonomous EU public morality also restricts the degree to which the particular moral choices of individual Member States can be reflected in EU law. These restrictions require that the ethical choices of Member States do not deviate from a common European element of EU public morality containing commitments to proportionality, coherence, free movement rights and the notion of fair balance between competing values, all of which reflect, *inter alia*, a degree of respect for individual autonomy which is inherent in the Union's commitment to balance between the religious, cultural and humanist influences underlying its public order.

Such an approach to public morality has much in common with MacCormick's notion of the Union as characterised by a legal pluralism characterised by the interaction of legal systems.¹⁷⁴ Indeed, the analogy can extend to other areas of EU law such as freedom of movement where one could argue that, just as EU law requires that national regulatory decisions take into account the principle of free movement of goods, similarly it requires that national ethical choices take into account the moral commitments of EU

¹⁷⁴ N. MacCormick, "The Maastricht Urteil: Sovereignty Now" (1995) 1 *European Law Journal* 259, 264-5.

membership embodied by the Union's public morality and fundamental rights commitments. This is seen in the judgments in *Promusicae* and *Omega* which indicated that what is required is that Member States take account of the various "goods" and elements of public morality recognised by EU law in coming to their ethical decisions.

Although the Union has adhered to a relatively strict formal neutrality in its dealings with religions, these "goods" and the notion of what constitutes a fair balance between competing rights are both, of course, influenced by European culture and history. Indeed, the importance of Europe's ethical and religious "*inheritance*" in the determination of the content of the public morality of the EU has been explicitly acknowledged in the Treaties. Combined with deference towards Member State cultural and moral autonomy and the promotion of the notion of balance between religious and humanist influences, the notion of respect for an ethical inheritance permits culturally entrenched Christian religions and those faiths which can reconcile themselves to limitation on religious influence which respect for Europe's humanist tradition entails, to exercise greater influence over EU law. Nevertheless, the Union recognises the complexity of the relationship between liberal democracy and religion in general and provides limits to the public ambitions of all faiths, even those with strong humanist traditions and deep cultural roots in Europe. Thus, the notion of balance can be seen as attempting to reconcile religion's important role in communal identity with protection of individual identity rights, including the right not to be forced to adhere to particular religiously-inspired communal moral norms, which derive in part from the humanist elements of the Union's public order.

The Union's public morality therefore upholds the broad outlines of the balance between religion and secular/humanist balance in Europe and the cultural values and way of life to which this balance gives rise. Its approach is not religiously neutral and exhibits a preference for culturally-entrenched faiths which play strong roles in communal cultural identities in Europe and which can reconcile themselves to the notion of balance between humanist and religious influences. Those religions that do not exercise significant cultural

influence in a Member State, which are opposed to certain shared European cultural norms or which are anti-humanist, are largely excluded from influence and are, at least implicitly, identified as in some ways contrary to the Union's public morality and notion of the good. On the other hand, religions such as mainstream Christian churches which have deep cultural roots and which have a strong humanist tradition, may find that they exercise a far greater influence over European public morality than other faiths. Nevertheless, although the strong humanist elements of European public morality, and the secular influences which they gave rise to, may owe something to Christian humanism, they also provide powerful limitations on the influence which all religions, including Christianity, can exercise over the law. Thus, the Union's approach is characterised by a complex and shifting balance between religious, cultural and humanist influences. This balance is struck in a pluralist context which attempts to reconcile the differing balances between such influences in individual Member States with the need to maintain the open and sufficiently religiously neutral common European ethical framework necessary for the functioning of the Union as a polity.

Chapter IV: Religion as Identity and the Fundamental Rights Obligations of the Union

1. Introduction

2. Rationales for Protecting Religious Freedom in Contemporary Europe

3. The Scope of Freedom of Religion in EU Law as Part of the Union's Fundamental Rights Commitments

4. Jurisprudence of the European Court of Human Rights Relating to Religious Freedom

4.1 The Text of the Article

4.2 Individual Religion Freedom as a Private Right

4.3 Institutional Religious Freedom

4.4 Religion as Part of the State

5. Conclusion

1. Introduction

Chapter III showed how the Union, though limiting the role of religions in the political and lawmaking arena in important respects, also permits religion to exercise influence over law as an element of civil society and, perhaps more importantly, as an element of a public morality which, provided that individual autonomy is respected, is promoted out of respect for national cultural autonomy. Chapter IV shows the importance of religion's status as an element of identity within such a framework and how such an approach fits in with the Union's fundamental rights obligations in respect of religious freedom. The constraints imposed on the Union in this regard are determined, largely, but not entirely, by the European Convention on Human Rights which provides the basis for the protection of religious freedom in EU law. This chapter considers how the European Court of Human Rights ("ECtHR") has had to reconcile principles such as equality and individual autonomy in religious matters which underpin liberal rationales for religious freedom, with more communal rationales which recognise religion's communal nature and the right of Member States to promote a communal identity, which may be religiously-specific, through their public institutions.

The chapter demonstrates how the ECtHR has seen individual religious freedom as a right which is principally private in nature and focuses on an individual right to develop and adhere to a religious identity. The Court has generally refused to require states to provide special accommodation for religion in non-private contexts such as the labour market. The chapter notes how, at times, the Strasbourg Court has seen the relationship between religion in the public arena and the liberal democratic state in essentially competitive terms and has empowered states to limit religious expression in the public contexts in order to defend the principles and interests such as state neutrality, equal treatment or public order. Such an approach would seem to be consistent with notions of the neutral state and with the defence of religious freedom, albeit to a degree which is limited by the needs of the state in the public sphere and on the principle of respect for individual autonomy, both of which are linked to the Union's humanist heritage. However, the chapter also demonstrates how such individually-based protection has nevertheless been influenced by broader cultural factors and how the protection provided by the Strasbourg Court has slanted towards forms of religion which are culturally established in Europe to the detriment of religious practices which are less familiar and culturally entrenched.

Having considered the protection of religion as an individual right, the chapter then examines the Court's approach to the institutional element of religious freedom. It demonstrates that, while the Court has endorsed the right of states to confine religion to the private sphere in order to ensure the neutrality of the public contexts, it has not always seen the relationship between non-private religion and the state in competitive terms. It contends that, in an approach which is reflective of communal notions of religion and the protection of religion's broader role in communal identity, the ECtHR's judgments have shown a willingness to uphold the conferral of significant public sector privileges by Member States on certain denominations, even when such privileges interfere with individual rights such as the right to equal treatment and personal autonomy. The chapter demonstrates how the confining of individual religious freedom to the private sphere, coupled with the right of the state to protect the institutional role and social status of certain religions,

reveals an approach to the relationship between the state and religion which by and large respects the right of states to define their own relationship to religion, including relationships which involve the close identification of certain states with individual denominations. It shows how the ECHR has been interpreted so as to permit the use of coercive state power to promote the interests of certain religions and how liberal principles such as equal treatment and freedom of expression have, at times, been required to give way to the right of states to promote a religiously specific communal identity. The chapter therefore concludes that there are two sets of rights relevant to the Union's duties in respect of religious freedom. The first consists of a duty to respect the right of individuals to develop and adhere to a religious identity of their choosing in the private sphere while the second right is more permissive than mandatory in nature focus on the right of the state to define religion's role in collective identity. Therefore, the constraints imposed by the ECHR on the choices of both the EU and its Member States in this area are in fact relatively limited and consist mainly of a duty to respect religion in the private sphere and to ensure that the identification of the state with a particular religion is not such as to imperil the level of pluralism inherent in the liberal democratic nature of the Convention system. The fundamental rights obligations of the Union in relation to religious freedom therefore leave it free to grant priority to the right of Member States to define their own relationship to religion, to defend their public spheres and state institutions from religion or, conversely, to promote certain denominations through state institutions and do not require it to ensure adherence on the part of such Member States to principles such as state neutrality and equal treatment of religions.

The first section of the chapter analyses the major rationales for the protection of religious freedom in contemporary Europe and how such rationales accommodate the diverse nature of religion. The second section traces the emergence of the Union's fundamental rights obligations in EU law and the role of religion and the ECHR in those obligations. The chapter then considers the protection of religious freedom in its individual and collective forms by the ECtHR before concluding with an assessment of the implications of the

Court's approach for the relationship of religion to both the EU and its Member States.

2. Rationales for Protecting Religious Freedom in Contemporary Europe

The complex, and at times contradictory, nature of religion makes the issues arising out of its legal protection particularly complex. Religion is both a matter of individual choice and a type of communal action which may impinge on individual choice. It is also an ideological matter of beliefs and opinions which nevertheless also involves significant elements of cultural identity which set it apart from purely political beliefs. This section analyses the major rationales advanced for the protection of religious freedom in contemporary Europe and the degree to which each can accommodate religion's complex nature as well as the further complications relating to the balance of power between the Union and Member States which arise in the context of the EU.

Four such rationales are generally advanced in the modern European context, for the protection of religious freedom.¹ The first two focus on religious conflict as a source of suffering and disorder, the third relies on religious justifications for religious tolerance and the fourth emphasises the role of religious freedom as part of a wider commitment to liberalism and personal autonomy.² The first two rationales are closely related and emphasise the historical strife caused by religious conflict. The first approach sees religious freedom as an instrument to avoid the suffering brought about by religious intolerance. It recognises religious diversity as inevitable and protects religious freedom as a means to avoid the conflict which a failure to tolerate such diversity would inevitably bring. This argument has found favour in some international human rights instruments such as the *United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief*.³ The preamble to the declaration

¹ C. Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford and New York, Oxford University Press, 2001) 22-33.

² *Ibid.*

³ *United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief*, Proclaimed by General Assembly resolution 36/55 of 25 November 1981. Available at <http://www.ohchr.org/english/law/religion.htm> accessed, 30 April 2007.

specifically refers to the suffering caused by a failure to respect religious freedom arguing for religious tolerance on the basis that:

*“the disregard and infringement of human rights and fundamental freedoms, in particular of the right to freedom of thought conscience, religion or whatever belief, have brought, directly or indirectly, wars and great suffering to mankind”*⁴

The second and related approach focuses on the fact that historically, religion has often been the ground for persecution. Respect for religious freedom is therefore seen as a means to avoid the recurrence of such persecution. The highlighting of the fact that, as in the case of race and ethnicity, persecution has often been focused on religion, provides a rationale for the inclusion of specific guarantees of religious freedom in addition to more general commitments to freedom of opinion and expression.⁵ This historical and pragmatic approach has certainly had some influence on the emergence of the principle of freedom of religion in Europe. Indeed, it was the destruction and suffering occasioned by the religiously-fuelled conflicts that convulsed post-Reformation Europe that prompted the recognition of the degree (albeit a rather limited one) of religious diversity embodied in the *cuius regio eius religio* principle that was enshrined in the Peace of Augsburg of 1555 and the Treaty of Westphalia of 1648. Such principles retain relevance today; the European Union, as will be shown below,⁶ has been markedly reluctant to interfere with the relationships developed between some of its Member States and certain religions. However, on the other hand, the wording of the relevant articles of both the European Convention on Human Rights and EU Charter of Fundamental Rights focus on a concrete personal right to choose and practice one’s religion,⁷ not on the need to avoid persecution or discrimination on religious grounds. Although discrimination on religious grounds is addressed

⁴ *Ibid.*, Preamble.

⁵ Above n. 1 at 24-25.

⁶ See sections 4.3 and 4.4 and n. 38 below.

⁷ See sections 3 and 4.1 below.

by the EU Charter,⁸ this is done in a general anti-discrimination article which covers grounds such as racial, gender and sexual orientation discrimination which, unlike religious freedom are not addressed by a separate and specific article. Indeed, when the issue of the avoidance of conflict has arisen in the ECHR caselaw the Strasbourg Court has generally invoked the possibility of conflict as a reason to *restrict* religious freedom⁹ or has framed the issue as one of hurt personal feelings rather than persecution or disorder.¹⁰

The third justification relies on religious grounds. A policy of toleration of religious difference can serve as a means by which adherents of the majority faith can ensure that their faith will be tolerated in places where other faiths predominate. John Stuart Mill, for instance, argued from a Christian perspective that religious truth will most easily be established in an environment free of religious coercion¹¹ while Locke felt that religious coercion merely bred hypocrisy and deceit and that forcing Christianity was futile as insincere Christians would not, in any event, be “saved”.¹² However, Evans also notes that while:

*“religious tolerance may be part of the teachings of some religions, (...) it is not common to all religions and even religious groups that contain some commitment to the notion of freedom of religion may disagree fundamentally as to the meaning of and limits to that freedom”.*¹³

The Catholic Church for instance vigorously opposed the idea of religious freedom for many years and only finally reconciled itself to the principle after the Second Vatican Council in the 1960s. For example, the “*Syllabus of Errors*” issued by Pope Pius IX explicitly condemned the idea that “*Every man is free to embrace and profess that religion which, guided by the light of*

⁸ See Article 21(1), Charter of Fundamental Rights of the European Union, 14.12.2007 OJ 2007/C 303/01.

⁹ See for instance *Sahin v Turkey* 44774/98 [2004] ECHR 299 (29 June 2004) at paras. 97 and 98

¹⁰ *Otto Preminger Institut v Austria* -13470/87 [1994] ECHR 26, paras. 48 and 56.

¹¹ J. S. Mill, *On Liberty*, (Wordsworth Classic edition, 1996) in Evans, n. 1 above. at page 25.

¹² J. Locke, “Letters on Toleration” in the *Works of John Locke*, Vol. VI, at 28 (1823) quoted at page 25 of Evans.

¹³ Above. n. 1 at 26.

reason, he shall consider true”¹⁴ or that people in Catholic countries should be free to “enjoy the public exercise of their own peculiar form of worship”.¹⁵

While the modern Catholic Church has embraced the notion of religious freedom,¹⁶ this is not true of all major religions. Although the Koran does state “let there be no coercion in religion”¹⁷ it also mandates the death penalty for apostasy which remains a crime in several Muslim states. Saudi Arabia argued strongly against the inclusion of a right to change one’s religion in the Universal Declaration of Human Rights¹⁸ and more recently, the *Cairo Declaration on Human Rights in Islam*¹⁹ agreed by the Islamic Conference of Foreign Ministers in 1990, demonstrates a notably ambivalent attitude towards religious freedom. Article 10 of the Declaration states:

“Islam is the religion of unspoiled nature. It is prohibited to exercise any form of compulsion on man or to exploit his poverty or ignorance in order to convert him to another religion or to atheism“.

The Declaration makes no mention of a corresponding right not to be compelled to remain within Islam. Therefore, while some faiths do provide reasons to protect freedom of religion others have not done so in the past or do not do so in the present. In contrast to approaches which see religious freedom as part of respect for individual rights or as part of communal cultural rights, this religiously based view sees religious freedom as something comes from beyond and which transcends the state. How such a right would be operationalised within a legal system such as the European Union in which

¹⁴ Proposition 15, *The Syllabus of Errors*, The Holy See, 8 December 1864. (H. Dezinger (ed.) *The Sources of Catholic Dogma*, (B. Herder Book Company, 1957). See also the Papal Encyclical *Quanta Curat* 1864 in Carlen (ed.), *The Papal Encyclicals, Vol. I 1740-1878* at 382.

¹⁵ *Ibid.*, *Syllabus of Errors*, Proposition 78.

¹⁶ Vatican II, “Declaration on Religious Freedom”, in W. M. Abbott (ed.) *The Documents of Vatican II*, (Piscataway, American Press, 1966) 677.

¹⁷ The Koran, *Sûrah al-Baqarah*: 256

¹⁸ M. Evans, *Religious Liberty and International Law in Europe*, (Cambridge, Cambridge University Press, 1997) 187.

¹⁹ The Cairo Declaration on Human Rights in Islam, adopted and issued at the Nineteenth Islamic Conference, of Foreign Ministers in Cairo, 5 August 1990 available at <http://www.religlaw.org/interdocs/docs/cairohrislam1990.htm> accessed 22 April 2007.

nation states are extremely powerful, which is not a theocracy and which has never sought to justify its laws in explicitly theological terms, remains problematic.

The final rationale sees freedom of religion as an important part of a liberal society. Raz argues that “*freedom of religion or belief is an essential and independent component of treating human beings as autonomous persons deserving of dignity and respect*” and that “*if society does so treat people it will allow for choice between a variety of religious beliefs*”.²⁰ Similarly, Rawls views religions as “*a fundamental aspect of human life and self-definition*”,²¹ while Dworkin argues that states must treat citizens “*as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived*”.²² These views are echoed in the UN Declaration on religious intolerance which states that:

“*Religion or belief, for anyone who professes either, is one of the fundamental elements in his conception of life and that freedom of religion should be fully respected and guaranteed*”.²³

According to Evans, these arguments are based on the ideas that “*individuals are in the best position to determine their own concept of the good life and should, within certain constraints, be free to pursue their ideal without governmental interference*”.²⁴ This justification of religious freedom on the basis of liberal respect for individual autonomy and the right to form one’s own identity, fits in with the overall thrust of European human rights protection in the post war period which, in common with many modern human rights instruments, protects freedom of thought and conscience as well as providing specific protection for religious freedom. Such instruments also generally guarantee other rights such as the right to privacy and freedom of

²⁰ J. Raz, *The Morality of Freedom* (Oxford, Clarendon Press, 1988) 396.

²¹ J. Rawls, *A Theory of Justice*, (Cambridge, MA, Harvard University Press, 1971) 17-22. Quoted in Evans above. n. 1 at page 31.

²² R. Dworkin *Taking Rights Seriously* (Cambridge, MA, Harvard University Press, 1977) 272-3.

²³ n. 3 above.

²⁴ n. 1 above, 30.

expression as part of a wider, more general commitment to the protection of individual autonomy. The protection of freedom of religion at international level has, as Malcolm Evans suggests, “*been bound up with the development of the concept of individual human rights*”.²⁵ As shown in the previous chapter, the European Union has identified the humanist tradition with its strong streak of individual autonomy as a major influence on its constitutional values which have also been declared to include the “*rights of the human person, freedom, equality and the rule of law*”²⁶ all of which would seem to be consistent with this view of religious freedom.

However such an approach raises certain difficulties. It embodies a very secular view of religion, seeing it as a phenomenon worthy of protection only in so far our commitment to human choice and autonomy compels us to ensure that all items are on the menu in the cultural and philosophical restaurant. This raises the question of why specific protection for religious freedom should be provided rather than a more general commitment to respect personal autonomy. Furthermore, this approach fails to take account of religion’s broader social role and ideological nature. Religion is not a phenomenon that can be neatly contained within the private and individual realm within which liberal states are content to grant the decisions of individuals the maximum of respect, but has communal aspects and wider social and political ramifications. Thus an approach to religious freedom based solely on a respect for individual choice is, to some extent, inconsistent with the communal and social nature of many aspects of mainstream European religions many of which play important public roles both institutionally and as sources of identity in several Member States. As Dalacoura points out, a purely individualistic approach to religion undermines the ability of religion to retain social relevance. Religion, she argues:

“is a social affair, as well as a matter of personal belief. Its strength rests on socialisation, worship and the existence of taboos. Religion confined to the

²⁵ n.18 above, 172-3.

²⁶ See Preamble, Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ 2007/C 306/01.

*private sphere eventually loses its hold on the individual conscience, as the history of the Western world after the nineteenth century clearly demonstrates. If religion is not to guide us in our relationships with one another, it loses its relevance to our existence and therefore withers away.”*²⁷

For many religions therefore, to protect only religion's individual aspects is to undermine its ability to maintain the taboos and social presence necessary to avoid its decline as a relevant force in society. The maintenance of such taboos requires interference with individual choice and autonomy and is therefore somewhat inconsistent with the liberal rationale for religious liberty. Most European religions reject the notion of religion as a purely individual and private matter.²⁸ Although it is true that, in the period since the Enlightenment and Reformation, the influence of religions over the public sphere in Europe has declined significantly, the major Christian denominations all continue to engage in the public sphere and to attempt to influence law and public policy in certain areas.²⁹ For many religions whose presence on the European scene is more recent and whose relationship to the public arena and to post-Enlightenment values has not been as influenced by the key experiences of European history, the notion of religion as a private individual matter is even more problematic. Cantwell-Smith argues that most religions, apart from the traditional European faiths, view religion more as a matter of a way of life and behaviour than as a series of beliefs and opinions³⁰ while Esposito suggests that the idea of religion as a primarily personal private matter of individual

²⁷ K. Dalacoura, *Islam, Liberalism and Human Rights: Implications for International Relations*, (London and New York, I B Tauris ,1998) 11.

²⁸ See for instance the statements of the leader of the Anglican Communion Archbishop of Canterbury in “Down with Godless Government” *The Sunday Times*, 22 April 2007, available at:

http://www.timesonline.co.uk/tol/comment/columnists/guest_contributors/article1687465.ece (accessed 30 April 2007) and the Address of Pope Benedict XVI to the European People's Party of 30 March 2006 full text at:

http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/march/documents/hf_ben-xvi_spe_20060330_eu-parliamentarians_en.html, both of which call for active religious involvement in the political process.

²⁹ *Ibid.*

³⁰ W. Cantwell Smith, *The Meaning and the End of Religion* (New York, The Macmillan Company, 1963), at chapters 2 and 3 which states that the notion of religion, let alone the primacy of particular beliefs as opposed to a religious way of life is alien outside traditional European religions (quoted in C. Evans above. n. 1 at 75).

belief is largely a Western one.³¹ For such religions, an approach to religious freedom based solely on protection of individual autonomy would appear gravely deficient.

The fact that religion remains involved in public and political life reveals a further limitation in an approach based purely on respect for individual autonomy. Liberal theorists speak of religious freedom as an element of individual choice to be asserted by individuals against the state.³² However given its communal, social and political roles, religion itself can be a threat to individual autonomy. Religiously motivated actions can for instance have political consequences including the undermining of liberal democratic system and the principle of individual choice and autonomy itself. The difficulties posed by the need to respect religious choices while defending liberal democratic values from theocratic forces can be seen in the Union's pursuit of "balance" in the previous chapter and in the limitations on the political role of religion which such balance is seen as requiring. It is also seen in the approach of certain European bodies to the impact of religious freedom on the public sphere. Some such bodies have sought to place limits on the degree to which such freedom can be used to protect actions inconsistent with liberal democratic principles. The Parliamentary Assembly of the Council of Europe for example, has stated that: "*The recourse to religion [as a source of values] has, however, to be reconciled with the principles of democracy and human rights*"³³ while decisions of the European Court of Human such as that in *Refah Partisi v Turkey*³⁴ indicate clearly that freedom of religion is subject to a requirement that religious ideas or practices must not, particularly in the public sphere, threaten the wider liberal democratic values which underlie the European public order.

Indeed, the broader role of the state and national identity is an element which is not adequately addressed by an exclusive focus on personal autonomy as the

³¹ J. Esposito, *The Islamic Threat: Myth or Reality*, (Oxford and New York, Oxford University Press, 2002) at 199.

³² ns. 20-22 above.

³³ Parl Ass of C of E, Recommendation 1202 of 2 February 1993 on religious tolerance in a democratic society, para. 9.

³⁴ Applications nos. 41340/98, 41342/98, 41343/88 and 41344/98 (2003) 37 EHRR 1.

rationale for the protection of religious freedom. This autonomy-centred approach is very much part of the broader liberal project of the generally neutral state which does not embody any particular vision of “the good life.”³⁵ However, several human rights instruments place strong emphasis on the rights of parents to pass on their religion to their offspring³⁶ (for example by ensuring that the right to religious education is protected) which would seem to stress religion’s role as an element of communal culture rather than solely a matter of individual choice. Furthermore, religion has been repeatedly defined as a partly cultural matter by EU institutions.³⁷ In more general terms, the emphasis on religion’s cultural role would seem to contradict an entirely individualistic and autonomy-based view of religion given that one’s cultural identity, at least partly arises out of involuntary factors such as race and upbringing. Most European states are not religiously neutral and have strong cultural, historical and institutional links to certain religions which are a key element of the collective national identity which such states embody. To give a few examples, questions of religious identity were fundamental elements of the nationalist revolts which saw Belgium secede from the Netherlands and Ireland secede from the United Kingdom. Orthodox Christian identity was also fundamental to the Greek struggle for independence while Protestantism was a key element in the formation of the British state. Relations between religious communities were hugely important internally in Germany and the Netherlands while conflict around the role of the Catholic Church represented the major cleavage in France, Spain and Italy for much of the 19th century. Indeed these struggles were fundamental elements in the creation of the modern French, Spanish and Italian states. Even today, a primary element of the identity of many Member States is provided by their relationship to religion or a particular denomination. France’s status as a secular republic is fundamental to its identity, the Catholic and Greek Orthodox Churches remain key elements of Greek and Polish identity while the changed relationship of countries like Ireland and Spain to the Catholic Church is seen by their citizens as representing a major change in their national identities.

³⁵ See for example Rawls n. 21 above.

³⁶ See for example Article 2 of Protocol 1 of the European Convention on Human Rights.

³⁷ See Chapter V.

This national and cultural role is at the centre of a further complication in the analysis of the protection of religious freedom under EU law. While EU fundamental rights law is very much part of the worldwide and regional post-war developments in human rights, the Union itself is an organisation of multi-level governance in which issues of subsidiarity and the relative powers of its constituent parts are particularly important. The Union's status as a functional organisation of restricted competence and limited democratic legitimacy means that the extent to which it is capable of articulating and imposing a distinctive approach to the issue of religious freedom is restricted by its duty to respect the autonomy and identity of its Member States. Indeed its founders deliberately sought to avoid entangling the Community with sensitive questions such as religion and identity on the grounds that it was only through functional integration that European unification could advance. Accordingly, the Union has had to be particularly sensitive not to appear to interfere with Member State choices in this area. Indeed, in a contemporary variation on the *cuius regio eius religio* theme, a Declaration appended to the Amsterdam Treaty and more recently a substantive article of the Reform Treaty state that "*The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States*"³⁸ thus deliberately attempting to limit the degree which EU law will interfere with the *religios* established by modern day *regii* (Member State governments).

Apart from purely religious rationales which struggle to achieve recognition within the European context, the protection of freedom of religion in the contemporary European context is underpinned by a mix of potentially mutually inconsistent rationales which focus on religion as an element of identity but which emphasise different elements of religion and view its relationship to the state in very different ways. These differing approaches see

³⁸ See Declaration 11, annexed to the Treaty of Amsterdam, Official Journal C 340 , 10/11/1997 P. 0308. See also Article 16 C of the Treaty of Lisbon which states "*The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.*" (Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ 2007/C 306/01).

religion as an element of individual identity to be protected from state power and as part of the culture which constitutes the state. The EU's attempts to define a distinctive relationship to religion and religious freedom in its public order is likely to be influenced by liberal ideas of individual autonomy which are at the heart of its identity as a "Community of Values". However, such ideas potentially clash with several other factors notably, religion's claim to transcendence, the problematic relationship between some religions and individual autonomy and the immense historical and cultural role of certain denominations in many Member States with which, as an institution of limited democratic legitimacy, the Union is ill-equipped to interfere.

3. The Scope of Freedom of Religion in EU Law as Part of the Union's Fundamental Rights Commitments

We have seen how the competing rationales for the protection of religious freedom offer very different visions of the role of religion within the modern state. The Union's balancing of these competing visions takes place within certain constraints, most notably its commitment to uphold certain fundamental rights. Over the course of its history the Union's fundamental rights obligations have broadened and deepened steadily. Undertakings by the Union and its Member States to respect certain fundamental principles have been increasingly explicit and have been turned into key elements of both the EU's legal and political orders.³⁹ This commitment to the upholding of certain fundamental rights informs the assessment of what can be considered to be a proper balance between religious, humanist and cultural influences over the law and can therefore potentially influence the Union's approach to the relationship between religion and state and the ability of Member States to pursue relationships to religion which violate such undertakings. Thus the Union's commitment to upholding freedom of religion can affect not merely the role of religion in the Union's own public order, but can also call into question the established structures and relationships which constitute the role of religion in the public orders of individual Member States.

³⁹ A. Williams, *EU Human Rights Policies: A Study in Irony* (Oxford, Oxford University Press 2004).

The evolution of the Union's legal obligations in relation to human rights began in the late 1960s when the Court of Justice started to develop the idea of "general principles" of Community law which included fundamental rights obligations and whose observance the Court declared it would ensure. In 1969, in *Stauder v City of Ulm*⁴⁰ the Court examined the implementation by the German authorities of a Commission decision enabling the sale of surplus butter. It found that the arrangements in question were compatible with Community law but at the same time held that fundamental rights were "enshrined in the general principles of law and protected by the Court".⁴¹ A year later in *Internationale Handelsgesellschaft*⁴² case it established that acts by the Community which violated such fundamental rights would be held to be illegal.

The decisions in *Stauder* and *Internationale Handelsgesellschaft* effectively created what was to become an unenumerated bill of rights in Community law. In *Internationale Handelsgesellschaft* the Court attempted to give some indication as to the content of these rights by invoking the "constitutional traditions" of the Member States as their source. In *Nold v Commission*⁴³ the Court recognised that international treaties to which Member States were part could also act as a source of fundamental rights. Such an approach obviously created great scope for the European Convention on Human Rights, as a treaty which all Member States had ratified, to play a role in the determination of the content of rights resulting from the "common constitutional traditions" of the Member States. The ECJ's judgment in *Rutili v Ministre de l'Interieur*⁴⁴ explicitly recognised the ECHR as such a source.⁴⁵ By the time of its 1989

⁴⁰ [1969] ECR 419.

⁴¹ *Ibid.* para. 7

⁴² Case 11/70 [1970] ECR 1125.

⁴³ [1974] ECR 491.

⁴⁴ Case 36/75 [1975] ECR 1219.

⁴⁵ The Court has also mentioned other treaties as sources of fundamental rights in Community law. The ICCPR for example was mentioned in *Orkem v Commission* [1989] ECR 3283, while the European Social Charter was mentioned in *Blaziot v Belgium* Case 24/86 [1988] ECR 379.

decision in *Wachauf v Bundesamt für Ernährung und Fortwirtschaft*⁴⁶ the Court could summarise the situation as follows:

*“The Court has consistently held [...] that fundamental rights form an integral part of the law, the observance of which is ensured by the Court. 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. International treaties concerning the protection of human rights on which the Member States have collaborated or to which they have acceded can also supply guidelines to which regard should be had in the context of Community law.”*⁴⁷

This obligation to respect human rights principles has been held to apply not merely to EU legislation itself but to all measures implementing or derogating from EU law. In the *ERT* case the Court was faced with a challenge to the award of a monopoly to a Greek broadcasting service by the Greek government. The award amounted to a derogation from the market freedoms protected by EU law. While such derogations are not in themselves necessarily incompatible with community law⁴⁸ the derogation in this case was challenged on the basis that, inter alia, it interfered with the right to freedom of expression protected by Article 10 of the ECHR. The Court therefore had to decide whether a national law measure, *derogating* from EU law was itself subject to compliance with Community fundamental rights norms. It held that:

*“the national rules in question can fall under the exceptions provided [...] only if they are compatible with the fundamental rights the observance of which is ensured by the Court.”*⁴⁹

This extensive view of the reach of EU fundamental rights norms means that the duty to respect the principle of religious freedom applies not only to EU

⁴⁶ Case 5/88 ECR [1989] 02609.

⁴⁷ *Ibid.* para. 17.

⁴⁸ *Ibid.* para. 1.

⁴⁹ *Ibid.* para. 43.

law itself but also to measures implementing or derogating from EU law. In *Segi v Council*⁵⁰ the Court addressed the issue of the status of anti-terrorism measures adopted under the Third Pillar and held that all acts of the Union which created legal effects in relation to third parties, including those taken under the third pillar could be the subject of a reference to the Court of Justice for the purposes of obtaining a preliminary ruling on, *inter alia*, the compatibility of such measures with fundamental rights norms. In the light of these judgments, it is clear that the Union's duty to respect fundamental rights applies across a wide range of areas of EU activity including all areas of the Single Market (including employment, regulation of advertising and commercial activities) as well as politically sensitive areas such as justice and home affairs and anti-terrorism policy.⁵¹

The ECJ's development of a fundamental rights jurisprudence has been part of a broader deepening of the Union's political commitment to fundamental rights. In 1977, the Parliament, Council and Commission adopted a *Joint Declaration on Fundamental Rights* in which they undertook to respect the provisions of the European Convention on Human Rights.⁵² In 1992, Article 6 of the Maastricht Treaty made a similar commitment to:

“respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome

⁵⁰ *Segi et al v Council* Case C-355/04 P Judgment of the Court (Grand Chamber) of 27 February 2007, paras. 53 to 56.

⁵¹ For an example of the relevance of religious freedom to Union law in this area see the Council Decision implementing the UN Convention Against Transnational Organised Crime which provides that Member States will not be required by the Convention to extradite an individual if there are “substantial grounds” for believing that the request for extradition was made for the purpose of prosecuting or punishing the person in question on grounds, *inter alia*, of religion or if extradition would “cause prejudice” to that person on that basis (Article 16(14), Council Decision of 29 April 2005 on the conclusion on behalf of the European Community, of the United Nations Convention Against Transnational Organised Crime. OJ L261/69 2004/579/EC). Similarly, the decision on the mutual recognition of financial penalties allows Member States not to execute the relevant penalty if there are “reasons to believe, based on objective elements that the financial penalty has the purpose of punishing a person on the grounds of his or her [...] religion.” (Para. 5, Preamble, Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, L76/16 22.3.2005). Respect for freedom of religion is also regularly required by the Union in its external relations (see for example Article 3(a), Council Common Position on Nigeria of 27 May 2002, 2002/401/CFSP.

⁵² OJ 1977 C103/1.

*on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of law”.*⁵³

The Constitutional Treaty and its successor, the Lisbon Treaty both viewed the Union as a “Community of Values” and defined the upholding of fundamental rights as a key element of EU membership. This reflected the approach adopted by the Union in the Enlargement process with the Copenhagen Criteria of 1993 which govern the accession of new members to the Union specifically requiring applicant states to ensure respect for human rights as part of the accession process.⁵⁴ In 2000 the Union went further and adopted its own Charter of Fundamental Rights although differences amongst Member States meant that it was stated that it operated only as a political declaration. The Lisbon Treaty envisages that the Charter will become a part of EU law.

A commitment to the protection of fundamental rights is therefore a key element of the EU’s legal and political orders. It is also clear that protection of religious freedom is one such fundamental right. As far back as 1976 the Court of Justice recognised in *Prais v Council*⁵⁵ that freedom of religion was part of the “general principles” of law which it was committed to upholding. In doing so the Court invoked Article 9 of the ECHR thereby indicating the Convention’s special status in EU law fundamental rights jurisprudence. The influence of the ECHR can be seen in Article 10 of the Charter which states:

“Freedom of thought, conscience and religion

- 1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public and private, to manifest religion or belief, in worship, teaching, practice and observance.*
- 2. The right to conscientious objection is recognised in accordance with the national laws governing the exercise of this right.”*

⁵³ Article F, Treaty on European Union, OJ C191 29 July 1992.

⁵⁴ These fundamental rights have included the right to religious freedom, see for instance the Commission’s Turkey 2005 Progress Report SEC (2005) 1426 {ECOM (2005) 561 final} at page 29 which highlighted respect for religious freedom as one of the requirements of accession.

⁵⁵ *Prais v Council* Case 130/75 Judgment of 27 October 1976.

Apart from the specific reference to conscientious objection in the second section, the text of Article 10 is almost identical to that of Article 9 of the ECHR.⁵⁶ The fact that its text very largely reproduces the wording of Article 9 of the ECHR indicates that the Union envisages that, although the Charter was not in itself legally binding, the level and scope of the protection of religious freedom in EU law were intended overlap significantly with the protection provided under the ECHR. This approach has been further strengthened by the rulings of the ECJ in the cases of *Akrich v Secretary of State for the Home Department*⁵⁷ and *Parliament v Council*⁵⁸ both of which accorded a dominant role to the jurisprudence of the Court of Human Rights in the determination of the requirements of the Union's commitment to fundamental rights. In *Parliament v Council* for instance, the Parliament requested that the Court annul certain provisions of the directive on the basis that they constituted a violation of the right to family life. In reaching its decision to uphold the directive, the Court based its analysis of the requirements of the EU's fundamental rights norms (including the Union's Charter of Fundamental Rights)⁵⁹ on the interpretation of Article 8 of the ECHR by the European Court of Human Rights noting the “*special significance*” of its jurisprudence in this regard.⁶⁰ It cited several judgments of the Strasbourg Court⁶¹ before upholding the impugned provisions on the basis that they:

“[did] *not run counter to the right to respect for family rights set out in particular in Article 8 of the ECHR as interpreted by the European Court of Human Rights.*”⁶²

⁵⁶ See section 4.1 below.

⁵⁷ Case C-109/01 ECR [2003] I-09607

⁵⁸ *Parliament v Council*, Case C-540/03 judgment 27th June 2006.

⁵⁹ Para. 38 where the Court acknowledged the Charter's importance in the determination of the content of the Union's fundamental rights norms. This was reaffirmed in *Advocaten voor de Wereld VZW v Leden van de Ministerraad* Case C-303/05 see the Opinion of Advocate General Ruiz-Jarabo at para. 78.

⁶⁰ *Ibid.* para. 35.

⁶¹ *Ibid.* para. 54.

⁶² *Ibid.* para. 98.

Apart from noting that that the relevant provisions appeared to be consistent with the Strasbourg Court's view of the requirements of Article 8, the ECJ offered no other reasons for its conclusion that the directive was consistent with EU fundamental rights norms. This would seem to indicate that the Court of Justice regards the Charter as having acted merely to confirm the rights which were already protected by EU law as a result of national constitutional traditions, of which the ECHR is a primary element.

The jurisprudence of the European Court of Human Rights will therefore have a significant impact on the relationship between religion and the public order of the EU. The ECHR provides the framework within which the Union can construct its relationship to religion. Politically, the Union has repeatedly committed itself to respecting the requirements of the ECHR while legally, the Court of Justice has made it clear that not only is the Convention a key source of fundamental rights obligations within EU law itself but that measures in violation of such rights will be struck down. Therefore, whatever balance the Union strikes between the rights of individuals, religious organisations and member states, must respect the fundamental norms laid down by the Strasbourg Court in its interpretation of the Convention.

4. Jurisprudence of the European Court of Human Rights Relating to Religious Freedom

This section analyses the approach of the Court of Human Right to the regulation of religious freedom and the relationship between religion and the state in contemporary Europe. The Strasbourg Court ("ECtHR") has had to reconcile principles such as equality and individual autonomy in religious matters which underpin liberal rationales for religious freedom and which reinforce notions of state neutrality vis a vis religion, with more communal rationales which recognise religion's communal nature and the right of Member States to promote a communal identity, which may be religiously-specific, through its public institutions. It argues that the constraints imposed by the ECHR on state-choice in this area are largely limited to a duty to respect religion in the private sphere and demonstrates how the ECtHR, through an approach which has granted priority to the right of states to define

their own relationship to religion, to defend the public sphere and state institutions from religion or, conversely, to promote certain denominations through state institutions, over approaches which stress ideas such as state neutrality and equal treatment, has reflected the continuing intertwining of the state and certain forms of religion in Europe.

4.1 The Text of the Article

The ECHR specifically identifies religious freedom as one of the key rights protected by the Convention system, Article 9 provides that:

- 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*
- 2. Freedom to manifest one's religion or beliefs shall be 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 the protection of the rights and freedoms of others.⁶³*

The wording of the article highlights the major issues arising in its interpretation by showing the tension between the potentially competing communal and individual elements of religious freedom. The first phrase defines religion as an individual right and as a matter of thought rather than culture or identity (“*everyone has the right to freedom of thought conscience or religion*”). However, it goes on to acknowledge its public and communal aspects (the right “*either alone or in community with others and in public or private, to manifest his religion or belief in worship, teaching, practice and observance*”). The second section deals with limitations on religious freedom. Although the use of the phrase “*necessary in a democratic society*” would seem to indicate that only weighty considerations would justify interference with Article 9 rights, the relatively extensive grounds mentioned (“*the protection of public order*”, “*health or morals*” and “*the protection of the*

⁶³ European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 9.

rights and freedoms of others”) indicate that broader interference may be permitted. Thus, the text of the article itself provides no simple answers to the complex issues of individual, communal and state rights and duties brought up by religious freedom and as will be shown below, the balance struck by the Strasbourg institutions between these rights and interests has appeared to differ in different circumstances.

4.2 Individual Religious Freedom as a Private Right

The Strasbourg Court has, despite Article 9’s protection of the right to “manifest” one’s religion, seen protection of individual religious freedom as being largely confined to the private sphere. In particular it has failed to require member states to provide religious individuals with special accommodations in order to allow them to adhere to their religious identities in public contexts. In *Arrowsmith v UK*⁶⁴ the European Commission of Human Rights⁶⁵ (“ECommHR”) stated that Article 9 did:

*“not give individuals the right to behave in the public sphere in compliance with all the demands of their religion or belief,”*⁶⁶

a statement which it has repeated on several occasions.⁶⁷ The Court has shown a concern to protect the State’s ability to regulate public space and public matters from demands to accommodate religious belief and practice. It has therefore adopted a relatively restrictive interpretation of the notion of “manifestation” of religion, refusing, for example, to acknowledge “commercial activities” on the part of a church (the selling of “e-meters” by

⁶⁴ *Arrowsmith v. UK* (Application 7050/75), Comm. Rep 1978, 19 DR 5

⁶⁵ Until 1998 the admissibility of applications under the Convention was decided by a separate European Commission of Human Rights which referred on successful applications to the Court for a final decision.

⁶⁶ *Ibid.* Here the term “*public sphere*” seems to be used in a broader sense meaning non-private contexts as opposed what Asen calls the “realm of social life in which public opinion can be formed” (R. Asen “Toward a Normative Conception of Difference in Public Deliberation” *Argumentation and Advocacy* 25 (Winter) 115-129 (1999).

⁶⁷ See for instance cases relating to cattle vaccination *X v Netherlands* Application 1068/61 (in relation to cattle vaccination) *C v UK* Application 10358/83 (taxation) and *X v Austria* Application 1718/62 (mandatory voting) (all quoted at page 180 of Evans, n. 1 above.).

scientologists)⁶⁸ or the contracting of a religious marriage⁶⁹ as falling within the meaning of this term. Furthermore, it has refused to acknowledge indirect discrimination on religious grounds as a violation of Article 9. The Court has repeatedly upheld laws challenged under Article 9 on the basis that they were “*generally applicable and neutral*”.⁷⁰ In *C. v UK*⁷¹ for example, the applicant who was a Quaker, objected to being required to pay income tax which might be used for purposes incompatible with his pacifist beliefs. The Commission in rejecting his claim noted that “*Article 9 primarily protects the sphere of personal beliefs and creeds*”⁷² and that it “*does not always guarantee the right to behave in the public sphere in a way which is dictated by such a belief*”⁷³ before concluding that there was no violation of the Convention on the basis, *inter alia*, that the legislation in question “*applies neutrally and generally in the public sphere.*”⁷⁴ Challenges to taxation arrangements, the compulsory vaccination of farm animals⁷⁵ and mandatory voting⁷⁶ have been upheld on a similar basis. These cases all involved consideration of a clash between the needs of the state in public matters such as regulation of the market, taxation and the political sphere, with the religious beliefs and practices of individuals who enter into such areas as consumers, producers or citizens. In each case the ECtHR upheld the right of the state to interfere with individual religious identities in order to ensure that the attainment of government goals in these areas would not be compromised and refused to require states to provide to religious beliefs, protections not given to other beliefs or opinions. The subjugation of religious freedom in public contexts to the needs of the State is seen equally clearly in cases where the presence of religion in public spaces such as educational institutions or the military is seen as a potential threat to the identity of the state or even to the state itself. The Turkish authorities were permitted to maintain strict limitations on the wearing of Islamic dress in

⁶⁸ *Church of Scientology v Sweden* Application 7895/77 16 Dec and Rep (1979) (quoted at 108-9 of Evans)

⁶⁹ *Khan v UK* Application 11579/85.

⁷⁰ *Chappell v UK* Application 12587/86.

⁷¹ *C. v UK* Application 10358/83 DR 37, 142.

⁷² *Ibid.* at 147.

⁷³ *Ibid.* See n. 66 above.

⁷⁴ *Ibid.*

⁷⁵ *X v Netherlands* Application 1068/61

⁷⁶ *X v Austria* Application 1718/62

educational institutions in *Karaduman v Turkey*⁷⁷ and in *Kalaç v Turkey*⁷⁸ to purge the army of those with connections to Islamic fundamentalist movements as part of their attempts to defend the secular nature of the Turkish State.⁷⁹ In both cases the ECtHR and ECommHR argued that the state's need to defend its secular identity rendered legitimate restrictions on the individual religious identity of those who chose to study in or work for public bodies such as universities and the military. Similarly in *Dahlab v Switzerland*⁸⁰ the Court upheld the right of the Swiss authorities to prevent state primary school teachers from wearing the Islamic headscarf on the basis that it was legitimate for the state to attempt to ensure the neutrality of the educational system. The Court's decision in *Sahin v Turkey*⁸¹ in which restrictions on the headscarf in universities were again upheld, also invoked notions of public order and the possible impact on the rights of the less religious of an assertive religious presence in public institutions. It should be pointed out that not all "generally applicable and neutral" laws have been upheld by the Court. In *Thlimmenos v Greece*⁸² it held that Greek laws which did not provide for exemptions for those who objected to national service on religious grounds violated Article 9. This however was very much an exception with the Court, as Evans states, viewing "the fact that a law is general and neutral [as] at least a powerful indicator that it cannot interfere with freedom of religion or belief".⁸³

The Court's view of individual religious freedom as a right that is largely restricted to the private sphere and which does not generally provide an entitlement to special accommodation beyond this sphere, is also seen in its characterisation of religion as a purely voluntary matter whose adherents can be taken to have waived their right to adhere fully to their religion when they enter the public arena. In *Ahmad v UK*⁸⁴ for example, the case of a Muslim teacher who was refused time off by his employer to attend the Mosque on

⁷⁷ *Karaduman v Turkey*, Application 16278/90, Commission. decision of 3 May 1993, DR 74.

⁷⁸ 41 Eur Ct HR (Ser A) 1199 at 1203 (1997-IV)

⁷⁹ In 1998 the Commission (which had decided on the admissibility of cases) was merged with the Court under a series of reforms of the operation of the Court of Human Rights.

⁸⁰ *Dahlab v Switzerland*, Application 42393/98 ECHR V.

⁸¹ (2005) 41 EHRR 8.

⁸² *Thlimmenos v Greece* (2001) 31 EHRR 15.

⁸³ *Ahmad v UK* (1982) 4 EHRR 126.

⁸⁴ *Ibid.* at 130

Fridays, failed partly on the basis that he had agreed to such limitations on his freedom of religion when he had accepted a contract of employment which did not provide for time off on Fridays. In *Stedman v UK*⁸⁵ no violation of the Article 9 was found in the case of an applicant who refused to work on Sundays on the basis that she was free to leave her employment while in the case of *Karaduman v Turkey*,⁸⁶ as noted above, the applicant's decision to attend a university whose regulations forbade the wearing of headscarves was seen by the court as having constituted agreement to waive her right to wear the garment while being photographed for her university ID card.

The Court's failure to require member states to provide protection for the right to have one's religious practices accommodated in areas such as employment does bring the risk that the religious practices of adherents of majority religions will receive greater protection given that social and economic life is, for historical reasons, likely to be arranged around their practices (with for example holidays covering the Christmas period and the weekly rest period covering Sundays in mainly Christian countries). Indeed the cultural partiality of the protection provided by the ECHR is seen more directly in its approach to the notion of "*manifestation*" of one religious belief. It has held that only acts "*required*" by a particular religion will be covered by the right to manifest one's religion and, in contrast to the approach of the US Supreme Court⁸⁷ the Strasbourg Court has taken upon itself to determine "*objectively*" what constitutes manifestation for these purposes rather than relying on the subjective views of applicants. Thus in *Ahmad v UK* it held that Mosque attendance was not a requirement of the religion of the Muslim teacher refused permission to take time off school to attend Friday Prayers⁸⁸ while in *Karaduman v Turkey* it decided that the right of a female applicant to wear an Islamic headscarf was not "*manifestation*" for the purposes of Article 9.⁸⁹ Similarly, in *Valsamis v Greece*⁹⁰ the Court simply substituted its view for that of the Jehovah's Witness applicants who felt that being required to take part in

⁸⁵ *Stedman v UK*, Application 29107/95.

⁸⁶ n. 77 above.

⁸⁷ *Thomas v Review Board of Indiana Social Security Division*, 450 US 707, 714 (1981).

⁸⁸ *Ahmad v UK* (1982) 4 EHRR 126

⁸⁹ *Karaduman v Turkey* Application 16278/90, Commission. decision of 3 May 1993, DR 74

⁹⁰ *Valsamis v Greece* 2 ECt HR Ser A 2312 (1996-VI) Evans at 121.

a Greek national day parade violated their pacifist beliefs, deciding that the parade was not military in character. Although the Court has been relatively liberal in its definition of religion,⁹¹ its insistence that its views, rather than those of the applicants, should decide what is required by the relevant religion has meant that, as Evans notes, there is a risk that the Court “*will single out for protection religious rites and practices with which the members of the Court are familiar and feel comfortable*”.⁹² Cumper notes that “*the Commission and Court have, at times, been accused of being unsympathetic to the claims of those from non-Christian traditions or religions without a long history in Europe*”.⁹³ The low priority accorded by the Court to rights such as the right to wear a headscarf or other items of religious apparel⁹⁴ compared to its willingness to uphold more typically Christian practices such as proselytism⁹⁵ and worship⁹⁶ means that states are under even less obligation to modify norms of their public sphere which are culturally or religiously specific in order to accommodate minority religious needs.

⁹¹ The Strasbourg institutions have not engaged in detailed analysis of the issue of what qualifies as a “religion or belief” for Article 9 purposes and have instead tended not to dispute that the belief systems at the centre of claims fall within the definition of “religion or belief”. Thus the claims of movements such as Scientology (see *X. and Church of Scientology v Sweden* Application No. 7805/77. 16 DR 68) and the “Divine Light Zentrum” (*Omkaranda and the Divine Light Zentrum v Switzerland* Application No 8118/77, 25 Eur Comm’n HR Dec & Rep 105 (1981) both discussed in Evans above. n. 1 at 55) have been analysed on the basis that they fall within Article 9 as have the claims of certain non-religious movements such as pacifism (*Arrowsmith v UK*).

⁹² n. 1 above, 125.

⁹³ P. Cumper, “The Rights of Religious Minorities: The Legal Regulation of New Religious Movements” in P. Cumper and S. Wheatley (eds.), *Minority Rights in the “New” Europe*, (The Hague: Martinus Nijhoff Publishers, 1999), 174-175 (1999). And T. J. Gunn *Adjudicating Rights of Conscience under the European Convention on Human Rights* in J. D. Van Der Vyver and J. Witte J (eds) *Religious Human Rights in Global Perspective: Legal Perspectives* (Hague, Boston, London, Martinus Nijhoff Publishers, 1996), 305, 322.

⁹⁴ The Court has never found in favour of an applicant seeking the right to wear an item of religious apparel (see Evans above. n. 1 at page 125) who states that “[*The judges of the Court*] have never held in favour of an applicant in cases dealing with the wearing of religious apparel or having particular appearance, for example, which can be important to people from some religious traditions despite having little relevance in Christianity. On the other hand they have been quick to hold that there is a right to proselytize or “bear Christian witness”.”

⁹⁵ *Kokkinakis v Greece* (Application No. 260-A) Judgment of 25 May 1993, Ser. A.; 17 EHRR 397.

⁹⁶ *Manoussakis and Others v Greece* (18748/91) [1996] ECHR 41 (26 September 1996).

There are however, limits to the degree to which individuals can be required to modify their behaviour in order to maintain their religious freedom. In *Darby v Sweden*⁹⁷ the ECommHR rejected the argument that an applicant's decision to reside chiefly in another state meant that he had voluntarily waived his right to avoid the compulsory church taxes imposed by the Swedish government on temporary residents. Notably however, the law to which the Commission took exception in *Darby* imposed the duty on the applicant to pay the relevant church tax merely as a result of his living in Sweden rather than as a result of his having engaged in public activities. Accordingly this decision can be seen more as a vindication of a private right to individual religious freedom rather than a right to have one's faith accommodated by public authorities.

The ECtHR's general approach has therefore been to uphold the right of states to restrict religion to the private sphere. It has consistently characterised individual religious freedom as a right which does not necessarily include an entitlement to have one's religious identity accommodated contexts such as employment or education which are not purely private. The Strasbourg Court has seen the relationship between religiosity in public contexts and the needs of the state in competitive terms and has resolved this perceived conflict in favour of the right of the state to regulate public space and activities. This approach is largely consistent with the secular idea of the public sphere as a religiously neutral place in which religious concerns deserve no special consideration and with the idea of religious freedom as a primarily a matter of individual freedom of thought rather than a way of life or source of identity. The ECtHR's emphasis on the neutrality and general applicability of laws as a reason for their compatibility with the Convention would seem to draw heavily on liberal and secular conceptions of the neutral state while its emphasis on voluntarism and choice seem to place it firmly in line with the notion of religious freedom as an element of a wider respect for individual autonomy rather than approaches which stress the need to protect religion's communal and social role. Indeed the Court has referred approvingly to secularism as a notion which is in harmony with the values of the Convention

⁹⁷ *Darby v Sweden* (1990) 13 EHRR 774 (discussed at Evans, above. n. 1 at 127).

on more than one occasion.⁹⁸ Furthermore, by regarding religion as a rival to the state and by focusing on the need to restrict religious freedom in the public arena in order to protect “the rights and freedoms of others”, the court’s approach appears to recognise that despite its status as an important part of individual identity, religion can itself pose a threat to individual autonomy.

However, while the Court’s reluctance to require accommodation of religion in public contexts may be consistent with notions of neutrality and individual autonomy, it does not necessarily imply that the Court has embraced these ideas as the foundation of its approach to the regulation of the relationship between religion, the individual and the state. First, as noted above, the Court has faced allegations that its approach to the issue of the right to manifest one’s religion has been tainted with bias towards traditionally European forms of religion. Perhaps more importantly, the Court’s decisions are heavily focused on protection of the rights of the state rather than those of individuals. Particularly in areas such as the education system or the military which are linked to the formation of citizens or the protection of the public order, the Court has been willing to protect the right of states to restrict religious expression or activity in public contexts even when efforts to do so impinge on individual autonomy in arguably personal and private matters such as the wearing of religious apparel. However, as will be shown below, the Court has never required states to ensure the neutrality of state institutions in order to protect individual autonomy from the communal aspects of religion. Indeed the Court has repeatedly upheld the public role of individual denominations in states which maintain particular ties to certain religions. Seen in this way, the restriction of the requirement to respect religious freedom to the private sphere can be seen more as an empowerment of the state to define its own relationship to religion (which may include significant public and communal privileges for certain religions) rather than as an embrace of liberal ideas of the religious neutrality of the state. This approach is also seen in the Court’s

⁹⁸ See *Refah Partisi and Others v Turkey* (2003) 37 EHRR 1 at para. 93 and *Sahin v Turkey* 44774/98 [2004] ECHR 299 (29 June 2004) para. 99.

decisions relating to the institutional aspect of religious freedom to which I now turn

4.3 Institutional Religious Freedom

The Strasbourg Court's approach to the regulation of the institutional aspect of religious freedom and the relationship of religious institutions to the state also, in general, reflects the prioritisation of the right of the state to choose to define a particular communal religious identity. While the Court has been unsympathetic to attempts to require states to accord special accommodation for individual religiosity in the public arena, it has upheld the granting by Member States of significant public privileges to state-favoured religious institutions. The Court has placed boundaries on the rights of states in this area. In *Hasan and Chaush v Bulgaria*,⁹⁹ it was faced with a situation where in reaction to internal disputes, the Bulgarian Government had dismissed the leadership of the Bulgarian Muslim community in order to ensure that each religious community would have a unified leadership. In ruling on a complaint by those dismissed, the Court recognised the importance of the institutional element of religious freedom stating that " *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.*"¹⁰⁰ It went on to find that attempts by the state to interfere in the internal affairs of religious communities constituted a violation of Article 9¹⁰¹ and could not, in a democratic society, be justified by the need to ensure unified religious leadership.¹⁰²

Indeed the Court has gone further and has recognised that the internal autonomy of religious institutions can also legitimately be recognised as extending to cover situations where religious organisations engage in otherwise regulated activities such as employment, in order to carry out

⁹⁹ (2002) 34 EHRR 1339.

¹⁰⁰ *Ibid.* para. 62.

¹⁰¹ *Ibid.* para. 82.

¹⁰² *Ibid.* para. 78. See also *Church of Scientology Moscow v Russia* (Application no. 18147/02) Judgment of 5 April 2007 where the deregistration of the Church of Scientology was held to violate article 11 in conjunction with Article 9.

religious activities. In *Knudsen v Norway*¹⁰³ the Norwegian State Church had dismissed one of its ministers who disagreed with recent abortion legislation and refused to perform certain tasks which he felt required him to act in violation of his conscience. The minister's application under Article 9 was dismissed on the grounds that the church was entitled to require its ministers to behave in a certain way or to resign. Although the church in question was a state church, the central holding in the case applies equally to religions which are not similarly connected to individual state. It would seem therefore that religious freedom under the ECHR involves a degree of internal autonomy for religious institutions that may not be provided for other institutions. Religions, by virtue of their religious nature are seen as being exempt from certain otherwise generally applicable norms. The Catholic Church, for example, is not required to obey gender equality laws in its recruitment of priests. To hold otherwise would have serious implications for the ability of religious institutions to organise themselves in accordance with their beliefs. This willingness to uphold the autonomy of religious institutions does in effect permit states to enable religious organisations to claim exemptions from generally applicable laws on grounds of religious freedom.

In relation to tasks such as that as acting as a member of the clergy or as a political campaigner where the job in question has a clear ideological element, it can be appreciated why respect for freedom of conscience can be invoked to justify some discrimination. However, in relation to religion, the Court and, prior to its abolition, the Commission of Human Rights, have gone further and have upheld such privileges even when such institutions are engaging in regulated activities such as employment in jobs which are not directly related to religious activities but which instead relate to a religion's broader public role. In *Rommelfanger v Federal Republic of Germany*¹⁰⁴ the Strasbourg institutions upheld the dismissal of a doctor in a Catholic hospital who was fired after he criticised the Catholic Church's attitude to abortion in a letter to a newspaper. The German Constitutional Court upheld the decision to dismiss

¹⁰³ *Knudsen v Norway* (1986) 8 EHRR 45.

¹⁰⁴ *Rommelfanger v Federal Republic of Germany* 1989 62 DR 151 ECommHR Decision of 6.9.1989. German Constitutional Court Decision: BNR 12242/86.

the Applicant on the basis that his letter had constituted a breach of his contractual duty of loyalty to his employer. The Commission of Human Rights dismissed his application under the Convention on the basis that the enforcement of the employer's contractual rights did not violate an interference with his ECHR rights. In doing so the Commission was supporting the right of a religious institution to terminate the employment of an employee of a partly state-funded body (the Catholic hospital) whose functions were largely secular, on the basis of his disagreement with the religious teachings of the owner of that institution. Robbers sees this decision as representing acknowledgment "to a great degree" of the "right of self-determination of the religious communities in its substance"¹⁰⁵ by the Convention institutions. In this case the relevant "right to self-determination" involves the exemption of such religious institutions from norms generally applied to bodies engaged in the public sphere activity of employment in institutions which are not exclusively religious in nature. Moreover these privileges were held to comply with Article 9 despite their impact on the rights of individual employees of such organisations. As has been noted above, the Court has repeatedly held that individuals cannot rely on claims of religious freedom to demand exemptions from generally applicable government regulations in areas such as employment. However, the rulings in *Knudsen* and *Rommelfanger* seem to indicate that the Strasbourg institutions are sympathetic to the granting of precisely such exemptions by member states to certain religious institutions.

Such an approach could be interpreted as the Court embracing a version of collective religious freedom which recognises religious cultural and communal aspects and which enables religious institutions to make demands of the state in public contexts. However, it would be a mistake to view this conferral of public privilege on religious institutions as an instance of the Convention institutions requiring the state to subjugate its interests to those of religious freedom. First, in both cases the Court was upholding the choice made by the

¹⁰⁵ G. Robbers, "State and Church in the European Union" in G. Robbers (ed.) *State and Church in the European Union*, (Baden Baden, Nomos Verlagsgesellschaft 1996).

state to grant such privilege rather than laying down rights enforceable against the state. Second, the wider Convention caselaw shows very little support for the prioritisation of religious freedom to such an extent. Not only would this be inconsistent, as noted above, with the Court's approach to individual religious freedom; the Strasbourg institutions have repeatedly accorded priority to the rights of States to define the religious nature of public contexts over those of individual religious freedom. This has occurred not only in relation to its upholding of "*neutral and generally applicable*" laws but in cases such as *Sahin*, *Kalaç* and *Dahlab* where the efforts of the Turkish and Swiss states to control the wearing of religious apparel in educational and military establishments in order to uphold the secularity of public institutions were upheld by the Court. The primacy of the needs of the state and the particular public orders of individual states is also seen in the analysis of the Article 9 jurisprudence of the Court of Human Rights undertaken by the French *conseil constitutionnel* as part of its 2004 decision in relation to the proposed EU Constitutional Treaty.¹⁰⁶ The *conseil* analysed the Treaty's protection of religious freedom in order to assess its compatibility with France's constitutional principle of secularism. It noted that the protection afforded to freedom of religion under the proposed Treaty was substantially similar to that provided by Article 9 of the ECHR. Having reviewed the relevant caselaw, the *conseil* noted that Convention rights were to be interpreted in harmony with the constitutional traditions common to the member states and concluded that Article 9 had been interpreted by the Strasbourg institutions in such a way as to confer on member states a wide margin of appreciation. This margin of appreciation was considered by the *conseil* as being sufficiently broad to prevent the protection provided to religious freedom by the Union's Charter of Fundamental Rights (which it viewed as the having the same substance as that provided by Article 9) from undermining the constitutional principle of strict secularism laid down in the French constitution notwithstanding any impact the application of this

¹⁰⁶ See Decision of 19 November 2004, 2005-505 available at www.constitutionnel.fr. See also Guy Carcassonne, "France: Conseil Constitutionnel on the European Constitutional Treaty" *European Constitutional Law Review*, 1: 293-301, 2005.

principle may have on religious freedom.¹⁰⁷ In other words, the religious freedom protected by Article 9 would, under the jurisprudence of the Strasbourg Court, give way to the right of the state to defend its public order and to structure and regulate the public sphere in accordance with its particular religious (or a-religious) communal identity. The *conseil's* assessment of the limited impact of Article 9 on the ability of individual states to define their own relationship to religion would appear to be largely correct. In circumstances such as those in *Kalaç, Karaduman* and *Sahin*¹⁰⁸ where states have seen public expressions of religiosity as a threat to the identity of the state, or even in cases like *Dahlab* where the objection was to certain forms of religious expression as opposed to religion in general,¹⁰⁹ the Court has been willing to see the relationship between religion and the state in the public arena in essentially competitive terms. Furthermore, it has been clear that conflict between the right to religious freedom and that of the state to control and define the nature of public spaces and institutions will generally be resolved in favour of the latter. However, unlike France, most member states of both the Council of Europe and the EU have official links to certain religious traditions with religion underpinning of the constitutional order,¹¹⁰ undertaking state functions in areas such as education and healthcare¹¹¹ or acting as a major source of national identity.¹¹² When, as in cases such as *Rommelfanger*, states have chosen to confer important public roles on certain favoured denominations, the Court has not seen the religion as a rival to the state in the public arena. Indeed, in upholding such arrangements it has, in contrast to its approach in cases such as *Sahin* or *Dahlab*, downplayed the impact of the presence of religion in the public sphere on those of different or no religion. It is therefore arguable that the recognition by the Court of Human Rights of the rights of religious institutions in the public sphere is not a matter of the assertion of religious rights against the authority of the state in the public sphere but rather a matter of a recognition of the right of states to define their own identity and relationship to religion, including the

¹⁰⁷ *Ibid.*

¹⁰⁸ See ns. 78, 81 and 86 above.

¹⁰⁹ See n. 80 above.

¹¹⁰ See Chapter I.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

right to treat certain denominations as, by virtue of history, constitutional status and institutional reality, in some way part of the state and broader public order.

It must be noted that the Court has indicated that the Convention imposes limitations on the degree to which states can seek to impose a single religious identity or legislate for the religious law of a single faith. For instance its judgment in *Refah Partisi v. Turkey* stated that a political programme aimed at introducing Islamic religious law would be “*incompatible with the fundamental principles of democracy, as set fourth in the Convention*”,¹¹³ noting particularly how “*the way [Islamic religious law] intervenes in all spheres of private and public life in accordance with religious precepts*” meant that it “*clearly diverges from Convention values*”.¹¹⁴ Although these comments were, strictly speaking, *obiter*, they represent a clear indication that there is a point at which promotion of certain forms of religion through state institutions or religious influence over the state would be incompatible with the respect for pluralism and individual autonomy inherent in the Convention system. Nevertheless the Court’s upholding of the status of state churches together with the decision in *Rommelfanger* show a recognition of the cultural role of religion in certain Member States and an unwillingness to interfere with the promotion of a religiously particular communal identity by such states. Thus the Court has not seen the identification of the state with a particular denomination, the promotion of a religiously specific communal identity or the involvement of religious institutions in the exercise of state functions as violating Convention values despite the impact of such policies on the equal treatment of religions or on individual freedom from religion. On the other hand, apart from the rather limited internal rights recognised in cases such as *Knudsen* and *Hasan and Chaush*, states have not been required by the Court to provide religious institutions with the public role Dalacoura would see as necessary to the maintenance of their public role. Thus, the failure of the Convention institutions in cases such as *Rommelfanger* to interfere with the granting of public sphere privileges to certain religions can be seen as

¹¹³ *Refah Partisi and Others v Turkey* (2003) 37 EHRR 1, para. 123

¹¹⁴ *Ibid.*

empowering the state to define its relationship to religion in the manner of its choosing rather than as a requirement that such a relationship encompass certain collective privileges for religious institutions.

4.4 Religion as Part of the State

Taken together, the Strasbourg Court's characterisation of the relationship between religion and the state in the public arena in competitive terms, its prioritisation of the rights of the state over those of religions in the public contexts and its upholding of the right of states to allow religious institutions to exercise significant public sector activities point to a recognition of certain religions as in some way part of the state.

Despite the evolution of real and substantial limits on the influence of religion over both public and private spheres in Europe, many European states have not fully renounced the use of state power to promote religious interests or to uphold the taboos necessary for the maintenance of religious influence over society. The use of state power in this way has a potentially serious impact on individual autonomy and runs counter to the liberal rationale for the protection of religious freedom. As noted above, the Court has shown a degree of nervousness at the impact on Convention values of governmental involvement in this area by repeatedly emphasising the state's role as "*neutral and impartial organiser of the exercise of various religions.*"¹¹⁵ Nevertheless, the ECHR has not mandated the separation of church and state been interpreted so as to facilitate the use, albeit to a limited degree, of coercive power to promote the interests of certain religions and which identifies the interests of certain religions with those of the state.

In *Darby v Sweden*¹¹⁶ the ECtHR explicitly stated that the establishment of a single faith as a state religion did not breach Article 9 (although it did say that the terms of establishment must include safeguards for individual religious freedom).¹¹⁷ The direct collection of taxes by churches and the use of the

¹¹⁵ *Ibid.* para. 91.

¹¹⁶ *Darby v Sweden* 13 E.H.R.R. 774 (1991)

¹¹⁷ *Ibid.*

judicial apparatus of the state to enforce payment of religious taxes have also been upheld despite the danger that such an approach may force individuals to reveal their religious beliefs to the state.¹¹⁸ The Strasbourg institutions have also upheld the outright favouring of certain denominations under the taxation system provided that there are “*objective and reasonable justifications*” for such discrimination¹¹⁹ and have refused to find a right to recognition by the state even when such recognition brought significantly more favourable treatment from state institutions.¹²⁰

Even more strikingly, in *Kokkinakis v Greece*¹²¹ the ECtHR was faced with a Greek law banning proselytism. Although a process of constitutional amendment had removed the sections which explicitly favoured Greek Orthodoxy, the law had originally been introduced and continued to function so as to maintain the dominant position of the Greek Orthodox Church. The Court found in favour of the applicant (a Jehovah’s Witness convicted of seeking to convert a Greek Orthodox woman) but did so on the basis that the Greek Courts had failed to indicate with sufficient precision what element of the applicant’s actions had constituted the relevant offence. It explicitly refused to condemn anti-proselytism laws in general and specifically upheld the compatibility of laws banning “*improper proselytism*”. In doing so the Court upheld what was in effect, the use of coercive legal measures to restrict the ability of minority religions to undermine the dominance of what, as the Court noted, was in the Greek context the “*religion of the state*.”¹²² It was left to the dissenting judgment of Judge Martens to make the case for viewing religious freedom as essentially an individual matter and to argue that:

“*Whether or not someone intends to change religion is no concern of the State’s and, consequently, neither in principle should it be the State’s concern if someone attempts to induce the another to change his religion.*”¹²³

¹¹⁸ *E & GR v Austria* App No 9781/82 37 Eur Comm’n HR Dec & Rep 42 (1984).

¹¹⁹ *Iglesia Bautista “el Salvador” and Ortega Moratilla v Spain* 1992 Application 17522/90

¹²⁰ *X v Austria* Application 8652/79 26 Dec and Rep 89 (1981)

¹²¹ *Kokkinakis v Greece* (1994) 17 EHRR 397

¹²² *Ibid.* para. 14.

¹²³ *Ibid.* Dissent of Judge Martens at para. 14.

Indeed despite its statement that Article 9 is “*also a precious asset for atheists, sceptics and the unconcerned*”¹²⁴ the ECtHR has gone as far as using it and the notion of religious freedom in general, as justification for laws under which the state can restrict expression deemed hostile or insulting towards religion. In *Otto Preminger Institut v Austria*¹²⁵ the Court upheld a ban on the (private) showing in the predominantly Catholic Tyrolean region of a film which the Austrian authorities felt would be insulting to Catholics stating that:

“in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them”.¹²⁶

It went on to use Article 9 as a justification for restricting freedom of expression under Article 10 on the basis that:

*“The respect for the religious feelings of believers as guaranteed in Article 9 can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society.”*¹²⁷

The Court repeated this line of argument in *Wingrove v UK*¹²⁸ where it based its decision to uphold restrictions on the distribution of an allegedly blasphemous film on the “*right of citizens not to be insulted in their religious feelings*”.¹²⁹ There is, however, no such right apparent in the text of Article 9. Moreover, there was no suggestion in either case that the films in question incited violence or hatred against any religious group. In 2005 the Court again upheld the compatibility of blasphemy laws with in *I.A. v Turkey*.¹³⁰ Three of the seven judges argued strongly that:

¹²⁴ *Kokkinakis v Greece* (1994) 17 EHRR 397, para 31.

¹²⁵ *Otto Preminger Institut v Austria* (1994) 19 EHRR 34

¹²⁶ *Ibid*, para. 47

¹²⁷ *Ibid*.

¹²⁸ *Wingrove v UK* (1996) 24 EHRR 1.

¹²⁹ *Ibid*.

¹³⁰ *I.A. v Turkey* (Application no. 42571/98) Judgment of 13 September 2005.

*“the time has perhaps come to “revisit” [the approach in Otto Preminger Institut and Wingrove], which in our view seems to place too much emphasis on conformism or uniformity of thought and to reflect an overcautious and timid conception of freedom of the press”*¹³¹

However, the majority relied on the precedents set in *Otto Preminger Institut and Wingrove* to hold that the conviction of a publisher for publishing a book which was harshly critical of the Koran met the legitimate aim of intending “to provide protection against offensive attacks on matters regarded as sacred by Muslims”¹³² and, as the book had not been seized, the measure was proportionate.¹³³ Such a view of Article 9 grants to the state significant latitude to use its coercive powers to maintain the taboos Dalacoura has argued are necessary for the maintenance of the social position and influence of individual denominations and would appear to be at odds with the liberal notion of religious freedom as predominantly a means to ensure respect for individual choice within the framework of a neutral and secular state.

As noted above, European society is notably a-religious in international terms and both EU and ECHR institutions have evidenced a strong concern that unfettered religious influence over the public sphere may be incompatible with Europe’s shared commitment to liberal democracy. The expansive and communalist view of religious freedom seen in *Wingrove*, *Otto Preminger* and *I.A.* has the potential to impact on liberal democratic values and freedom from religion to a significant degree and the Court has not held to it in all circumstances. The Court has been willing to countenance relatively clear disparities in treatment in relation to the rights of different denominations in the public sphere. In *Wingrove*, when dealing with insults towards the UK’s established Christian religion the Court had invoked the “right of citizens not to be insulted in their religious feelings,”¹³⁴ in contrast in *The Church of*

¹³¹ *Ibid.* para. 8, dissenting judgment of Judges Costa, Cabral-Barreto and Jungwiert.

¹³² *Ibid.* para. 30.

¹³³ *Ibid.* para. 32.

¹³⁴ *Ibid.*

*Scientology and 128 of its Members v Sweden*¹³⁵ the Commission dismissed a complaint against the failure of the Swedish State to punish a man who had been critical of the religion on the basis that “a right to be free from criticism” was not part of freedom of religion.¹³⁶ Similarly *Choudhury v UK*¹³⁷ when faced with a UK law that criminalised blasphemy of the Christian religion but not Islam, the Commission refused to find a violation of the Convention and held that the failure to make out a claim under Article 9 also defeated arguments under Article 14 which prohibits discrimination in respect of rights protected by the Convention.¹³⁸ Thus states have been permitted to provide protection for selected religions and to use coercive legal powers to protect those religions which form part of their communal identity.

Obviously, the liberal and egalitarian values of the Convention, and in particular the duty to respect individual religious identity, do provide significant limitations on the degree to which states can use their coercive powers to favour certain chosen religions. The Court, for instance, recently ruled that a failure to provide exemptions from compulsory religion classes to pupils whose parents objected to the content of the lessons was a violation of the Convention.¹³⁹ Furthermore, as noted above, the Court’s judgment in *Refah Partisi v Turkey*¹⁴⁰ gave strong indications that attempts to introduce a theocratic system or to legislate for religious law in such a way as to interfere significantly with rights to privacy and self-determination would be inconsistent would breach the ECHR.¹⁴¹ Nevertheless, these values have not been interpreted so as to require separation of the interests of the state and individual religions. Despite its attachment to liberal values the Court’s approach to the relationship between religion and the state in Europe owes as much to visions of religion as a collective and cultural matter as to liberal notions of religious freedom as an element of individual autonomy. The Court

¹³⁵ *The Church of Scientology and 128 of Its Members v Sweden* App. No. 8282/78 (1980) 21 D&R 109, 100

¹³⁶ See Evans above. n. 1, 69-70.

¹³⁷ *Choudhury v UK* App No 17439/90 12 Hum Rts LJ 172 (1991)

¹³⁸ *Ibid.*

¹³⁹ *Zengin v Turkey* App No 1448/04, Judgment of 9 October 2007.

¹⁴⁰ (2003) 37 EHRR 1.

¹⁴¹ *Ibid.* at para. 123.

has permitted Member States to use state institutions to offer privileged treatment to certain denominations, to use coercive powers to uphold the dominant position of certain religions and to insulate chosen faiths from the full rigours of democratic debate thus enabling such states to maintain and promote certain religions as elements of their collective identity.

5. Conclusion

The fundamental rights obligations of the EU in respect of religious freedom are therefore unlikely to require it to call into question the continued intertwining of religion and the state in many of its Member States. The Union is committed to the protection of religious freedom and this obligation applies across all areas of EU law. The jurisprudence of the ECtHR, which largely determines the content of the Union's fundamental rights obligations, does reflect humanist ideas to a significant degree. The Court's view of individual religious freedom as largely a private matter of identity is consistent with notions of the religiously neutral state. Decisions such as *Refah Partisi* and those relating to the wearing of Islamic dress in public institutions, reflect a fear of the consequences for individual autonomy of significant religious presence in the public arena. However, overall, the Court has shown a pragmatic acceptance of the continued importance of religion to Member State identity and has been unwilling to interpret guarantees of religious freedom in such a way as to interfere with the ability of Member States to define a relationship to religion which reflects their cultural norms. While not requiring them to do so, the ECtHR's judgments have permitted states to grant significant institutional privileges to religious bodies and have enabled them to play key roles in relation to important state functions such as the provision of healthcare and education, despite the impact that such an approach may have on individual freedom from religion and equal treatment of religions. Furthermore, it has upheld not only the recognition of official state religions thus recognising the pragmatic virtue of the old *cuius regio eius religio* principle, but has also endorsed the use of coercive state powers to maintain the taboos necessary for the continuance of religion's social role by upholding laws which are designed to maintain the dominance of certain

denominations¹⁴² or which provide selective protection to certain faiths from ridicule or blasphemy.

In summary, the fundamental rights framework provided by the ECHR provides significant latitude for states to maintain close relationships to certain denominations. Given religion's dual nature as an individual and collective phenomenon, it is not surprising that conflicts between protection of individual and collective religious identities have arisen. The approach of the ECtHR has been to protect individual religious identity in private but to do so in a manner which grants greater protection to practices common to culturally-entrenched traditionally European religions than to practices of religions whose large scale presence in Europe is more recent and whose practices are more likely to conflict with established structures. Furthermore, in non-private contexts, the ECHR jurisprudence has, by granting to individual states the right to define and protect a denomination-specific communal religious identity, required individual religious identity to give way to particular communal religious, political or cultural norms. Thus, religious identity is protected in a framework within which, provided that it respects the pluralism and respect for individual autonomy inherent in the liberal democratic values which underpin the Convention, the right of the state to maintain a religiously specific element to its identity and to promote such an identity through public institutions is largely upheld. Nevertheless, although the ECHR largely determines the content of EU fundamental rights norms, the admittedly limited EU jurisprudence in this area indicates a slightly broader view of the protection to be given to individual religious identities in non-private contexts and appears to grant greater scope to individuals to require equal treatment of their particular religious identity in contexts such as employment where doing so may impinge on the ability of states to promote particular communal cultural and religious practices. Such an approach has also been seen in EU legislation in this area, which is the subject of the next chapter.

¹⁴² See for example *Kokkinakis v Greece* above. n. 95.

Chapter V: The Regulation of Religion in the Single Market

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4. Conclusion

1. Introduction

In line with the approach outlined in the previous chapter, this chapter shows how EU law has largely viewed religion as a matter of identity. In regulating this form of identity in the context of the Single Market, the Union has adopted a dualist approach which sees religion both as an economic choice within the market and as a phenomenon requiring protection from the economic and commercial processes of the market. As religious identity is both individual and collective in nature, the Union is therefore required to mediate conflicts between individual and collective religious identities. This chapter shows how EU law has actively facilitated individual religious identity within the Single Market on a basis which promotes the equal treatment of all religions and potentially destabilises denomination specific communal market practices and structures, most notably through its prohibition of direct and

indirect discrimination in employment on grounds of religion. On the other hand, the actual impact of this facilitation is limited by the need to respect the overall structures of the competitive market and by the Union's recognition of collective religious identity. EU law has recognised religion, including religiously influenced market structures and institutional arrangements, as elements of national culture which Member States are entitled to uphold. It has also granted religious institutions exemptions from anti-discrimination legislation, thus according priority to their collective identity over that of the individual identity of the employees of such institutions.

However, in line with the notion of balance discussed in Chapter III, the facilitation of both individual and collective religious identities is also limited. Exemptions from anti-discrimination legislation have been narrowly drawn and regarded as exceptional. Furthermore, the limitations on religion's political influence which the Union sees as intrinsic to the notion of balance which underpins its public order have also been recognised through the explicit subjugation of religious rights to those of the state to defend fundamental state interests and the liberal democratic order.

The chapter shows that this approach to religion, and in particular, the characterisation of religion's public role as part of national culture, has allowed "insider" religions which have strong cultural roots in Member States to access significantly greater privileges within the marketplace. Furthermore such privileges are limited by the needs of the market and state to a significantly lesser degree than the individual religious rights recognised in other areas of Single Market law. Finally, the chapter demonstrates how the cultural prism through which "insider" faiths are seen causes their ideological demands to be viewed as cultural, and therefore less liable to restriction on the basis of the need to respect restrictions on religion's political influence than the demands of "outsider" religions. Accordingly, the Union allows religious elements of national culture, and therefore denominationally-specific practices and ideas of the good life, to exercise significant influence within the marketplace. The regulation of religion within the Single Market reflects the wider culturally-conditioned dialectic in EU law between the accommodation

of religion's role in individual and collective identity and the need to limit the public role of religion required by the balance between the religious, cultural and humanist elements which characterises the Union's public order.

2. Dual Approach to Religion in the Market

2.1 Religion as a Market Choice

The law of the Single Market views religion in the market place in two distinct ways, recognising it as both an economic choice which can be facilitated by the economic liberties of the Single Market and as an intimate, non-economic phenomenon which requires protection from those same liberties. In relation to the former, the Court of Justice has, on occasion, been willing to stretch the notion of economic activities in order to protect religiously motivated choices by individuals even when the actions in question lacked features such as exchange and commercial value which normally characterise market transactions. For instance, in *Steymann v Staatssecretaris van Justitie*,¹ the Court assessed the right of a German national to live in a religious commune in the Netherlands solely in terms of his rights to freedom of movement and the economic aspects of his activities. In this case the Applicant challenged the refusal of the Dutch authorities to grant him the residence permit to which EEC nationals employed in the Netherlands were entitled. Mr Steymann was a member of a religious commune known as the Bhagwan Community for whom he performed household chores and helped with the Community's commercial activities. In return the Community provided for Mr Steymann's material needs.² However, the Community provided for the needs of all of its members whether they performed such duties or not. The Dutch authorities ruled that Mr Steymann was not pursuing an activity as an employed person and refused him a residence permit on that basis. The Dutch *Raad van Staat* referred the following question to the ECJ:

“Can activities which consist in, and are entirely centred around, participating in a community based on religion or on another form of philosophy and in following the rules of life of that community, whose

¹ *Steymann v Staatssecretaris van Justitie* Case 196/87 ECR [1988] 06159.

² *Ibid.* para. 4.

members provide each other with benefits, be regarded as an economic activity or as a service for the purposes of the Treaty establishing the European Economic Community?”³

It appeared to take a very minimalist view the competence then held by the EC in relation to religious matters stating:

“in view of the objectives of the European Economic Community, participation in a community based on religion or another form of philosophy falls within the field of application of Community law only in so far as it can be regarded as an economic activity within the meaning of Article 2 of the Treaty”.⁴

The Court went on to hold that the work carried out by members of the Bhagwan Community constituted an *“essential part of participation in that community”⁵* and that the support given to members could be regarded as *“an indirect quid pro quo for their work.”⁶*

Accordingly the Court found in favour of the Applicant holding that:

“Article 2 of the EEC Treaty must be interpreted as meaning that activities performed by members of a community based on religion or another form of philosophy as part of the commercial activities of that community constitute economic activities in so far as the services which the community provides to its members may be regarded as the indirect quid pro quo for genuine and effective work.”⁷

Thus the Court regarded religion as relevant to EU law rights only in so far as it could be subsumed into the broad economic framework of the issue of free movement of workers. Therefore, while the judgment certainly approached the issue from an individual rights perspective, the right in question was seen as

³ *Ibid.* para. 6.

⁴ *Ibid.* para. 9.

⁵ *Ibid.* para. 12.

⁶ *Ibid.*

⁷ *Ibid.* para. 14.

that of freedom of movement rather than freedom of religion. Indeed, the most notable aspect of the decision is Court's concern to bring activities which were not economically motivated, within the framework of commercial norms such as "*quid pro quo for genuine and effective work*" and its refusal to allow the religious nature of the activity to impinge on its purely economic and individualistic analysis of the issues involved. Religious choices were therefore seen as economic choices and as falling within the ambit of EU law for that reason.

In *van Rosmaalen v. Bestuur van de Bedrijfsverenigingen*⁸ the Court showed a similar willingness to emphasise the commercial aspects of religious conduct, even in contexts where they did not provide the primary motivation for the relevant activities. In this case the Court of Justice was required to interpret the definition of "self-employed" in relation to the pension entitlements of a priest who had worked for several decades as a missionary in what was then called Zaire. The Court ruled that:

*"The term 'self-employed person' [...] applies to persons who are pursuing or have pursued, otherwise than under a contract of employment or by way of self-employment in a trade or profession, an occupation in respect of which they receive an income permitting them to meet all or some of their needs, even in the income is supplied by third parties benefiting from the services of a missionary priest."*⁹

In other words, the fact that during the course of the Applicant's ministry, he had been maintained by the local community rather than the order of priests to which he belonged was sufficient to bring him within the definition of "self-employed" for the purposes of EU law.

The Court offered no definition of religion in either case. Indeed the repeated references in the *Steymann* judgment to "*religion or other form of*

⁸ Case 300/84 [1986] ECR 3097.

⁹ *Ibid.* para. 23

philosophy”¹⁰ could be seen as consistent with a view of religion as simply a form of philosophy which is not entitled to any greater consideration or role in public life than other beliefs. Although the *Steymann* decision could be seen as showing a willingness to facilitate individual freedom of religion and the ability of individuals to construct their own identity, by supporting the right of an individual to use his or her European right to freedom of movement to take part in the life of a religious community in another Member State, the failure of the Court to attribute any special significance to the religious aspects of the case and its implicit acquiescence in the Dutch Court’s characterisation of religion as a form of philosophy might be less welcome from a religious perspective in other circumstances. Therefore although the strong emphasis placed by markets on respect for individual autonomy and choice¹¹ does draw on some of the same principles which form the basis for liberal theories of freedom of religion, a purely economic approach can lead to mischaracterisation of individual religious behaviour to a significant degree and ignores vital elements of religion such as its collective, institutional and cultural elements.

2.2 Protection of Religion from the Market

However, as shown in the previous chapter, the Union is required to protect religious freedom as part of its commitment to fundamental rights. EU law has therefore also recognised religion as a fundamental right which requires protection within the Single Market. The upholding of religious freedom not only involves the balancing of religious rights against the interests of broader structures such as the market and the rights of the non religious, it also requires the reconciliation of potentially conflicting institutional, collective and individual religious rights. The protection of religious freedom within the Single Market has led Community law to recognise various individual rights such as an individual right not to be discriminated against on the basis of one’s religious identity when engaging in market activities and a right to have one’s religious identity facilitated in the workplace. At the same time it also

¹⁰ *Ibid.* para. 9.

¹¹ See for example E. Petersmann “Constitutional Economics, Human Rights and the WTO” (2003) 58 *Aussenwirtschaft* 49, 56-8.

acknowledged collective interests and has sought to balance the right to protect institutional religious ethos and the religious elements of national culture against such individual entitlements.

The notion that respect for religion required a degree of active protection within the Market was seen from relatively early on in the history of the Community. The preamble to the European Social Charter of 1961 for example, states that:

*“the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin....”*¹²

In its dealings with its own employees the Community has forbidden religious discrimination for some time. For instance, the 1962 Regulations governing the recruitment and employment of Council staff¹³ and the 1976 Council Regulations regulating the conditions of employment of the staff of the European Foundation for the Improvement of Living and Working Conditions¹⁴ and the European Centre for the Development of Vocational Training¹⁵ all prohibited discrimination on religious grounds. On the other hand however, none specified whether applying generally applicable rules which did not make special allowances for religious beliefs or practice would constitute such discrimination. The ruling of the Court of Justice in the mid 1970s in *Prais v Council*,¹⁶ indicated that a duty to take such active steps and to protect individual choice and identity in relation to religion may be part of the general principles of EU law. In this case the applicant had been unable to

¹² European Social Charter (18.10.1961), c.f. e.g. art. 136(1) EC.

¹³ EEC/EAEC Council: Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of officials and the conditions of employment of other servants of the European Economic Community and the European Atomic Energy Community, Official Journal B 045, 14/06/1962 P. 1385-1460, Article 27(2).

¹⁴ Council Regulation (ECSC, EEC, Euratom) No 1860/76 of 29 June 1976 laying down the Conditions of Employment of Staff of the European Foundation for the Improvement of Living and Working Conditions, Official Journal L 214, 06/08/1976 P. 0024-0046, Chapter 3, Article 23.

¹⁵ Council Regulation (ECSC, EEC, Euratom) No 1859/76 of 29 June 1976 laying down the Conditions of Employment for Staff of the European Centre for the Development of Vocational Training, Official Journal L214, 06/08/1976 P 001-0023, Chapter 3, Article 23.

¹⁶ *Prais v Council* Case 130/75 Judgment of 27 October 1976.

complete examinations for the recruitment of officials as they had been scheduled for a Jewish holy day on which she felt unable to write or travel for religious reasons. The Council refused her request to change the day on which the exam was to take place. The applicant argued that that in the light of Article 9 of the ECHR, the regulations governing the recruitment of Community officials should be interpreted so as to enable every candidate to complete the examinations irrespective of his or her religious background. The Defendant did not dispute that freedom of religion as guaranteed by Article 9 of the ECHR was part of the general principles of Community law or that the Staff Regulations required the Council to recruit without reference to the religion of applicants, but argued that to oblige it to take account of the religious requirements of all candidates would involve an excessive administrative burden. The Court ruled that the if the Council were to be informed within good time by a candidate that a particular date presented religious difficulties, then it:

*“should take this into account (...) and endeavour to avoid such dates”*¹⁷

but that:

“neither the Staff Regulations nor the fundamental rights already referred to can be considered as imposing on the appointing authority a duty to avoid a conflict with the a religious requirement of which the Authority has not been informed.”

The judgment concludes rather cryptically stating:

“In so far as the Defendant, if informed of the difficulty in good time would have been obliged to take reasonable steps to avoid fixing for a test a date which would make it impossible for a person of a particular religious faith to undergo the test, it can be said that the Defendant in the present case was not informed of the unsuitability of certain days until the date for the test had been

¹⁷ *Ibid.* para. 16.

fixed, and the Defendant was in its discretion entitled to refuse to fix a different date".¹⁸

This statement left as an open question the issue of whether the Council would have been obliged to set a new date had it been informed in good time or whether such an approach was merely desirable. The decision does however indicate both support for the idea of religious freedom as part of the general principles of EU law and a degree of openness on the part of the Court to the idea that individual religious freedom included a right to adhere to one's religious identity in market contexts such as the workplace, with a corresponding duty on the part of Community institutions actively to facilitate such religious identities. Such a view of individual religious freedom would seem to go beyond the requirements of Article 9 as it has been interpreted by the Strasbourg Court.¹⁹

This dual approach of recognising religion both as a choice which could be facilitated as part of the commercial processes of the Single Market and as a reason to circumscribe such processes, is also seen in more recent Community legislation in relation to employment. Directive 2003/88, which regulates aspects of working time, shows a willingness to defend religious choices even when they potentially impinge on the pursuit of market imperatives such as maximum efficiency, permitting Member States to allow derogations from working time legislation for "*workers officiating at ceremonies in churches and religious communities*".²⁰ In doing so the Union permits Member States to go beyond their minimum ECHR duties and to facilitate individual religious identities in market contexts by disapplying the rules otherwise applicable to workers which could interfere with religious practices despite the impact that such facilitation may have on the organisation of the working day. More significantly, the Union's anti-discrimination legislation has conferred

¹⁸ *Ibid.* para. 19.

¹⁹ See Chapter II.

²⁰ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L299/9 18.11.2003 (this amended Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time OJ L307 13.12.1993 which had a similar provision). See *Dellas v Premier Ministre* Case C-14/04 1 December 2005.

significant more general protection on the religiously motivated choices of individuals in the area of employment.

Despite the commitments in relation to discrimination in documents such as the European Social Charter of 1961, a treaty basis for EU legislation in relation to religious discrimination was lacking until the entry into force of the Treaty of Amsterdam in 1999. The situation changed significantly with Article 6a of the Treaty which granted the Community the authority to make laws prohibiting discrimination on various grounds, including religion.²¹ In late 2000 the Council used these new powers to enact *Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation* (“the Framework Directive”).²² This directive was intended to combat discrimination on the grounds listed in Article 6a. In line with EU anti-discrimination law as it had applied in relation to gender discrimination, the directive prohibited both direct and indirect discrimination on religious grounds. Article 2.2 of the directive defined these concepts in the following terms:

“2.2(a): Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1 [these grounds are: religion or belief, age, disability or sexual orientation].

2.2(b): indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared to other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”

The duality of the Union’s approach to religion in the marketplace is seen here in relation to the differing approach to direct and indirect discrimination. The

²¹ Treaty of Amsterdam, Article 6a OJ C340, 10 November 1997.

²² OJ L 303, 2.12.2000, p. 16–22

prohibition in Article 2.2(a) on direct discrimination prevents an individual's religious identity being used to prevent them from engaging in market activities. Religious individuals are not to be prevented from engaging in the activity of employment or to be paid less than their market worth of their labour on the basis of their religion. Thus, the freedom of religious individuals to enter into the free market is protected. This can be seen as in some ways comparable to the judgment in *Steymann* where the religious nature of the applicant's motivation was not seen as a reason to deny him the market freedoms granted by EU law. Indeed Article 2.2(a) goes further and enshrines the formal religious neutrality of the Single Market. Market actors are required by the Directive to be "religion blind" and not to hold the fact of an individual's religious identity against them. Such an approach reflects the formal equality of all religious individual identities in EU law and establishes the market as an arena within which individuals of all religious backgrounds have an equal opportunity to take part. Thus, notwithstanding the predominance of a single religious tradition in a Member State, outright favouring of adherents to particular religions in the area of employment is prohibited by the Union which thereby enforces and upholds the notion of the formal equality of individuals as market actors.

The prohibition of indirect discrimination in Article 2.2(b) on the other hand, takes a different approach. By providing that "*apparently neutral*" provisions or practices which place individuals of a particular religion at a disadvantage are to be considered discriminatory unless objectively justified, the Directive goes beyond formal equality and requires that the religious choices of individuals be actively facilitated thus providing the possibility of protecting such choices from standard market practices. Thus, workplace dress codes which preclude the wearing of headscarves for female Muslim employees or arrangements in respect of working time which interfere with the ability of workers to respect religious feast days, are potentially covered by the notion of indirect discrimination. This is an approach which goes significantly beyond the requirements of Article 9, which, as interpreted by the Court of Human Rights does "*not give individuals the right to behave in the public sphere in*

*compliance with all the demands of their religion or belief*²³ and which involves the active facilitation of religious behaviour even when such behaviour impinges on pre-established workplace practices.

It is noteworthy that the privileges granted by the directive are applicable to religion in general and make no distinction between culturally entrenched and newer or minority faiths. Indeed, the approach of the directive provides significant scope for undermining denomination-specific privilege in the workplace in that it enables adherents of minority religions to characterise workplace structures built around the traditions and practices of the dominant religion as measures placing adherents of minority faiths “*at a particular disadvantage compared to other persons*”. Thus, by bringing workplace practices which give reflect a particular religious tradition within the notion of discrimination, EU Single Market law not only requires that such practices be objectively justified but also seems to categorise as discrimination, and therefore implicitly to deprecate, the maintenance of communal structures which accord preferential treatment to certain religions. This approach has the potential to undermine, in the name of the rights of religious individuals, not merely the rights of employers but also the ability of in individual Member States to structure the workplace, and thereby the communal life of the state, in such a way as to reflect their predominant religious tradition.

2.3 Reconciliation of Religious Rights with Established Norms and Structures

The prohibition of indirectly discriminatory measures, as Fredman notes, can be seen as an attempt to reduce the costs to individuals of adhering to certain identities.²⁴ Taken together Articles 1²⁵ and 2.2 of the Directive place religion together with characteristics such as age, disability or sexual orientation which

²³ See *Arrowsmith v. UK*, (Application No.7050/75), Comm. Rep 1978, 19 DR 5. Here the term “*public sphere*” seems to be used in a broader sense meaning non-private contexts as opposed what Asen calls the “realm of social life in which public opinion can be formed” (R. Asen (see n. 66 of Chapter IV).

²⁴ See S. Fredman “Combating Racism with Human Rights: The Right to Equality” in S. Fredman (ed.) *Discrimination and Human Rights The Case of Racism* (Academy of European Law, European University Institute, OUP, 2001).

²⁵ Article 1 reads “The purpose of this directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.”

are seen as either immutable or as so fundamental to personal identity that people should not be asked to change or disavow them. They would therefore appear to grant priority to the protection of individual religious identity and the notion of equal treatment of adherents to different religions, over the right of states or employers to reflect a particular religious heritage in their workplace practices. Being centred on ideas of respect for and facilitation of individual autonomy, such an approach can be seen as being broadly in line with liberal rationales for the protection of religious freedom. However such facilitation must be reconciled with other factors. Rights, of course, do not exist in a vacuum and their exercise must take account of countervailing rights and interests. Unsurprisingly the Directive provides that the rights it provides may be restricted in order to protect *“the rights and freedoms of others.”*²⁶ Thus, religiously motivated harassment of colleagues or refusals to work with people of a particular gender or religion will not be protected.

Nevertheless, religious rights are in certain circumstances accorded clear priority over other countervailing norms. In relation to animal cruelty for example, EU law has provided exemptions from laws requiring humane slaughtering methods in order to facilitate religious practices in relation to meat preparation. Directive 93/119/EC on the protection of animals at the time of slaughter of killing²⁷ confers authority on religious institutions in relation to animal slaughter in Article 2(8) which provides that:

*“religious authority on whose behalf the slaughter is carried out shall be competent for the application and monitoring of the special provisions which apply to the slaughter according to religious rites”.*²⁸

The Directive’s preamble notes that it is *“necessary (...) to take account of the particular requirements of certain religious rites.”* It goes on to provide in Article 5(2) that the requirement that animals be stunned before slaughter does

²⁶ Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation Article 2(5) *OJ L 303, 2.12.2000*

²⁷ Directive 93/119/EC of 22 December 1993 on the protection of animals at the time of slaughter of killing.

²⁸ *Ibid.* Article 2(8). Para. 1 of the Preamble to Directive 2001/88/EC of 23 October 2001 amending Directive 91/630/EEC laying down minimum standards for the protection of pigs *OJ L 316 1.12.2001*, has a similar provision.

not apply “*in the case of animals subject to particular methods of slaughter required by certain religious rites*”²⁹ thus subjugating the prevention of cruelty to animals to the religious rights of those who only wish to consume ritually killed meat.

Perhaps more significantly for the purposes of this chapter, the rights to active facilitation of religion in the marketplace conferred by EU law and the Framework Directive in particular, also have to be reconciled with the interests of the two pillars of the European public order, the market and the humanist elements of the liberal democratic state.

2.3.1 Reconciliation with the Structures of the Market

Although in legislation such as the Framework Directive, EU law has provided significant protection to the right of individuals to adhere to and retain a religious identity, this facilitation must adapt itself to the overall structures of the market. A competitive market economy such as that envisaged by the EU treaty, is characterised by certain features such as the commercial exchange and the pursuit of profit, efficiency and self-interest. The protection provided by EU law of the rights of religious individuals in areas such as employment can impact on the pursuit of these objectives and a balance must therefore be struck found between them.

Although in *Steymann*, the Court of Justice, in characterising the relationship between the Applicant and the religious community to which he belonged as one of employment, was willing to overlook the absence of genuine economic exchange or profit seeking between them, EU law in this area has been clear that the facilitation of religion must adapt to the profit motive and the need for efficiency in the market. Article 2.2(b)(i) of the Framework Directive makes this point explicitly, stating that an apparently neutral provision which disadvantages an individual will not be discriminatory if:

²⁹ *Ibid.* Article 5(2).

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”³⁰

Therefore workplace practices which place individuals of a particular religion at a disadvantage compared to other individuals will not be considered discriminatory if they are “*objectively justified by a legitimate aim*” and the means chosen to achieve the aim are “*appropriate and necessary*”. The Directive’s provisions make it clear that the pursuit of market goals such as efficiency and competitiveness are to be considered to be legitimate aims in this regard. Paragraph 17 of the Directive’s preamble states that:

“This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo relevant training (...)”³¹

Thus, where the beliefs or practices of a particular religious identity are incompatible with fundamental commercial demands such as the need to perform the “*essential functions*” of a post, the duty to facilitate religion will give way to the need to maintain business efficiency and the duty of the employee to provide effective work in return for employment. Indeed, the concern to temper the protection of the rights of religious individuals in order to avoid unduly burdening business and administration was already to be seen in the Court of Justice’s judgment in *Prais* which stressed that the duty to schedule recruitment exams so as to avoid clashing with religiously mandated days of rest would only apply when the defendant had been: “*informed of the difficulty in good time*” and only extended to a duty:

“to take reasonable steps to avoid fixing for a test a date which would make it impossible for a person of a particular religious faith to undergo the test”³²

³⁰ n.26 above Article 2.2(b)(i)

³¹ *Ibid.* Preamble, para. 17

³² n. 16 above

thus allowing the duty to facilitate an individual's religious choices to be circumscribed by the need to avoid unduly burdening the process of recruitment.

Judgments in other areas of discrimination law have shown similar concerns. Thus, the need to avoid placing “*an intolerable burden on employers*” was relied on to limit the duty of employers to justify differences in pay between employees³³ while “*justifiable operational reasons*” were invoked to limit the duty to facilitate employees on parental leave.³⁴ The needs of the broader economy have also been seen as justifying a difference in treatment in respect of employees of small firms³⁵ and differences in treatment in respect of older workers.³⁶ The common thread in these cases is the willingness of the Court to circumscribe rights to equal treatment and the facilitation of individual identities in order to protect the ability of enterprises to operate efficiently within a competitive economy or to protect the ability of the state to regulate the economy. While the Court has on occasion found interferences with the principle of equal treatment to have been disproportionate, in general it has shown considerable deference to the needs of employers and the regulatory state. In relation to discrimination on grounds of religion therefore, the rights provided by EU law to employees are likely to be required to accommodate the needs of the competitive market to a significant degree. In relation to indirect discrimination on religious grounds in particular it must therefore be thought likely that certain religiously motivated behaviour such as a refusal on the part of Muslim supermarket workers to handle pork or alcohol may well be held to relate to an availability to perform essential functions of the job and to fall outside of the protection of the Framework Directive on this basis. Writing in relation to the EU Race Directive³⁷ (which contains similar provisions

³³ Opinion of Mr Advocate General Poiares Maduro delivered on 18 May 2006. *B. F. Cadman v Health & Safety Executive* Case C-17/05 ECR [2006] I-09583.

³⁴ Para. 47 Opinion of Advocate General Kokott delivered on 15 March 2007. *Sari Kiiski v Tampereen kaupunki* Case C-116/06.

³⁵ Case C-189/91 *Kirsammer-Hack v Sidal* [1993] ECR I-6185.

³⁶ See Case C-411/05 *Palacios de la Villa v. Cortefiel Servicios SA* Judgment of the Court (Grand Chamber) 16 October 2007, [2007] All ER (D) 207 (Oct) and C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981.

³⁷ Council Directive 2000/43/EC on 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin OJ L180/22 19.7.2000.

relating to indirect discrimination), Chalmers has suggested that minority identities are recognised:

*“only on the basis that they transform themselves so that they be judged according to the “rules of the game” of the existing model of political economy, whatever hidden structures or biases it contain”.*³⁸

Given that matters such as the range of products sold in shops is likely to have been influenced by wider cultural norms which are themselves partly the product of particular, (and in Europe mainly Christian), religious traditions, it is inevitable that the subordination of the right to maintain a religious identity in the workplace to the need to ensure that employees carry out the essential functions of their jobs will impinge more on followers of minority religions. It is clear however, both from the caselaw of the Court and the provisions of the Framework Directive, that EU anti-discrimination law is not intended to displace the influence of the commercial elements of the market economy and that indirectly discriminatory measures which seek to safeguard the ability of an enterprise to compete in the market place will, be seen as having the legitimate aim necessary to withstand challenge on grounds of religious discrimination.

The accommodation of economic interests is not absolute and directly discriminatory measures which prevent individuals from entering the marketplace on the basis of the mere fact of their religious identity will not be upheld on this basis, even if the employer’s commercial interests are at stake, as for example in cases where for example a large number of customers dislike being served by a Jewish staff member. Neither would measures which were disproportionate, as for instance an unwillingness, on grounds of efficiency, to allow an employee to respect his or her religious day of rest in a context where the relevant tasks could be performed on other days, be upheld. However, while economic interests will not be accorded priority in every occasion, the protection of religion within the Single Market, at least in so far as it involves

³⁸ D. Chalmers, “The Mistakes of the Good European?” in S. Fredman (ed.) *Discrimination and Human Rights The Case of Racism* (Academy of European Law, European University Institute, Oxford University Press, 2001) 220.

active facilitation of religious behaviour as opposed to protecting the mere fact of religious identity, will have to accommodate itself to a significant degree, to the centrality of commercial norms such as the pursuit of profit and efficiency in EU law.

2.3.2 Reconciliation with the Structures and Norms of the Liberal Democratic Polity

2.3.2.a Religion as Part of the Public Order of the EU

However, the interests that EU law recognises as being capable of justifying the restrictions on religious rights are not solely economic. The accommodation of religion within the Single Market also has to take account of the desire of EU law to maintain certain restrictions on the public role of religion (particularly in the political arena) in order to maintain the balance between religious, humanist and cultural influences which underpin its public order and which is seen as having given rise to the Union's liberal democratic ethos.

While certain limitations are imposed on this basis, the EU is not a strictly secular policy and does recognise both the promotion of a particular public status for religion, including a degree of protection from liberal principles such as freedom of expression, as part of its public order. Indeed the EU's own public order has notably un-secular elements with Single Market legislation both accommodating religious perspectives and seeing the promotion of an elevated cultural and social status for religion as an element of the public good. For example, the law of the Single Market has characterised the enforcement of respect for religious taboos, the prevention of the denigration of religion and the promotion of an elevated public status for religion as part of the public good as well as providing recognition of religious perspectives within its regulatory law.

Union law on trade marks for instance has contemplated restrictions motivated by a desire to protect religious taboos around certain symbols by providing that Member States may:

“provide that a trade mark shall not be registered or, if registered, shall be liable to be declared invalid where and to the extent that: (...) (b) the trade mark covers a sign of high symbolic value, in particular a religious symbol”.³⁹

Similarly the 2007 Broadcasting Directive requires that:

*“Member States shall ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality”*⁴⁰

thus protecting those who hold religious but not other kinds of beliefs. More significantly, the Directive also provides that *“No television advertising or teleshopping shall be inserted during religious services”*⁴¹ thereby attempting to ensure by means of the law the a degree of reverence for religious services. Furthermore, as was demonstrated in Chapter III,⁴² in addition to promoting a particular status for religion, the Union has, in certain circumstances, recognised the validity of the promotion of religious morality by means of “public morality” clauses in legislation as a valid element of EU law. Restrictions on cloning and bio-technology⁴³ and on gambling⁴⁴ have, as discussed in Chapter III, been recognised on this basis. Therefore, in contrast to strictly secular polities,⁴⁵ EU law does recognise religious perspectives as a

³⁹ Directive 89/104/EC Art 3(2)(b).

⁴⁰ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, Chapter A, Article 3b..

⁴¹ *Ibid.* Chapter IIC section 14.

⁴² See sections 4 and 5 of Chapter III.

⁴³ Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions. OJ L 213, 30.7.1998, p.13-21.

⁴⁴ Case C-275/92, *Her Majesty's Customs and Excise v. Gerhart Schindler and Jörg Schindler* [1994] E.C.R. I-1039; [1995] 1 C.M.L.R. 4. See also *Placanica* Joined Cases C-338/04, C-359/04 and C-360/04 para. 47, judgment of 6 March 2007. See discussion in Chapter IV, Section Four.

⁴⁵ The Preamble to the Turkish constitution for example requires that *“there shall be no interference whatsoever by sacred religious feelings in state affairs and politics”* and in Article 24 prohibits *“even partially basing the fundamental, social, economic, political, and legal order of the state on religious tenets.”* See the Constitution of the Republic of Turkey, English translation available from the Office of the Prime Minister at <http://www.byegm.gov.tr/mevzuat/anayasa/anayasa-ing.htm> (last accessed 2 March 2008).

valid element of law making and appears to regard the promotion of an elevated public status for religion in general as part of the public good.

2.3.2.b Limitations on Religion as Part of the Public Order of the EU

Such accommodation is however, part of a broader context in which significant limitations on the degree of public influence which can be exercised by religion are seen as a key element of a the balance between religious, cultural and humanist influences inherent in the liberal democratic nature of the Union's public order. As is shown in Chapter VI, the Union's approach to migration and Enlargement show that it regards the limitation of religious influence over law and politics as perquisites for the respect of principles such as privacy and equal treatment.⁴⁶ Furthermore, the duty to accept these limitations has been seen both as a duty of states wishing to join the Union⁴⁷ and as an individual duty of individuals seeking to reside there.⁴⁸ The European Court of Human Rights has also been explicit that preponderant religious influence over law and politics is repugnant to the democratic values underlying the European Convention of Human Rights which the EU has undertaken to respect.⁴⁹

Such limitations are also seen in EU Single Market legislation. Article 2.5 of the Framework Directive provides that:

*“This Directive shall be without prejudice to measures laid down by national law which in a democratic society, are necessary for the public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.”*⁵⁰

A similar limiting clause was not included in any of the other anti-discrimination directives to date so it can be assumed that it was feature or features of the grounds protected in Directive 2000/78 (sexual orientation,

⁴⁶ See Chapter VI.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Refah Partisi and Others v Turkey* (2003) 37 EHRR 1.

⁵⁰ n. 26 above

religion or belief, disability and age) that were thought to render such a clause necessary. The fact that the grounds given in Article 2(5) are strikingly similar to those given in Article 9.2 of the ECHR (“*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 the protection of the rights and freedoms of others*”) would seem to indicate that it was the inclusion of religion in the directive caused the inclusion of this limitation clause.

The notion that religious rights, like all other rights, are to be limited by the need to respect the rights of others is not remarkable. However, Article 2.5 goes further and limits the protection of religion in the market in order to safeguard the principle of balance between religious and humanist influences and the fundamental interests of the liberal democratic state. The Union’s overall approach to religion is characterised by both a respect for religion’s role in individual and communal identity and an awareness that a high level of religious influence over public institutions can pose a threat to the state, to democracy and to the humanist elements of the balance between religious and humanist influences required by the EU’s public order.⁵¹ Just as Article 2.2’s prohibition on discrimination on religious grounds represents this respect for religious identity, Article 2.5 can be seen as reflecting the Union’s desire to maintain certain limitations on religion’s public role in the interests of the state, liberal democracy and the principle of balance which underpins its approach to religion. The provisions of Article 2.5 subordinate the prohibition on discrimination in the Directive is specifically to “*the interests of public safety*” and “*the protection of public order*” in so far as such subordination is “*necessary in a democratic society.*” The invocation of ideas such as “*public order*” and “*public security*” would seem to indicate reflect a view that there are core elements related to the authority and security of the modern state which cannot be expected to accommodate individual or collective identities in general and religion in particular, without undermining the stability of the public order as whole. Such an approach has much in common with the restrictions on the assertion of religious claims to truth in the political arena

⁵¹ See Chapter VI.

outlined in Chapter III. Thus, the need of a democratic society to maintain public order, or indeed, to promote “*morals*” or personal freedom (“*the rights and freedoms of others*”), trumps the need to respect religious freedom in the marketplace. Notably, unlike the “*objective justification*” exemption in Article 2.2(b)(i), the exemption provided by Article 2.5, covers both the both direct and indirect discrimination. Accordingly, adherents to religions which are seen as contrary to the public order, or which are hostile to the notion of balance and the accommodation of humanist and cultural influences which it entails, may be excluded from employment in, for example the security services or the army, simply on the basis of their religious identity.

2.3.3 Accommodation of Existing Religious Privilege in the Market

However, as has be noted in Chapter IV, in addition to its personal aspects, religion is also a communal phenomenon and most mainstream European faiths regard an approach to religious freedom based solely on protection of individual autonomy as gravely deficient.⁵² The right of individual employees to equal treatment on grounds including religion can be inconsistent with the rights of such institutions to organise themselves in accordance with their religious beliefs. Indeed the relevant ECHR caselaw,⁵³ and therefore in all likelihood the general principles of EU law,⁵⁴ suggest that the protection of the collective religious identity of religious organisations requires that exemptions from anti-discrimination laws be provided to religious bodies, at least in relation to those employed to carry out religious tasks such as preaching. However, the role of religious bodies in the market place is not restricted to the employment of clergy.

Certain religions have achieved privileged status in many Member States. More importantly in terms of Single Market law, religious institutions continue play a key role in the provision of public services such as health and education in several EU Member States.⁵⁵ The EU has specifically undertaken not to interfere with this institutional role for religion at Member state level. In

⁵² See Chapter IV.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ See Chapter II.

1998 the Member States agreed to append a *Declaration on the Status of Churches* to the Amsterdam Treaty.⁵⁶ This Declaration has also been included in the Lisbon Treaty⁵⁷ and provides that:

“The European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States”.⁵⁸

The Union has therefore undertaken to avoid interfering with the status which Member States choose to grant, or not to grant, under national law to individual denominations or to religious organisations as a whole. Thus, EU law recognises that it cannot be used to force a state to reconsider, in general terms, its decision to promote, to some degree, a religiously specific collective identity in public contexts and could not be used, for example, to require a member state to disestablish a state church, or potentially, to restrict the public role exercised by religious institutions in individual Member States. The centrality of the role of the Member States in relation to the demarcation of the public role of religious bodies is underlined by the fact that no definition of “*religion*”, “*religious*”, “*association*” or “*church*” is provided by EU law which, under the terms of the Declaration, would appear to be bound to defer to the definitions of national law in these matters.

This commitment to respecting the pre-existing Market privileges granted to religions by Member States is given concrete form in the Framework Directive which significantly limits the applicability of the prohibitions on direct and indirect discrimination on grounds of religion on this basis. Indeed paragraph 24 of the Directive specifically invoked the Declaration stating:

⁵⁶ *Declaration on the status of churches and non-confessional organisations*, Declaration No.11 to the last act of the Treaty of Amsterdam, Official Journal C 340, 10/11/1997 P. 0133.

⁵⁷ Article 16C, Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ C 306/42 17.12.2007.

⁵⁸ *Declaration on the status of churches and non-confessional organisations*, Declaration No.11 to the last act of the Treaty of Amsterdam, Official Journal C 340, 10/11/1997 P. 0133. The declaration also states “*The European Union equally respects the status of philosophical and non-confessional organisations*” however, such organisations do not have the institutional and legal status held by various denominations under Member States’ laws meaning that the inclusion of this rider could be seen as something of a meaningless gesture designed to lessen the degree to which the Union appeared to be granted special treatment to religious bodies.

*“The European Union in its Declaration No. 11 on the status of churches and of non-confessional organisations, annexed to the Final Act of the Amsterdam Treaty, has explicitly recognised that it respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States and that it equally respects the status of philosophical and non-confessional organisations. With this in view, Member States may lay maintain or lay down specific provisions on genuine legitimate and justified occupational requirements which might be required for carrying out an occupational activity”*⁵⁹

The substantive provisions of the Directive reflect this accommodation of collective institutional religious privilege. In Article 4.2 which deals with “*occupational requirements*”, the Directive provides that Member States may provide that acts which would otherwise be considered discriminatory:

*“shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context within which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.”*⁶⁰

This article provides protection for the internal autonomy of religious organisations by exempting them from the duty not to discriminate, religious practices such as restriction of membership of the clergy to believers or, for those religions for which it is necessary, to members of one gender. Importantly, these privileges are granted not directly to the relevant institutions but instead provide Member States with the right to grant such privileges if they so desire.

However, the exemption granted to Member States by the directive goes beyond the accommodation of genuine occupational requirements. Article 4.2

⁵⁹ n. 26 above.

⁶⁰ *Ibid.*

substantially curtails the application of the key EU law of principle non-discrimination to religious institutions while leaving it to apply with full rigour to other kinds of institutions. The Article states:

“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 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.”⁶¹ (emphasis added).

There are a number of noteworthy features of this article. First, it covers religious bodies alone. However, its scope goes beyond that of mere internal autonomy for churches and extends to “*other public or private organisations the ethos of which is based on religion or belief*”. Thus, the notion of “*occupational requirement*” is deliberately extended in order to ensure that religious bodies exercising public functions can protect the religiously specific nature of the public services they provide by providing scope within EU law to

⁶¹ *Ibid.*

exempt them from otherwise applicable non-discrimination norms. Indeed the directive goes even further in the second paragraph of Article 4.2 which contemplates the extension of the rights of religious institutions as employers to require individual employees to act “*in good faith and loyalty to the organisation’s ethos.*” This approach involves significant curtailment of principles such as the prohibition on discrimination against individuals on grounds of religion and individual freedom from religion in favour of the collective rights of religious bodies. Moreover, it allows religious institutions to exercise these rights in relation to functions that are not specifically religious. Actions which result from a particular ethos are exempt from the normal standard of “*genuine and determining occupational requirement*” applied by Article 4.1 to other kinds of employers. Instead, religious employers are permitted to bring their beliefs into the calculation of what constitutes a “*genuine legitimate and justified occupational requirement*”. Thus, a religious organisation which operates a publicly funded hospital or school is permitted to import its religious rules relating, for example, to appropriate sexual behaviour, into the law by gaining exemptions from prohibitions on discrimination on this ground in order to defend its “*ethos*”. Such an approach supports the protection of a broad collective institutional religious identity in public contexts such as the provision of healthcare or educational services, even when such protection impacts on the rights of individual employees in the private arena (insofar as the conduct of an employee of an organisation with a religious ethos in his or her private life could be seen as failing to act “*in loyalty to organisation’s ethos*”). The fact that a decision to discriminate is religiously motivated is therefore seen as a reason to curtail the applicability of the otherwise generally applicable principle of non-discrimination.

Moreover, the term “*ethos*” is not defined meaning that it could be extended to cover almost any form of otherwise-prohibited discrimination, provided that the discriminatory intent is religious in nature. In addition, while under Article 2.2(b)(i) of the Directive indirect discrimination against an individual on the grounds of his or her religion (or on any of the other prohibited grounds) is permitted only when it can be “*justified by a legitimate aim, and the means of*

achieving that aim appropriate and necessary.⁶² No such limitation is placed on discrimination necessitated by “*an ethos which is based on religion or belief*”. Thus, religiously motivated discrimination alone is not required to justify itself in terms of legitimacy of its aims, its necessity or appropriateness. This appears to place religion outside of the norms governing the public behaviour of institutions in modern liberal societies and to characterise religion as a kind of non-rational, non-modern phenomenon whose actions cannot be regulated or assessed according to generally applicable modern norms without impinging on its essence. In other words, by exempting acts which result from the religious ethos of an organisation from generally applicable principles of non-discrimination while refusing to define what such an ethos may or may not encompass, EU law seems to suggest that religion cannot be expected to account for itself in the rationally structured norms which apply to other organisations in modern liberal democratic societies.

This approach would seem to suggest that EU law recognises religion as an exceptional phenomenon whose communal rights and public role are entitled to broad recognition not accorded to other kinds of bodies. However, although many of the rights provided by the Directive are wide-ranging and specifically religion-related, they do not indicate a broad prioritisation of the rights of religious institutions at the expense of principles such as equal treatment or the protection of individual identity. Instead the provisions of Article 4.2 can be seen as an attempt on the part of the Union to ensure that its embrace of norms such as equal treatment on grounds of religion does not interfere with the established institutional privileges and public role of certain religions in the market in several Member States.

This deference towards *pre-existing* (and therefore largely Christian) religious structures in the market is seen by the fact that the exemptions provided by EU law in respect of religious employers take the form of a right, but not a duty, of Member States to impose a standstill clause maintaining such privileges. Furthermore, although EU law, as noted above, does recognise the promotion

⁶² *Ibid.*

of a particular public status for religion as part of the public good and accommodates religious perspectives in its regulatory framework, it also implicitly characterises such exemptions from the principle of equal treatment as anachronistic and anomalous.

This view of such privileges as anachronistic is shown by the fact that only those national practices which predated the Directive are protected by the exceptions provided by Article 4.2 (“*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*”).⁶³ Thus, while EU law is willing to provide recognition to established Member State practices, it is not willing to require the rolling modification principle of equal treatment in to the future in order to facilitate religious privilege. The status of these privileges as anomalies is seen in several ways. First, the structure of the Directive establishes non-discrimination as a general principle from which religious bodies are then granted an exception. The norm to which the religious privileges are exceptions is therefore that of the liberal principle of equal treatment. Second, although non-religious bodies do not have the public role which would enable them to benefit from the exemptions in Article 4.2 (one does not find for example publicly funded socialist, environmentalist or fascist hospitals or schools at Member State level), nevertheless those who agreed on terms the Directive felt constrained to indicate, at least rhetorically, a commitment to the equality of religious and non-religious beliefs by including in the terms of Article 4.2 “*churches and other public or private organisations the ethos of which is based on religion or belief” (emphasis added). Although the practical impact of this inclusion is limited, it does represent an implicit denial that religion is by its nature entitled to privileged status to which other belief systems are not.*

Furthermore, even the accommodation of pre-existing religious structures is constrained by the religion-limiting elements of the broader dialectic within

⁶³ *Ibid.*

EU law between recognition of religion and a desire to limit the public role of religion in the interests of the balance between religious, cultural and humanist influences which is seen as underlying liberal democratic values. Thus the public role accorded to religion by Article 4.2 is one which is exceptional and which must be reconciled with the wider hegemony of liberal values. Therefore although discriminatory actions motivated by an institution's religious ethos are exempt from the otherwise applicable standards of legitimacy, necessity and appropriateness, the limited and non-hegemonic public role assigned to religion by the Directive is nevertheless underlined by the fact that it specifically requires that the communal rights provided under Article 4.2 be implemented "*taking account of Member States' constitutional provisions and principles, as well as general principles of Community law*" and that they "*should not justify discrimination on another ground.*" This reference to the principles of Member State constitutional law and the general principles of EU law, coupled with the provisions of Article 2.5⁶⁴ subjugating the rights conferred by the Directive to public security, the rights and freedoms of others (which apply equally to the provisions dealing with religious institutions), make it clear that the privileges granted to religion are viewed as exceptions which fall to be justified against the overall constitutional principles (and therefore, to an extent, collective identity) of both the Member States and the Union and can therefore be seen as an element of an overall public order which embodies contrary elements and which is, in the final instance, defined by the secular institutions of the polity. Indeed in the United Kingdom litigation relating to the implementation of the exemptions provided in Article 4.2, the Courts have stressed that, as departures from the principle of equal treatment, they need to be narrowly interpreted.⁶⁵

⁶⁴ Article 2.5 provides: "*This Directive shall be without prejudice to measures laid down by national law which in a democratic society, are necessary for the public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.*" (see n. 39 above.)

⁶⁵ *R. (Amicus and others) v. The Secretary of State for Trade and Industry* [2004] EWHC 860. See also the narrow interpretation given to the exemption in a case where the Bishop of Hereford was found to have breached the rights of a gay applicant for a diocesan social work job when he questioned him about his sexual life in a way in which a heterosexual employee would not have been questioned. See "Bishop Urged to Resign after Diocese Loses Gay Bias

Of course, these principles of national constitutional law are themselves not entirely secular and are likely, particularly in countries where religious institutions are granted a major public role, to reflect the religious identity of the very institutions whose public role they may be invoked to limit. For example Irish legislation implementing Article 4(2) takes a broad approach providing exemptions from the duty not to discriminate to:

“A religious, educational or medical institution which is under the direction or control of a body established for religious purposes or whose objectives include the provision of services in an environment which promotes certain religious values shall not be taken to discriminate against a person [in contravention of the Act] if—

(a) it gives more favourable treatment, on the religion ground, to an employee or a prospective employee over that person where it is reasonable to do so in order to maintain the religious ethos of the institution, or

(b) it takes action which is reasonably necessary to prevent an employee or a prospective employee from undermining the religious ethos of the institution.”⁶⁶

Furthermore, in the Irish case, the country’s heavily Catholic constitution may well prove unlikely to provide significant grounds for restriction of the exemptions in the Directive given that Irish Courts have in the past upheld the dismissal of a teacher in a Catholic school on the grounds that she was unmarried and pregnant.⁶⁷

Thus, the institutional privileges granted by Article 4.2 are subject to certain limitations in the name of respect for balance, liberal democracy and the restrictions on the public role of religion which they entail. However, these limitations are provided by such humanist and secular elements as there may be in the public orders of both the Member States and the EU which may

Case” *The Guardian* Newspaper, 19 July 2007, <http://www.guardian.co.uk/gayrights/story/0,,2129741,00.html> (last visited 6 February 2008).

⁶⁶ Employment Equality Act 1998, section 37(1).

⁶⁷ *Flynn v Power* [1985] IR 648.

themselves bear the influence of particular religious traditions or regard the promotion of an elevated (albeit limited) public status for religion in general as part of the public good.

Accordingly, EU law in this area engages in a rather complex balancing of individual and collective identity rights in relation to religion which is informed and limited by its commitment to an overall balance between religious, cultural and humanist influences over law. While the Union recognises both a right to engage in religion as a market activity and a right to protection for religious and identity and activities within the market, these rights must adapt to established structures, norms and institutional arrangements. While the right not to be penalised for being a believer in a particular faith (and therefore individual religious identity), is protected to a very significant degree, the right to act in accordance with the beliefs in the marketplace can be limited when such actions clash with fundamental market norms such as the pursuit of profit or efficiency. Both the right to hold a religious identity and to act in accordance with such an identity in the market are also limited not only by the requirement that it be balanced with other rights but also by the fundamental interests of the state and the liberal democratic public order. Furthermore, the facilitation of individual religiosity and the attempt by EU law to restrict discrimination on religious grounds is also required to accommodate the pre-existing religious structures in the marketplace thus enabling significant departure from key principles such as equal treatment in order to facilitate the maintenance of the public role of certain religions in individual Member States.

3. Cultural Autonomy, Single Market Law and Religion

There is however a further means through which religion is recognised within the Single Market which also reflects the desire of EU law not to interfere with the established structures underpinning the role of certain religions in the public life of Member States. Not only does the role played by religion in national culture enable it to achieve a degree of recognition in the marketplace, this role is not subject the same degree to the limitations imposed

by the market, the state and liberal values which constrain the rights accorded to religion in other areas of Single Market law.

As discussed in Chapter III, the EU is a pluralist public order committed to respecting the cultural autonomy of its Member States (including the right of each state to define its own notions of public morality). Indeed, as an institution of limited democratic legitimacy, attempts on the part of the EU to interfere with cultural autonomy could have very serious consequences for the stability of the Union. On the other hand as Taylor points out, sustainable political communities are not made up of “*a scratch team of history with nothing more in common than the passenger list of some international flight*”⁶⁸ but require some kind of common identity.⁶⁹ Seen in this light, it is hardly surprising therefore that the Union has repeatedly referred to itself as a “*community of values*” and has attempted to promote the “*common cultural heritage*”⁷⁰ of Europe.

This dual approach of respecting Member State cultural autonomy while promoting a common cultural identity derived from these various national cultures is reflected in Article 151 of the EC Treaty which provides that:

1. “*The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.*”

[...]

4. “*The Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures.*”

3.1 The Definition of Culture in EU Law

⁶⁸ C. Taylor, “Liberal Politics and the Public Sphere”, Discussion Paper 15, (The Centre for the Study of Global Governance, London School of Economics, 1995) 19.

⁶⁹ *Ibid.*

⁷⁰ Article 151, Treaty Establishing the European Community OJ c 325/33 24.12.2002.

According to predominant contemporary perceptions, culture is seen as an ethnographic or anthropological state of affairs covering matters of values and beliefs and the generation of meaning as well as practices relating to matters such as food, leisure rituals or clothing.⁷¹ Such a view of culture is not readily understandable in terms of rational argument or teleology.⁷² Indeed, the existence of a national culture in particular, is seen as requiring no justification in rational terms or in terms of the attainment of greater goals.⁷³

Neither does culture, as a phenomenon which is not goal oriented, fit readily in to the competitive structures of the free market and has in general been protected from the impact of the market in significant ways. As Sassoon noted in relation to postwar Europe:

*“Even after the boost in the ideological strength of the free market following the post-war boom, hardly any political party(...) was willing to support the strict application of the market mechanism in the field of culture.”*⁷⁴

The distinctiveness of individual cultures has also often been seen as a good in itself.⁷⁵ This placing of a high value placed on distinctiveness for its own sake underlines culture’s specific and particularist nature. As a culture is constituted by certain habits, ideas and practices shared by a certain group it defines itself in relation to existing practices and structures which are linked in some way to past practices and structures of the same group. Furthermore, as it is constituted by certain shared distinctive features, culture is inherently particularist as it by definition excludes those who do not share such commonalities.

⁷¹ See F. Inglis, *Culture* (Cambridge UK and Malden MA, USA Polity Press, 2004) 28-29. See also C. Barker “Culture” in *The SAGE Dictionary of Cultural Studies* Sage. (London, New Dehli, Sage, Thousand Oaks, 2004) 45.

⁷² *Ibid.* 12.

⁷³ D. Sassoon *The Culture of the Europeans: From 1800 to the Present*, (Harper Collins, London, 2006) 861. This exemption from standards of rationality is also seen, as noted above, in relation to Article 4(2) of the Framework Directive which notably fails to require that discriminatory decisions justified on the grounds of religious ethos, be justified in terms of rationality or reasonableness.

⁷⁴ *Ibid.* 867.

⁷⁵ See arguments of Von Herder Quoted in Inglis above note 71, 14.

The law of the Single Market has repeatedly adapted to and facilitated these features. The Court of Justice has demonstrated an anthropological and ethnographic understanding of culture. In *Eman v College van Burgenmeester en Wethaiders van den Haaq*,⁷⁶ it was faced with a challenge to Dutch law which required citizens of Dutch overseas territories to reside in the Netherlands for ten years before they could vote in European elections. In reaching its decision the Court was required to consider the attributes of nationhood in relation to Member States. The Court listed the elements of such national identity stating that a nation was “*the totality of individuals linked by the fact of sharing traditions, culture, ethnicity, religion, and so on*”.⁷⁷ The valuing of cultural distinctiveness is also seen in EU law, most notably in Article 151’s commitment to respect “*national and regional diversity*” in cultural matters.

Single Market legislation has repeatedly recognised culture’s non-economic nature and the need to protect a shared cultural heritage from the impact of the free market. The preamble to the 2007 Broadcasting Directive stated that the status of audio visual services as “*cultural services*” and their “*growing importance [...] for education and culture justifies the applications of special rules to these services*”.⁷⁸ It also noted that Article 151(4):

“*requires the Community to take cultural aspects into account in its action under other provisions of the Treaty, in particular in order to respect and to promote the diversity of its cultures.*”⁷⁹

and that the European Parliament had resolved that:

⁷⁶ *Eman v College van Burgenmeester en Wethaiders van den Haaq*, Case C-300/04, [2006] ECR I-08055, para 79.

⁷⁷ *Ibid.*

⁷⁸ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States, OJ L 332/27 18.12.2007, Preamble, para. 3.

⁷⁹ *Ibid.* para. 4.

*"cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value,"*⁸⁰

thus acknowledging both culture's role in generating meaning and identities as well recognising that this important role could be threatened by the regulation of cultural matters in accordance with purely commercial and economic principles.

Religion is, of course a key element of many national cultures and has accordingly been explicitly recognised by EU law as forming part cultural identity not only in the caselaw of the Court of Justice which, as noted above in *Eman* defined culture as *"the totality of individuals linked by the fact of sharing traditions, culture, ethnicity, religion, and so on"*,⁸¹ but also in legislation. For instance, *Council Regulation 3911/92 on the export of cultural goods*, includes *"elements forming an integral part of artistic, historical or religious monuments"* and the *"inventories of ecclesiastical institutions"* in its definition of *"cultural objects."*⁸² *Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State* adopts the same definition.⁸³ These Directives therefore recognise the role of religion in national culture by including church records and religious objects as parts of national heritage the preservation of which the Union acknowledges as a legitimate ground for departure from normal rules of the free market. Thus, the Union attempts to shelter certain elements of national culture, including religion, from the impact of the exercise of its powers to regulate the Single Market. In doing so it recognises a specific religious heritage as part of the collective identity of the state which the institutions of the state are entitled to promote and protect on grounds of cultural autonomy.

EU legislation does not merely see religion as a historical and symbolic element of identity. It has also recognised religion, as an element of a broader

⁸⁰ *Ibid.* para. 5.

⁸¹ n. 76 above.

⁸² Article A 2 of the Annex to Council Regulation 3911/92 of 9 December 1992 on the export of cultural goods OJ L 395.

⁸³ See preamble to Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State OJ L 074, 27/03/1993 P 0074-0079

cultural communal way of life which Member States are entitled to seek to maintain. As noted in Chapter III, this includes the promotion of particular views of “public morality” which may be religiously influenced. It also includes the protection of certain market structures which may also be linked to particular religious traditions. Thus, Directives *94/33EC on the protection of young people at work*⁸⁴ and *93/104/EC concerning certain aspects of the organisation of working time*⁸⁵ both enable Member States to designate Sunday as part of the weekly rest period if they so choose (although in doing so they are required to take account of “*the diversity of cultural, ethnic, religious and other factors*”).⁸⁶ These directives establish exceptions which enable Member States to promote communal practices which result from particular religious practices and to shield such practices from the impact of the a-religious free market orientation of EU law. The Court of Justice, in line with its anthropological definition of culture in *Eman*, has taken a similar approach categorising a decision to ban Sunday trading by a local authority as 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”*⁸⁷

Such an approach sees the regulation of workplace practices in a manner which is influenced by a particular religious tradition as a legitimate exercise of cultural autonomy by Member States whose regulatory approach is to be permitted to promote a particular communal identity for the state. The Christian Sabbath can therefore be legally protected not on the basis of its religious significance *per se*, nor on the basis of a duty to respect individual choice (though this right may be protected by other EU laws) but due to its status as a collective “*regional socio-cultural characteristic*”. The provisions of the Framework Directive relating to indirect discrimination in the

⁸⁴ Directive 94/33EC of 22 June 1994 on the protection of young people at work, OJ L 216.

⁸⁵ See preamble to Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time OJ L 307.

⁸⁶ *Ibid.*

⁸⁷ Case C-145/88 *Torfaen Borough Council v B & Q plc* [1989] ECR 3851.

workplace do place some limits on the degree to which Member States will be free to define general rules which disadvantage adherents of minority religions,⁸⁸ nevertheless, Directives 94/33/EC and 93/104/EC make it clear that EU law does enable Member States to take account of and grant legal privilege to practices linked to certain religious traditions in defining general rules such as those relating to weekly rest periods and to shield such facilitation of religious practices in the marketplace from the operation of commercial market norms.

While such an approach enables certain denominations to use the power of the state to regulate the market to promote their specific religious practices, it does not grant rights to religions as religions but instead empowers the state to define its identity and public culture in such a way as to benefit specific religions should it choose to do so. It therefore enables the promotion of a religiously specific identity in public matters and the embrace of a religious element to the identity of the state at the same time as enabling the refusal to grant a public role to religions which are seen as either culturally or ideologically incompatible with the predominant ideological or cultural norms of this culturally specific state. Certain religions may therefore access significant legal privilege in the communal life. However, they do so not as religion per se but merely as elements of the broader communal identity of the state which is equally free to exclude religious elements from the public order should it choose to do so.

3.1.1 Institutional Arrangements as Culture

The recognition by EU law of the religious element of national cultural identity has extended to cover not merely religious practices but to particular institutional arrangements between certain religions and Member States. In *Council Decision 1982/2006*⁸⁹ which related to the Union's actions in relation to research and technological development, the Council of Ministers called for

⁸⁸ See Section 2.2 above.

⁸⁹ Decision No 1982/2006/EC of the European Parliament and of the Council of 18 December 2006 concerning the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007-2013) OJ 30.12.2006 L412/1.

activities which would promote “*the citizen in the European Union*” including promotion of:

*“respect for Europe’s diversities and commonalities in terms of culture, religions, cultural heritage, institutions and legal systems, history, languages and values as building elements of our European multi-cultural identity and heritage”.*⁹⁰

This recognition of religion as an element of culture and the Council’s placing of religion in the context of notions of “*diversities*”, “*multi-cultural identity*” and “*institutional and legal systems*” is also consistent with the *Declaration on the Status of Churches* appended to the Amsterdam Treaty⁹¹ and included in the Lisbon Treaty⁹² which, as noted above,⁹³ provides that:

*“The European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States”.*⁹⁴

thus linking existing institutional arrangements such as those surrounding the role of certain religions in individual Member States to broader issues around the Union’s obligation to respect Member State identity in the exercise of its powers. Indeed, the fact that the right to grant or to withhold the exemptions from the principle of non-discrimination contained in Article 4.2 of the Framework Directive is given to Member States underlines the fact that these institutional religious privileges can equally be seen as recognition within EU

⁹⁰ *Ibid.* section 8, page 25.

⁹¹ *Declaration on the status of churches and non-confessional organisations*, Declaration No.11 to the last act of the Treaty of Amsterdam, Official Journal C 340, 10/11/1997 P. 0133.

⁹² Article 16C, Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ C 306/42 17.12.2007.

⁹³ n. 58 above.

⁹⁴ *Declaration on the status of churches and non-confessional organisations*, Declaration No.11 to the last act of the Treaty of Amsterdam, Official Journal C 340, 10/11/1997 P. 0133. The declaration also states “*The European Union equally respects the status of philosophical and non-confessional organisations*” however, such organisations do not have the institutional and legal status held by various denominations under Member States’ laws meaning that the inclusion of this rider could be seen as something of a meaningless gesture designed to lessen the degree to which the Union appeared to be granted special treatment to religious bodies.

law of Member State cultural autonomy rather than the institutional autonomy religions.

3.2 Culture as Discrimination between Religions

3.2.1 Culture, Insider Religions and Compatibility with the Public Order

Culture therefore, is seen in EU law both as contemporary habits, ideas, customs and institutional structures which distinguish particular groups, as well as containing important elements from the past which give meaning to such habits, ideas, customs and structures. Thus, it is a dynamic phenomenon in which present interpretations of a collective past are constantly reinvented and renewed. Recognition of a practice or structure as part of national or European culture is also a privileged category in legal terms with the Union permitting the exemption of such cultural phenomena from the standards which its law applies to other matters.⁹⁵ There is no legal definition of the contents of such culture, indeed given its dynamic and non-rational nature, it is difficult to imagine how such a definition could be arrived at. Accordingly, political understandings of what is and is not part of such culture play an important role in determining what will be recognised as coming within this legally privileged category. Nevertheless, despite its influence over law, culture is viewed as in some way separate from the rationalism and ideological nature of political sphere.⁹⁶ The strong historical and cultural role of the mainstream Christian denominations mean that the public role of Christian institutions is likely to be recognised as part of the national cultural identities which EU Single Market law is bound to respect. However, despite the recognition of the promotion of an elevated cultural and social status for

⁹⁵ See for example the manner with which the Framework Directive exempts discriminatory actions motivated by religious ethos from the generally applicable standards of having a legitimate aim and being reasonably necessary (section 2.3.3 above), the exemption of religious slaughtering practices from animal cruelty legislation (section 2.3.1 above) or the deference to religious choices in relation to rest days (section 3.1 above).

⁹⁶ See A. Gramsci, *Selections from the Prison Notebooks*, (New York, International Publishers, 1971) 238 and S. Žižek, *In Defence of Lost Causes*, (London, Verso, 2008) 21 both of whom acknowledge that despite this perception culture is a site of political power and is not ideologically neutral.

religion as an element of the public good and the accommodation of religious perspectives in Single Market law noted above,⁹⁷ such culturally characterised religious privilege is, like other religious privileges in this area, subject to real limitations in the name of the protection of the principle of balance and the liberal democratic values to which such balance is viewed as giving rise. There are strongly humanist and secular elements of the public order of the EU which are themselves seen as part of European culture and identity. As shown in Chapter VI, Enlargement policy, migration legislation and the rulings of the Court of Human Rights make it clear that religious domination of politics and law is incompatible with EU membership. Furthermore, as noted above, the provisions of Article 2.5 do provide limitations on religious privilege in the name of the “*rights and freedoms of others*” and the needs of a “*democratic society*”. However, it is also noticeable that the secular elements of the European public order are imposed to a greater degree against “outsider” religions whose large scale presence in Europe is a more recent phenomenon than against the historically entrenched “insider” religions which play large cultural roles at Member State level. EU law’s culturally saturated view of religion and the view of the influence of cultural norms over law as in some way non-political lead to a situation where “insider” religions are seen in cultural and markedly less ideological and political terms than “outsider” faiths. Such “outsider” religions are viewed, both within the legal and political arenas, much more in terms of their ideological elements and consequently are seen as greater threats to the humanist secular elements of the public order which require limitations on religious influence in the political arena.

Therefore while, in its regulation of employment and gambling, the Union has been willing to carve out exemptions from liberal or market principles to enable Member States to allow religion to continue to play an active public role, in dealings with religions whose large scale presence in Europe is a more recent phenomenon and which have not been subject to the same historical and cultural forces, European officials and institutions have demonstrated a concern that granting similar exemptions to such religions may pose a greater

⁹⁷ See section 2.3.3 above.

threat to the overall principle of balance and therefore to the liberal democratic nature of the public order.⁹⁸ In other words, mainstream Christianity, as a formative influence on European culture, is seen as consistent with the European public order, including its humanist and secular elements, to a degree to which other religions are not. For instance, the Union's approach to the issue of religious offence in advertising contrasts sharply with the attitude taken by some of its institutions to the controversy surrounding the publication of cartoons of the Prophet Mohammed by the Danish newspaper *Jyllands Posten*. In a statement on the issue to the European Parliament Commission President Jose Manuel Barroso stated:

*“Our European society is based on respect for the individual person's life and freedom, equality of rights between men and women, freedom of speech, and a clear distinction between politics and religion. Our point of departure is that as human beings we are free, independent, equal and responsible. We must safeguard these principles. Freedom of speech is part of Europe's values and traditions. Let me be clear. Freedom of speech is not negotiable.”*⁹⁹

These views were repeated almost verbatim by Franco Frattini, a Vice President of the Commission in an interview with the EU's official anti-racism body, the European Monitoring Centre on Racism and Xenophobia (the EUMC). Although the Commissioner did criticise the publication of the cartoons of the Prophet Muhammed in the Danish newspaper *Jyllands Posten* as “*thoughtless and inappropriate*”, he went on to say:

“During the debate, we have recognised that the publication of the cartoons aggrieved many Muslims all over the world, and that it is important to respect

⁹⁸ This argument also appears in relation to France, specifically in O. Roy *Secularism Confronts Islam*, (Columbia University Press, New York 2007).

⁹⁹ Jose Manuel Barroso, President of the European Commission, Statement on the issue of the cartoons of the prophet Muhammed, European Parliament, Strasbourg, 15 February 2006, Reference: SPEECH/06/86 Date: 15/02/2006 (<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/86&format=HTML&aged=1&language=EN&guiLanguage=en> last visited 5 December 2007). See also “The EU and the Cartoons of the Prophet Mohammed” *The European Consortium for Church and State Research Newsletter* Year 7 Issue 7 July 2007 (<http://www.church-state-europe.eu/newsletter/May2007.HTML> (last visited 5 December 2007)).

sensitivities. (...) Equally, we have reaffirmed that our European society is based on the respect for the individual person's life and freedom, equality of rights between men and women, freedom of speech and a clear distinction between politics and religion. We have said clearly and loudly that freedom of expression and freedom of religion are part of Europe's values and traditions, and that they are not negotiable."¹⁰⁰

Later in the same interview he reiterated the same point saying:

*"Let me be clear, even if European societies become multicultural, freedom of speech as an essential part of Europe's values and traditions, is simply not negotiable."*¹⁰¹

In relation to Islam, therefore, the right to freedom of expression was characterised as non-negotiable elements of Europe's values and traditions. Both the Commission President and Commissioner Frattini furthermore seemed to imply that such an approach to freedom of expression was part of Europe's tradition of freedom of religion. The fact that the two statements are so strikingly similar suggests that this view is one which has been agreed collectively to some degree by the Commission. Given that at the time the laws of several Member States and the relevant EU broadcasting legislation (the 1989 Broadcasting Directive),¹⁰² explicitly restricted statements which are offensive to religious beliefs (the changes effected by the 2007 Broadcasting Directive are assessed below), it is difficult to see the Commission's statement as a fair depiction of the true situation. Rather it would seem to be the case that under EU law some legal suppression of religious offensive material is permitted and that freedom of expression can be restricted on this basis. However, such protection is contingent on a perceived acceptance on the part of such religions of the principle of balance between religious, cultural and humanist influences and the non-hegemonic nature of religion's role in such a

¹⁰⁰ See: "Equal Voices" Issue 18 June 2006 published by the European Monitoring Centre on Racism and Xenophobia at page 5.

¹⁰¹ *Ibid.*

¹⁰² Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation of Administrative Action in Member States concerning the pursuit of television broadcasting activities Official Journal L298, 17/10/1989

public order and has been extended to majority, culturally-entrenched religions to a greater degree than to less mainstream (in European terms) religions.¹⁰³ Furthermore, the granting of such privileges to religion is seen as promotion of a goal of promoting respect for culture and identity¹⁰⁴ rather than an attempt to assert claims of religious truth in the political arena or to subjugate liberal principles such as freedom of expression to religious norms as part of a wider ideological aversion to the humanist elements of Europe's public order.

Of course, the statement of individual Commissioners does not necessarily represent the view of the Union as a whole. However, the Commissioners' statements in relation to the *Jyllands Posten* controversy, in the context of the toleration of restrictions on expression considered offensive on religious grounds by the Court of Human Rights and EU Member State laws, represent something more than the conferring of privilege on certain favoured religions. It reveals the assumption, noted above, that the exercise of legal privileges granted to mainstream, Christian denominations will be tempered by a shared approach to liberal enlightenment values such as freedom of expression along with a concern that religions such as Islam, which have been less influenced by the European social, historical and political norms, might, if accorded similar status, make excessive use of such privileges in a way which would be incompatible with democratic society. Such views have not been restricted to the European Commission. As will be shown below, other European institutions also appear to consider that the expectations of Christian religions with long histories in Europe in relation to their public role will have been conditioned by long exposure to the historical and cultural forces which brought about the modern European nation-state.

¹⁰³ The Court of Human Rights, for example, has upheld denomination-specific blasphemy laws *Choudry v UK* App No 17439/90 12 Hum Rts LJ 172 (1991) while Directive 89/552 is likely to benefit well-established majority religions whose services are far more likely to be the subject of television broadcasts than the services of minority or non-mainstream faiths.

¹⁰⁴ The 1989 Broadcasting Directive (*Council Directive 89/552/EEC*¹⁰⁴) focuses on the need to avoid the broadcast of material which is offensive to political beliefs as well as religious ones (Article 12(c) and also defends personal identity more generally by prohibiting advertising which encourages discrimination on grounds of race, sex or nationality (Article 12(b)).

Ferrari has argued that the “*constituent religions*” (Catholic, Protestant and Jewish) which were then present on the European public scene in the were party to “*a new Westfalia*” which was “*genetically inscribed in the crucial hairpin bend of the period after the Second World War*” under which they accepted the political supremacy of the liberal democratic state in return for a “*constitutional secularism that is less and less interpreted as separation and more and more as integration*” which enabled them to take a full part in civil society.¹⁰⁵ Religions such as Islam which were largely absent from the European scene at the time are not seen as having curtailed their political ambitions in this way and are consequently seen as a greater threat to democratic societies. Similarly, in relation to the role of Islam in France, Roy argues that suspicion is generated:

*“by the appearance of new communities of believers who do not feel bound by the compromises laboriously developed over the past century between cathos and laïques.”*¹⁰⁶

While Martin has argued that Christianity was particularly well-suited to adapt to secularism,¹⁰⁷ as Roy points out, the embrace by mainstream Christian religions of the principles of liberal democracy has as often been for reasons of *realpolitik* as for theological reasons. Nevertheless, they appear to be viewed in Europe as being more likely to have reconciled themselves to the limitations on their political and social influence which have emerged in Europe since the Enlightenment and therefore as being more trustworthy recipients of access to legal or political privilege. Roy notes how even political stands of Christian denominations are not seen as threatening to the state. The opposition of the Catholic Church to the policies of many Member States in relation to abortion for instance is not seen as evidence of its threatening

¹⁰⁵ A. Ferrari “Religions, secularity and democracy in Europe: for a new Kelsenian pact” Jean Monnet Working Papers Program NYU School of Law 2005.

¹⁰⁶ O. Roy *Secularism Confronts Islam* (translated by George Holoch) (New York, Columbia University Press, 2007) 6.

¹⁰⁷ See D. Martin, *On Secularisation: Towards a Revised General Theory* (Aldershot, Hampshire, UK, Ashgate, 2005).

nature “because the two parties accept precisely that the debate will not turn into opposition to the political system.”¹⁰⁸

In this vein, the resolution of the Parliamentary Assembly of the Council of Europe in relation to blasphemy laws¹⁰⁹ suggested that “*blasphemy, as an insult to religion, should not be considered a criminal offence*”.¹¹⁰ It noted that several Member States of the Council of Europe Member States do criminalise blasphemy but also significantly that “*Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world*”.¹¹¹ In other words, such laws are dead letters in the mainstream European cultural context but, as the Mohammed Cartoons controversy (which party prompted the resolution in question) showed, these cultural values are not universally shared. As noted above, such ideas would seem to have been influential in the Union’s Enlargement policy¹¹² and are, I would suggest, also to be seen in its attitude to freedom of speech. Whether such assumptions in relation to the attitudes of adherents of traditional European religions are justified is not for this work to assess. It must be noted that satire and ridicule of elements of the Christian religion is far more common in Europe than is similar treatment of Islam in Muslim majority countries. However, on the other hand, although the Catholic Church has been exposed to and participated in the conflicts surrounding the emergence of the modern European state, its attitude to the *Jyllands Posten* controversy demonstrated that it may still be striving for more extensive use of the law to suppress criticism or mockery of religion; Vatican representatives at the United Nations used the controversy generated by the cartoons and subsequent protests to call for legislation to

¹⁰⁸ *Ibid.* 21-22.

¹⁰⁹ Blasphemy, religious insults and hate speech against persons on grounds of their religion, Recommendation 1805 (2007), Assembly debate on 29 June 2007 (27th Sitting) (see [Doc. 11296](#), report of the Committee on Culture, Science and Education, rapporteur: Mrs Hurskainen, [Doc. 11319](#), opinion of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Bartumeu Cassany, and [Doc. 11322](#), opinion of the Committee on Equal Opportunities for Women and Men, rapporteur: Mr Dupraz). Text adopted by the Assembly on 29 June 2007 (27th Sitting). Available at: <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm> (accessed 11 July 2007)

¹¹⁰ *Ibid.* para. 4.

¹¹¹ *Ibid.*

¹¹² See Chapter VI.

suppress expression considered offensive to religion.¹¹³ Yet as Roy notes European States appear to believe that:

*“Christian dogma is compatible with laïcité or that the Church’s political acceptance of laïcité exonerates it from any suspicion about theological content.”*¹¹⁴

While the comments of Commission President Barroso and Commissioner Frattini do not necessarily represent the view of the Union as a whole, they along with the approach of the Council of Europe’s Assembly, provide neat examples of concerns that “outsider” religions present a greater threat to individual rights and European liberal democracy than culturally entrenched Christian denominations. Furthermore, their views are very much in line with the approach of EU institutions in other areas such as the emphasis placed by the Council of Ministers on the need for liberal and secular values to trump religious beliefs in relation to the integration of migrants from outside the EU¹¹⁵ and the Commission’s declaration that “*democratic secularism*” was a condition of Turkey’s accession to the Union, despite the lack of consensus around issues of secularism and church-state relations amongst existing Member States.¹¹⁶ All of these approaches seem to posit a degree of symbiosis between versions of Christianity traditionally dominant in Europe and liberal democracy which enables exemptions from generally applicable liberal norms to be granted to such religions without imperilling the overall liberal democratic nature of the public order. The implication appears to be that a condition of the privileged status granted by EU law religion in public life, is

¹¹³ See “Intervention of the Holy See at the ordinary session of the United Nations Human Rights Council on Religious Freedom, Address of H.E. Msgr. Silvano M. Tomasi, Geneva, 22 March 2007”. Available at:

http://www.vatican.va/roman_curia/secretariat_state/2007/documents/rc_seg-st_20070322_religion_en.html (accessed 1 May 2007).

¹¹⁴ Above Note 98, 22.

¹¹⁵ See Chapter VI.

¹¹⁶ Speech by Olli Rehn, Commission for Enlargement in the Open Debate on Enlargement, European Parliament, Foreign Affairs Committee, Brussels, 7 May 2007, Reference SPEECH/07/287, Date 07/05/2007.

Available at:

<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/287&format=HTML&aged=0&language=EN&guiLanguage=en> (accessed 30 July 2007).

an acceptance by such religions of the legitimacy of humanist perspectives and of the non-hegemonic role of religion in the overall public order. European institutions appear to consider that through a combination of *realpolitik*, historical experience or even theological conviction, mainstream Christian denominations accept this peripheral status and can therefore be trusted to moderate the use they may make of such public privilege. On the other hand religions such as Islam which have not been subject to similar pressures and experiences would appear to be seen as less “trustworthy” in this regard, the suggestion being that its adherents may use such privileges in ways which might impact on the overall principle of balance between religious and humanist influences to a greater degree.

The characterisation of the public role of certain denominations at Member State level as a matter of national culture exacerbates this tendency by characterising the ideological preferences of culturally entrenched religions in respect of gender or sexuality as instances of culture and accommodating them in the marketplace on this basis while categorising similar ideological preferences of non-culturally entrenched faiths as ideological aims incompatible with the principle of balance and with liberal norms of equality. There are indications that existing model of European secularity under which the cultural roots of historically European faiths obscure the ideological elements of such faiths is coming under pressure in a more multicultural context. Klausen’s study of European Muslims involved in public life noted arguments that worries around the role of Islam in Europe were pushing many European states towards a more comprehensive secularism with a resultant reduction in the public role of culturally-entrenched faiths. She quotes a Muslim member of the Bundestag who suggests that:

*“when the history of how Muslims changed Europe will be written [sic], the conclusion will be that they promoted secularism and the separation of church and state.”*¹¹⁷

¹¹⁷ J. Klausen, *The Islamic Challenge: Politics and Religion in Western Europe*, (Oxford University Press, Oxford and New York, 2005) 179.

There is indeed some evidence that such a process may be underway and may lead to a strengthening of the humanist and secular elements of the European public order. In the aftermath of the Mohammed cartoons controversy not only, as noted above, did the Parliamentary Assembly of the Council of Europe call for the abolition of blasphemy laws, EU law broadcasting legislation was amended so as to reduce significantly the restrictions it imposed on free speech in order to prevent criticism of or insults to religion. In the 1989 Broadcasting Directive¹¹⁸ the Union used its powers to regulate television advertising to restrict expression which would be “offensive” to religious beliefs. Article 12(c) of the Directive provided that “*Television advertising shall not be offensive to religious (...) beliefs.*”¹¹⁹ When a revised version of the Directive was under consideration in 2007 this prohibition was initially retained.¹²⁰ Several secularist groups objected to the retention of Article 12(c) on the basis that there was no valid distinction to be drawn between religious and political beliefs and the article in question offered:

*“far too strong a power of suppression of legitimate communication to people who are liable to be ultra-sensitive”*¹²¹

and noting that:

*“the idea of protecting political beliefs is dangerous. Politics is a realm of robust debate and those putting forward political views must be open not just to criticism but to mockery etc.”*¹²²

The final version of the 2007 Directive, while retaining the prohibition on transmitting advertisements during the broadcast of religious ceremonies, deleted Article 12(c)’s prohibition of expression which is offensive to

¹¹⁸ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation of Administrative Action in Member States concerning the pursuit of television broadcasting activities. Official Journal L298, 17.10.1989.

¹¹⁹ *Ibid.*

¹²⁰ *Coordination of certain of the Member States' provisions on television broadcasting* (amend. direct. 89/552/EEC, r gl. 2006/2004/EC), (“Television without Frontiers”) (COD 2005/260).

¹²¹ *Ibid.*

¹²² *Ibid.*

religious beliefs.¹²³ While too much should not be read into a single piece of legislation, it is notable that in deleting article 12(c), European institutions implicitly changed the balance between liberal the principle of free speech and that legal enforcement of respect for religion in a secular direction. Furthermore, in doing so the Union also drew the line at the facilitation of religious identity rights at the point at which such rights could impact on political debate and therefore the autonomy of and equality of participants in, the public sphere. Such an approach further underlines the Union's distinction between the cultural and the political in relation to its facilitation of religion.

3.2.2 Culture and Religions viewed as contrary to the Public Order

The use of culture as a means through which religion can access privileges within in the Single Market has nevertheless created a hierarchy under which the practices of culturally-entrenched religions receive significantly greater protection within the market than those of "outsider" religions which have fewer cultural links to Member States. Furthermore, the rights granted to such "insider" religions are seen as part of the state and its public order and as more cultural and less ideological than outsider religions. Thus, their public privileges are not subject to the same degree of limitation on the grounds the need to protect the liberal democratic state as are those of outsider religions which are seen in more ideological terms.

Although religions such as Islam may have less access to public privileges than culturally entrenched religious denominations, they are, nevertheless recognised as by EU law as religions and are capable of accessing the significant privileges outlined above which are granted to religion in general by EU law in areas such as employment, broadcasting, ritual slaughter. While EU law does seem to attribute theocratic ambitions to such outsider religions to a greater degree than insider religions such as the Catholic Church, Islam is not in general seen as something which is intrinsically threatening to Europe's

¹²³ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 332/27 (18.12.2007).

public order. On the other hand, despite the Union's commitment to the protection of religious freedom and the recognition of respect for religion in general as a part of the public order,¹²⁴ newer religions which lack institutional links to the state or a long history in Europe have been characterised as actively hostile to the public order and have received scant protection of either the public or private elements of their religious freedom in many EU Member States. Such religions have been excluded not merely from the marketplace benefits accorded to dominant, culturally-entrenched religions but from recognition as religions at all.¹²⁵ The Church of Scientology in particular has been the target of significant restriction of religious freedom. The German government denies that Scientology is even a religion¹²⁶ and has been accused of “*harassing and intimidating members of the Church of Scientology merely because of their belonging to an organisation (...) not because of any actions [Scientologists] have taken*” by the US State Department.¹²⁷ Allegations that Scientologists who are civil servants have been disciplined by the Bavarian Government were also noted by the UN Special Rapporteur on Religious Intolerance in 1994.¹²⁸ The authorities in other Member States have also manifested a strong degree of hostility towards newer religions.¹²⁹ Such

¹²⁵ “The New Europe: Sects, Orthodoxy and Discrimination by the State”, paper presented by the Rutherford Institute to the OSCE Human Dimension Seminar on Constitutional and Administrative aspects on the Freedom of Religion, Warsaw 16-19 April 1996 at 4. Quoted in Peter Cumper “The Rights of Religious Minorities: The Legal Regulation of New Religious Movements” in P Cumper and S Wheatley (eds) *Minority Rights in the New Europe*, Martinus Nijhoff Publishers, The Hague London, Boston, 1999 at 171.

¹²⁶ See: *The Scientology Organisation*, paper submitted by the German delegation at the OSCE Seminar on Religious Freedom, Warsaw, 16-19 April, 1996 at 6 where the German Government states: “goals are clearly oriented to economic activity and its claim to be such a denomination or community is simply a pretext.” ... “it is straightforward profit [rather than religion or faith] that lies at the heart of scientology”.

¹²⁷ Peter Cumper “The Rights of Religious Minorities: The Legal Regulation of New Religious Movements” in P Cumper and S Wheatley (eds) *Minority Rights in the New Europe*, Martinus Nijhoff Publishers, The Hague London, Boston, 1999) 171.

¹²⁸ See the report of Abdelfattah Amor, Special Rapporteur on Religious Intolerance to the UN Commission on Human Rights, 22 December 1994, E/CN.4/1995/91.

¹²⁹ See: *Les sectes en France. Rapport fait au nom de la commission d'enquête sur les sectes* (Paris: Les Documents d'information de l'Assemblée Nationale, 1996). For criticism by scholars and by the mainline churches see Massimo Introvigne and J. Gordon Melton (eds.), *Pour en finir avec les sectes. Le débat sur le rapport de la commission parlementaire*, 3rd ed. (Paris: Dervy, 1996) and Chambre des Représentants de Belgique, *Enquête parlementaire visant à élaborer une politique en vue de lutter contre les pratiques illégales des sectes et le danger qu'elles représentent pour la société et pour les personnes, particulièrement les mineurs d'âge*, 2 vols. (Brussels: Chambre des Représentants de Belgique, 1997)

religions are, as Ferrari notes, generally opposed on the basis that they tend to isolate their adherents from society, or as he himself states, because they represent “*centrifugal forces which estrange individuals from the circuits of democratic citizenship*”.¹³⁰ In other words, the failure of adherents of such religions to accept the peripherality of religion in terms of the public life of the state and their individual public duties as citizens, renders the religion a threat to the principle of balance between religion and humanism and therefore a threat to the public order. Indeed criticisms of Scientology by the German authorities explicitly make this point arguing that it “*engenders a marked friend-foe mindset in its members*” which can cause a weakening of links to family and society.¹³¹ These concerns that the individual’s role and responsibilities as citizen may be overwhelmed by their religious beliefs have it must be conceded also been seen in the approach of several Member States to Muslim migrants who have been required, through residence and citizenship exams, to indicate their acceptance of secular, liberal values as a precondition of citizenship or residence rights.¹³² Nevertheless, no Member State has considered subjecting Islam, which despite its status as a minority religion has a long cultural history in Europe, to the kind of restrictions faced by newer religions such as Scientology. Despite the Union’s commitment to upholding religious freedom, EU institutions have failed to intervene or to criticise Member State actions in this area.¹³³ This contrasts strongly with the strongly worded warnings to respect European human rights norms in other areas. The Polish Government for instance was warned by the Commission that it would have to uphold gay rights or risk losing voting rights in the Council of Ministers following the election victory of conservative parties in 2005.¹³⁴

¹³⁰ A. Ferrari, “Religions, secularity and democracy in Europe: for a new Kelsenian pact” *Jean Monnet Papers Series*, NYU School of Law, 2005.

¹³¹ *The Scientology Organisation*, paper submitted by the German delegation at the OSCE Seminar on Religious Freedom, Warsaw, 16-19 April, 1996 quoted in Cumper, note 117 above.

¹³² See Chapter VI.

¹³³ See J. T. Richardson and M. Introvigne ““Brainwashing Theories in European Parliamentary and Administrative Reports on “Cults” and “Sects”” *Journal for the Scientific Study of Religion* 40 (2): 143-168.

¹³⁴ See “EU Warns Poland on Gays”, 26 October 2005, available at: <http://www.365gay.com/newscon05/10/102605poland.htm> (accessed 6 April 2007).

The caselaw of the Court of Justice also indicates that Member States appear to have a relatively free hand to restrict the religious liberty of newer, non-mainstream religions in the context of the Single Market. In contrast to courts in other jurisdictions,¹³⁵ the Court has never attempted to define religion and has appeared willing to ignore the issues of religious freedom raised by the treatment of new religions such as Scientology. In early 1996 the Association Eglise de scientologie de Paris and the Scientology International Reserves Trust asked the French authorities to repeal a French law which enabled the authorities to require that prior authorisation be given to all international financial transactions deemed by the government to represent a “*threat to public policy [and] security*”.¹³⁶ The French government refused to do so and the proceedings taken by the two Scientologist organisations were referred to the Court of Justice for preliminary ruling.¹³⁷ The applicants alleged that the law in question represented an impermissible interference with the free movement of capital. The relevant Treaty provisions permitted Member States to maintain such restrictions as were justified on grounds of “*public policy or public security*”.¹³⁸ The Court noted that:

*“while Member States are still, in principle, free to determine the requirements of public policy and public security in the light of their national needs, those grounds must, in the Community context and, in particular, as derogations from the fundamental principle of free movement of capital, be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the Community institutions.”*¹³⁹

and that:

¹³⁵ See for instance the decisions of the US Supreme Court in *US v Seegar* 380 US 163, 180-1 (1965), *Wisconsin v Yoder*, 406 US 203, 215-216 (1972) and *Thomas v Review Board of the Indiana Employment Security Division*, 450 US 707, 714 (1981). See also the decision of the Australian High Court in *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)*, 154 CLR 120, 173 (1983).

¹³⁶ Article 5-1(I)(1) of Law No. 66-1008 introduced by Law No 96-109 of 14 February 1996 on financial relations with foreign countries in regard to foreign investments in France.

¹³⁷ Case C-54/99 *Association Eglise de scientologie de Paris and Scientology International Reserves Trust v The Prime Minister* ECR [2000] I-01335.

¹³⁸ *Ibid.* para. 16 (the relevant Treaty article is 73d(1)(b)).

¹³⁹ *Ibid.* para. 17.

*“Public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society “.*¹⁴⁰

Such measures were furthermore, subject to a proportionality test with the Member State being required to show that its restrictions were:

*“necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures.”*¹⁴¹

Given that the impugned measures were intended to restrict the ability of the Church of Scientology to function in France, one might have anticipated the issue of religious freedom to have played a prominent role in this case as for instance, potential restrictions on freedom of expression were considered in the Court’s judgment in the ERT case.¹⁴² At the very least one would have expected, given the fundamental nature of the right to religious freedom, that the proportionality argument would have played an important role and that the French authorities would be asked to justify their failure to take less draconian measures in their attempts to prevent the transfer of funds to the French Scientology organisation. The Court did strike down the relevant French legislation. However it did so on the basis that:

*“the essence of the system in question is that prior authorisation is required for every direct foreign investment which is such as to represent a threat to public policy and public security, without any more detailed information. (...) Such lack of precision does not enable individuals to be apprised of the extent of their rights and obligations deriving from Article 73b of the Treaty. That being so, the system established is contrary to the principle of legal certainty.”*¹⁴³

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.* para. 18.

¹⁴² See Chapter IV section 3.

¹⁴³ Above n. 127, para.s 21 and 22.

No mention of the religious aspect of the case appears anywhere in the judgment. Given that, as noted above, the aim of the actions of the Member State authorities were intended to restrict the capacity of a religious organisation to operate in the state in question, the absence of any mention of the issue of religious freedom is remarkable. This lack of concern for the institutional rights of minority religions contrasts strongly with the strong protection afforded to the institutional interests of the more established, Member-State-favoured churches by Single Market law, most notably under the Framework directive. Indeed, in the *Eglise Scientologie* case it appears that the Court of Justice simply did not consider that issues of religious freedom were raised by attempts to impede the functioning of the Church of Scientology. This is despite the fact that, under its ruling in the *ERT* case,¹⁴⁴ measures such as those in this case, which are adopted by Member States in derogation from their duty to respect the four freedoms under EU law, are subject to compliance with EU fundamental rights norms. The relevant fundamental rights clearly include the right to freedom of religion¹⁴⁵ yet the Court failed even to mention religious freedom as a pertinent issue.¹⁴⁶

It is true that the Court of Justice has, on occasion, preferred to side step sensitive topics in its judgments and has, perhaps deliberately, in cases such as *Grogan*¹⁴⁷ which dealt with Irish anti-abortion legislation, tended to base its decisions on less controversial areas of the law. Nevertheless, even in *Grogan*, the Court did acknowledge the wider controversy, albeit only to state that arguments about the moral nature of abortion were irrelevant.¹⁴⁸ In *Eglise Scientologie*, the Court failed to make any such acknowledgement despite the clear status of freedom of religion as a part of EU law. If one considers a scenario under which the Court was required to assess Member State

¹⁴⁴ Case C-260/89 *ERT* [1991] ECR I-2925.

¹⁴⁵ Freedom of religion is recognised in specific articles by both the EU Charter of Fundamental Rights (Article 10) and the European Convention on Human Rights (Article 9).

¹⁴⁶ The ECJ recognised as much in the case of *Prais v Council* in 1975 (see Chapter IV). Furthermore freedom of religion is protected by Article 9 of the ECHR whose role in the determination of the content of the EU's fundamental rights norms was recognised in *Rutili v Ministre de l'Interieur* Case 36/75 [1975] ECR 1219.

¹⁴⁷ Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd. v Stephen Grogan and Others* [1991] ECR I 04685

¹⁴⁸ *Ibid.* para. 20.

legislation which imposed similar financial penalties on the Catholic Church on the basis that the Member State in question felt that it represented a threat to public policy, it is difficult to imagine the case being decided without some mention of the principle of religious freedom or some attempt to seek justification from the member state in question for its characterisation of the church in those terms.¹⁴⁹

The Union's linking of issues of culture and religion would appear therefore to have influenced not only its view of the appropriateness of the role of certain denominations in the public sphere but has also conditioned its view of what can be considered to be religion with knock-on consequences for the protection provided by EU law to both the public and private elements of religious freedom in the Single Market. It is true that in the context of employment discrimination individual adherents to newer religions may be able to access some protection from direct discrimination under the provisions of the Framework Directive.¹⁵⁰ Nevertheless, while religion may be seen as part of the public order and even allowed a certain degree of societal, legal and political influence on this basis, religions such as scientology which are identified as contrary to this public order receive scant protection of their communal or institutional rights. The Union's categorisation of religion as a cultural matter, and its failure to recognize newer religions as religions at all, avoids the necessity of addressing awkward questions posed by its partial and compromised secularity. By recognising religion as a matter of culture and identity the Union allows certain religions to play a privileged role in the within the public order and facilitates the maintenance of culturally and religiously specific element to the identity of the state. However, religion cannot be seen in purely cultural terms. Religion is also ideological and, as the Union has emphasised in other areas, it can also pose a threat to liberal democracy and fundamental rights on this basis. While it may be happy to recognise a religious tradition discouraging work on Sundays as a "*regional*

¹⁴⁹ In *Steymann v Staatssecretaris van Justitie* (note 1 above), the Court similarly ignored the element of religious freedom in coming to its decision that the applicant's work in a religious commune for which he received food and accommodation was "employment" for the purposes of Community law.

¹⁵⁰ See section 2.2 above.

socio-cultural characteristic”, the EU would surely hesitate to defer on a similar basis to a legislative recognition of religious traditions discouraging women from working in the labour market or from venturing outside unaccompanied.

The European Union has declared equal treatment to be one of its fundamental principles. On the face of it, the granting of much broader rights to certain selected faiths would appear to contravene this principle. On the other hand, the rights which some religions may seek may place greater pressure on humanist elements of the European public order, most notably values such as individual autonomy and non-discrimination on grounds of gender or sexuality, than those sought by other religions. Categorisation of religion as a cultural matter and failure to recognise in all circumstances newer religions as religions for the purposes of European guarantees of freedom of religion, allows the Union to avoid the politically unpalatable options of stating explicitly its view that certain religions are more compatible with the European public order than others or of recognizing that its view of the appropriate public role of religion is historically, culturally and politically specific. While the Union may be motivated by a desire to enable Member States to promote and preserve their cultural identities, the results of this policy of accommodation cannot but influence the nature of the Union’s own public order and undermine claims it may make to be religiously neutral.

4. Conclusion

The regulation of religion within the Single Market is influenced by the wider dialectic within EU law between the recognition and facilitation of individual and collective religious identity and the desire to maintain certain limits on religion’s public role required by the principle of balance between religious, cultural and humanist influences which the Union sees as key to its liberal democratic public order. Single Market law approaches the regulation of religion in two different ways, treating it both as an economic choice which can be facilitated by the market and as a phenomenon whose importance to individual and collective identity entitles it to protection from the market. Legislation prohibiting discrimination against individuals on religious grounds

in employment, or protecting ritual slaughter methods in food production, protects individual religious identity in areas beyond the purely private contexts in which the European Convention on Human Rights requires that it be protected. The Union has also recognised collective religious identity and has, in some contexts accorded it a degree of priority over individual identities by curtailing the applicability of the principle of non-discrimination to religious bodies. However, although the Union does recognise the promotion of a particular public status for religion as an element of its own public order and is willing to accommodate religious perspectives in its regulation of the market, the public role allowed to religion under Single Market law is, in accordance with the religion limiting elements of the balance to which the Union is committed in relation to religion, limited by the need to respect the overarching structures of the market and to respect the humanist and cultural influences which are also part of the EU's public order.

Religion also achieves recognition within the Single Market through the confluence of the recognition accorded to its role in national culture and the Union's commitment to deferring to national cultural autonomy. This deference towards national cultural autonomy extends to the facilitation of significant aspects of the public role of individual religions within the public life and public orders of the Member States. In line with the leeway given to states by the European Court of Human Rights,¹⁵¹ EU law has recognised the right of the state to define national collective identity and to promote this identity, which can include the promotion of particular forms of religion, through law. This involves the recognition by EU law, and the accommodation within the regulation of the Single Market, of religion as sets of practices and as a way of life and the facilitation of particular institutional arrangements between certain denominations and Member States which enable religions to play important public roles in areas such as health and education. Such recognition can significantly undermine the potential of the prohibitions on discrimination on grounds of religion recognised elsewhere in EU law to destabilise established religious privileges.

¹⁵¹ See Chapter IV.

Nevertheless, in accordance with the overall approach of EU law to the accommodation of religion in public life, this cultural role is also subject to limitations. Restrictions on grounds of the need to respect the structures of the market are somewhat limited as EU law specifically recognises that cultural matters should not be subordinate to market forces. Nevertheless, the broader approach of EU law of seeking to impose limits on the public role of religion in order to safeguard the principle of balance, does limit the privileges which religion can assert in this way. Limitation on this ground is however, less stringent than that which applies in the case of the rights provided to religion which are not linked to respect for national cultural autonomy. First, there is a degree of circularity as institutional privileges granted by Member States to certain denominations are reflective of the important role played by such denominations in the very public orders which could act as a source of limitation on these privileges. Second, the religion-limiting elements of the EU's dialectical approach to the issue of religious privilege are at least partly based on the notion of religion as a potential ideological threat to the humanist elements of the Union's public order, including key liberal values such as equal treatment, personal autonomy and the autonomy of the public sphere from religious domination. As culture is seen as in some way non-political and non-ideological, the recognition of the public role of "insider" faiths as a cultural matter obscures the ideological element of the exercise of public influence by such denominations, thus limiting the scope for restricting the role of culturally-entrenched religions on the basis of the need to restrict religious influence within the political arena. Indeed, EU institutions have in general seemed to assume a compatibility between culturally entrenched religions such as Roman Catholicism and the humanist elements of the Union's public order, even when the privileges they seek to assert are inconsistent with such humanist values (as in the case of the desire to discriminate against employees whose behaviour is inconsistent with the ethos of their organisations or in relation to the criminalisation of blasphemy). On the other hand, they have been quicker to recognise the ideological elements of outsider religions such as Islam and the threat which these elements can pose to such values. Even more notably, new religions such as Scientology

which have few cultural roots and which are seen as actively contrary to the liberal democratic public order have, in some circumstances, not even been recognised as religions and have received scant protection of their rights in the marketplace. Thus, EU Single Market law can be seen as establishing a hierarchy of privilege within the market which grants culturally entrenched Christian religions at the top and newer religions such as Scientology firmly at the bottom.

Therefore, the overall picture is one in which the right to individual religious identity and the sometimes competing right to collective religious identity are protected by EU law. The balance between these two sets of rights takes place within the context of the Union's commitment to the notion of balance between religious, cultural and humanist influences and of the recognition of the right of states to promote particular forms of religion as an element of their national cultures. Therefore, although individual religious identity is protected on a denomination neutral basis by Single Market law, this protection must adapt itself to predominant market structures and humanist influenced political and constitutional norms. The protection of collective religious identity in the form of religious notions of morality, communal religious practices and institutional religious structures are also accorded protection the Single Market, but largely on the basis of respect for the established religious structures in the marketplace and national cultural autonomy. Thus, it is largely those values, institutions and practices which are compatible with pre-existing practices, values and institutional structures recognised by the Member States, many of which retain close identifications with and promote important public roles for certain Christian denominations, that will be recognised. While it is therefore arguable that the Single Market could be seen as a "Christian Market", such an approach would go too far. It is certainly true that Christian denominations exercise significant religious privilege within Single Market law and that other religions are accorded much lower levels of privilege. However, many of these collective rights (such as exemptions from anti-discrimination legislation), are characterised by EU law, in so far as they clash with the right to individual identity, as anachronistic and anomalous exceptions to established humanist elements of the Union's public order such

as individual autonomy and equal treatment. Furthermore, although there is a reluctance on the part of EU institutions to recognise the ideological nature of the influence over law wielded by culturally entrenched Christian denominations, the continued exercise of privilege by such denominations within the Single Market can be seen as contingent. Acceptance of the notion of balance and the limitation of religious influence and truth claims in the political arena which such balance involves, has been attributed to such insider denominations by EU law and they must therefore avoid seeking a degree of privilege which would be inconsistent with these principles. Indeed, these privileges may, as the changes made in relation to religiously offensive speech in the 2007 Broadcasting Directive indicate, be vulnerable to rising fears in relation to the role of religion in public life and perceived threats to humanist elements of Europe's public order which may result in more vigilant policing of the limitations on religious influence over the political sphere and a consequent restriction of the cultural influence of insider religions over law.

Chapter VI: Competing Identities Limiting Religious Influence within the EU Legal Order

1. Introduction

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1. Introduction

Previous chapters have shown the significant facilitation of both religious identities and religious influence over law that is provided by the public order of the EU. However they have also indicated that such facilitation is limited by the humanist elements of that public order. In particular the accommodation of the promotion of collective religious morality, by virtue of the status of such morality as a part of national cultural identity, has been limited by the need respect the autonomy of the public sphere from religious domination and the principle of individual private autonomy. This chapter shows how, in its

dealings with outsiders, the Union has both identified the principles of respect for public and private autonomy as fundamental elements of its public order, thereby highlighting the distinction between its acceptance of religious influence over law as a matter of culture, and its desire to restrict religious attempts to influence the political and legal arenas. It does so by analysing the Union's approach to the issues of Enlargement and the integration of immigrants.

The chapter demonstrates how the Union has regarded attempts to legislate for religious morality to an extent which is overly intrusive in relation to personal private autonomy, as incompatible with a desire to join the EU. The Union has identified a desire to subordinate the political sphere to religious influence or to legislate on explicitly religious grounds as similarly inconsistent with EU membership. Therefore, provided the principle of individual autonomy is respected, religious influence over law and promotion of religious morality by religious means as an element of cultural identity, are permitted by EU law. On the other hand, religion's ability to achieve the same ends in its capacity as a political or ideological movement, is considerably more restricted. Such a restriction on religion's political role impacts more heavily on outsider religions whose demands cannot as readily be characterised as elements of national culture.

This is seen particularly strongly in relation to the Union's dealings with Turkey and the influence of Islam whose influence, the chapter shows, has not been seen as part of European culture or as compatible with the Union's public order to the same degree as mainstream Christian denominations such as Roman Catholicism or Orthodox Christianity. The Union's hostility to religious attempts to influence law in ways which cannot be characterised as promotion of national culture is also seen in relation to the issue of the integration of immigrants. The chapter demonstrates how EU law has facilitated measures requiring migrants to indicate their acceptance of principles such as gender-equality and individual autonomy in private matters even when such principles, which are rejected by many mainstream European faiths, contradict their religious beliefs. The Union has therefore sanctioned

far-reaching state interference in the private sphere of beliefs and opinions in order to protect the general principle of the autonomy of the individual in the private sphere.

These measures indicate that the Union regards limitations on the influence of religion over law and politics as fundamental elements of its public order. Limitations in relation to the protection of individual autonomy are applied to all religions. Within the political arena, the Union's hostility to theocracy similarly restricts recourse to religious arguments of all faiths. However, by requiring outsider religions to forswear any desire to achieve through political means the degree of influence over law which the Union's deference to Member State identity rights enables insider religions to retain on grounds of cultural autonomy, the approach of EU law raises significant issues of discrimination and implicitly identifies particular religious traditions, most notably Islam, as especially threatening to its public order.

2. Enlargement and Religion in the Public Sphere

As has been shown in Chapter II, since the Reformation and Enlightenment, relations between religious institutions and those of the state have been characterised in Europe by a gradual decline in religious power and the establishment a legal order in which humanist notions such as individual autonomy and the authority of secular political institutions achieved major influence.¹ Although the balance between religious, humanist and cultural influences which the EU sees as having emerged from European history enables religious institutions continue to play a role in law-making, including at EU level, religious bodies have much lower political impact than in other areas of the world. The limited nature of religious influence over legal norms in Europe is shown by the fact that, even in relation to the law governing what Casanova terms "*lifeworld*" issues (namely those relating to the beginning and end of life, family and sexuality) which are the highest political priority for mainstream European religious² and which embodied the largely conservative approach of the Abrahamic religions to a significant degree as recently as 60

¹ See Chapter II.

² *Ibid.*

years ago, liberal norms of personal autonomy, privacy and equality have become increasingly dominant. This approach embodies the arguably Western notion of religion as a largely private matter with limited influence over law and political life and contrasts markedly with the situation in much of the rest of the world,³ most notably the Islamic world⁴ where religious principles continue to exercise a much greater influence over certain areas of law.⁵

2.1 Enlargement, Conditionality and Human Rights

Even prior to 1989, it was clear that the criteria for inclusion in the European Community amounted to more than adoption of a market economy. As far back as the 1960s, the Community was stressing the importance of respect for democratic principles and human rights in assessing Greece's application for membership.⁶ From the 1970s onwards Human Rights achieved an increasing prominence in the Community.⁷ Following the collapse of Communism, the speed with which newly liberated countries sought membership of the Union, meant that European institutions were required to make explicit the criteria which would be used to determine who could and could not become a member of the Community. The resulting "Copenhagen Criteria" were outlined in that city at the European Council of June 1993.

³ P. Berger and G. Weigel (eds.) *The Decsecularization of the Modern World: Resurgent Religion and Modern Politics* (Grand Rapids Michigan, Erdemans Publishing Company and Public Policy Center, 1999). See also P. Norris and R. Inglehart *Sacred and Secular: Religion and Politics Worldwide* (Cambridge, Cambridge University Press, 2004).

⁴ *Ibid.* Norris and Inglehart. See also B. Lewis *The Crisis of Islam: Holy War and Unholy Terror* (London, Phoenix, 2003) 14-17.

⁵ Private consensual sexual behaviour continues to be regulated by the criminal law to a significant extent in many largely Muslim societies. For instance, homosexuality remains a crime in the largely Muslim countries of Afghanistan, Algeria, Bahrain, Bangladesh, Iran, Iraq, Lebanon, Libya, Malaysia, Mauritania, Morocco, Oman, Pakistan, Somalia, the United Arab Emirates and Yemen see <http://www.gaylawnet.com/> (last visited 14 December 2006). In relation to the greater level of religiosity found in societies outside Europe see P. Norris and R. Inglehart *Sacred and Secular: Religion and Politics Worldwide*, n.4 above.

⁶ For an account of how democracy and human rights moved from implicit to explicit conditions of EU membership see H. Sjurson 'Enlargement in Perspective: The EU's Quest for Identity'. Paper given as part of the European Institute Research Seminar series, at the London School of Economics 24 May 2006

⁷ See the 1977 Tripartite Declaration on Human Rights of the Parliament, Council and Commission (OJ C 103, 27. 4. 1977, 5 April 1977). This process continued into the 1990s with direct reference being made to the European Convention on Human Rights in the Amsterdam Treaty and with the adoption of a Bill of Rights for the EU in the Nice Treaty. See also the series of rulings the ECJ in cases such as *Stauder v City of Ulm-Sozialamt*, [1969] ECR 419 through to *ERT Case* [1991] ECR I 2925.

The criteria specified that:

*“Membership requires that candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and, protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union.”*⁸

The act of setting out such explicitly political criteria represented a recognition by Member States that a state which was economically eminently suitable for membership would not be permitted to join the Community unless it showed a commitment to certain ideals (democracy, protection of human rights etc.) adherence to which was deemed necessary for the proper functioning of the European polity. These criteria have played a prominent role, not only in the enlargement process but also in the Union’s view of itself. The Maastricht Treaty gave this process constitutional status stating in Article 6 that the Union was *“founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law”* and pledging in the same article to respect the principles of the European Convention on Human Rights. The Copenhagen Criteria themselves have, according to both academic commentators and the Commission itself, also been turned into principles of European constitutional law.⁹ The European Commission is charged with assessing whether candidate countries meet these conditions. It makes a recommendation to the Member States who must unanimously decide to open negotiations.¹⁰ Formal accession negotiations have never been opened by the

⁸ See European Council in Copenhagen, 21-22 June 1993, Conclusions of the Presidency, SN 180/1/93 REV 1. Available at http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/ec/72921.pdf (last visited 20 June 2008).

⁹ See the Commission Regular Report of 2002 COM(2002)700 which states ‘since the entry into force of the Treaty of Amsterdam in May 1999, these [political] requirements have been enshrined as constitutional principles in the Treaty on European Union.’ See also C. Hillion ‘The Copenhagen Criteria and Their Progeny’ in C. Hillion (ed.) *European Enlargement: A Legal Approach* (Hart Publishing, Oxford, 2004), where it is argued that ‘The novelty of the Copenhagen criteria also lies in the way the obligations they embody have been enforced: their gradual ‘constitutionalisation’ has resulted in them being applied more strictly’ (3) and that ‘One may suggest that the political conditionality has been implicit in the Community legal order from the very outset, and made progressively more explicit’ (4).

¹⁰ Article 49 Consolidated Versions of the Treaty on European Union and the Treaty Establishing the European Community, OJ C321 E/35, 29.12.2006. See “How Does a

Union with a state that has not been judged by the Commission to be in compliance with the Copenhagen Criteria.

The criteria themselves do not, on their face, appear to mandate any particular approach to management of the relationship between religion, law and politics. However, at certain moments in the accession process, the EU has indicated that adherence to the criteria and the liberal democratic values underlying them require limitations on the role played by religion and religious norms in lawmaking.

2.2 Romania and Homosexuality

In 1996 the Romanian legislature amended Article 200 of the Penal Code to criminalise private homosexual acts and outlawed membership of gay and lesbian organisations. This law was strongly supported by the Romanian Orthodox Church with a former foreign minister identifying ecclesiastical opposition as a key factor behind the retention of the law.¹¹ The Romanian government attempted to repeal article 200 in 1998 but this was rejected by parliament after a vociferous campaign by the Orthodox Church. Church officials referred to gays and lesbians as “*the ultimate enemy*” and “*Satan’s army*” and accused legislators of being “*scared by the huge European pressures*”.¹² Again in September 2000 the Orthodox Church intervened forcefully appealing to legislators not to amend Article 200. Acknowledging the European dimension to the controversy Archbishop Nifon stated that he did not “*believe that European Union integration hinges on the [homosexuality] issue*”.¹³

Country Join the EU” European Commission, DG Enlargement, available at: http://ec.europa.eu/enlargement/questions_and_answers/background_en.htm last accessed 12 September 2007).

¹¹ See ‘It’s Still No Breeze for Gays, Even Diplomatic Ones’ in *The New York Times*, 17 October 2001. Note in particular the comments of former Foreign Minister Mircea Geoana attributing key importance to the Orthodox Church in the debate over decriminalisation.

¹² See Florian Buhuceanu ‘ACCEPT Country Report on the Status of LGBT’ at <http://www.globalgayz.com/romania-news.html> (last visited 14 June 2006).

¹³ See ‘Romanian Orthodox Church Denounces Homosexuality’ Reuters News Agency 13 September 2000 at www.ilga.org (last visited 14 June 2006).

At the time of the announcement of the Copenhagen Criteria in June 1993, the European Union had no competence in relation to sexual orientation discrimination.¹⁴ Neither had criminalisation of homosexuality been raised as an issue in any previous enlargement.¹⁵ However, notwithstanding this lack of internal competence or consensus amongst member states,¹⁶ the Union embraced the repeal of laws criminalising homosexual activity as part of the accession process. Importantly however, it did so on the grounds that such laws constituted an interference with the human rights of gays and lesbians. In its 1998 report on Romania's progress towards accession, the Commission noted that a proposal to reform the penal code which included a proposal to decriminalise homosexuality had been rejected by the Romanian parliament¹⁷ and that there were "*reports of inhuman and degrading treatment by the police, especially of Roma, children, homosexuals and prisoners*" by the police. These references were made in the section of the report dedicated to "*Human Rights and the Protection of Minorities*" and not in the section which covered "*Democracy and the Rule of Law*" indicating that the Commission saw the matter as a question of interference with the fundamental rights of a minority rather than a structural question relating to the role of religious norms in legislation.

The European Parliament was also particularly active on this issue. In September 1998 it adopted a resolution calling on Romania and Cyprus to abolish their anti-homosexual legislation. The resolution "*deplored the refusal of the Romanian Chamber of Deputies to adopt a reform bill presented by the Government to repeal all anti-homosexual legislation provided by Article 200*

¹⁴ The Amsterdam Treaty of 1997 did widen the scope of the Union's ability to legislate against discrimination to include discrimination on grounds of sexual orientation but such legislation required unanimity in the Council and was not enacted until late in the year 2000 (Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303)).

¹⁵ Homosexual acts were illegal in Scotland and Northern Ireland at the time of the accession of the United Kingdom in 1973. A similar prohibition was part of the law of the Republic of Ireland until July 1993.

¹⁶ *Ibid.*

¹⁷ See Section 1.2 of *Regular Report from the Commission on Romania's Progress towards Accession* at http://ec.europa.eu/enlargement/archives/pdf/key_documents/1998/romania_en.pdf (last visited 24 October 2006).

of the penal code.”¹⁸ It also specifically linked the issue of decriminalisation to the question of accession expressing the Parliament’s refusal to “give its consent to the accession of any country that, through its legislation of policies, violates the human rights of lesbians and gay men”.¹⁹ The Parliament repeated these sentiments in subsequent resolutions in March 2000 and July 2001.²⁰ In the summer of 2001 the Parliament’s Intergroup for Lesbian and Gay Rights held a hearing on the situation of lesbians and gays in the accession states. These activities contributed to an increase in pressure on the Commission to take a more proactive stand in relation to the issue of homosexuality and enlargement.²¹ Like the Commission, the Parliament’s resolutions were phrased solely in terms of the implications of criminalisation for the human rights of gays and lesbians and did not address the controversy’s religious aspects.

In remarks to the European Parliament in September 2001, the Commissioner responsible for Enlargement, Gunter Verheugen, stated that he wished to make it clear that the Commission would continue to press for human rights and non-discrimination in enlargement negotiations, including on grounds of sexual orientation.²² The Commissioner’s representative to the Intergroup on Gay and Lesbian Rights further stressed that there would be “no flexibility” on this issue on the part of the Commission. Commissioner Verheugen was even more explicit in a letter sent to the International Lesbian and Gay Association in which he stated the applicant states would be expected to accept the elimination of discrimination based upon sexual orientation and that “Equal treatment of gays and lesbians is a basic principle of the European Union”.²³ In December 2001 faced with the determined opposition of the Orthodox Church and conscious of its failure to push decriminalisation

¹⁸ Res. B4- 0824 en 0852/98 adopted 17 September 1998. See in particular para. F.

¹⁹ *Ibid.* para. J.

²⁰ Res. A5- 0223/2001, adopted 5 July 2001, para.s 80 and 83 and Res. A5- 0050/2000 adopted 16 March 2000, para.s 59 and 60.

²¹ See J. Sweibel ‘Gay and Lesbian Rights and EU Enlargement’ at <http://www.eumap.org/journal/features/2002/april02/gaylesbeu> (last visited 14 June 2006).

²² Quoted in Sweibel *ibid.*

²³ See *International News Report* ‘Anti-Gay Nations May Not Join European Union’ R. Wockner, 31 July 2001 at <http://gaytoday.badpuppy.com/garchive/world/073101wo.htm> (last visited 14 June 2006).

through the parliament on the previous occasion, the Romanian government resorted to an emergency ordinance to amend Article 200 and finally decriminalised homosexuality.²⁴

European institutions had therefore succeeded in forcing the Romanian authorities to remove from their statute book a legal measure which enshrined in the criminal law religiously-influenced norms against homosexuality. They had done so in the face of a vociferous and popular campaign by religious leaders of Romania's state church in favour of retaining the law. However, despite this, the Union saw the issue not as a primarily religious one but as a question of human and minority rights. It was to take a somewhat different approach in its dealings with Turkey.

2.3 Turkey and Adultery

2.3.1 Background: Turkey and EU Membership

The issue of Turkish accession is perhaps the most controversial aspect of the entire enlargement process. Although its first attempt to join what was then the EEC predate the collapse of Communism in Europe by almost thirty years,²⁵ Turkey has seen the traditionally Christian countries of Central and Eastern Europe all overtake it in the race to join the movement. The prospect of Turkish accession has proved far more unpopular with European electorates than any previous enlargement and has triggered the opposition of many prominent figures in European politics such as Valéry Giscard d'Estaing, Jacques Delors and Angela Merkel.²⁶ Much of this opposition has centred on

²⁴ Government Emergency Ordinance no. 89/2001. The Romanian also introduced an ordinance to enact a law prohibiting discrimination (including discrimination on grounds of sexual orientation) (Government Ordinance no. 137/2000). For details see <http://www.accept-romania.ro/news.htm> entry of 1 February 2002 (last visited 14 June 2006).

²⁵ Turkey made its first application to join the EEC in 1959 and concluded an association agreement with the Community in 1963. It applied for membership again in 1987. It was not recognised as a candidate for membership until 1999. Membership negotiations are still ongoing. See "Turkey and EU" from the website of the Turkish Embassy in Washington DC available at: http://www.turkishembassy.org/index.php?option=com_content&task=view&id=57&Itemid=235#ankara (accessed 17 January 2007). Although the membership applications of the formerly communist states of Eastern and Central Europe all post dated Turkey's 1987 application some 10 such states had become Member States by January 2007.

²⁶ See for instance the opposition of Valéry Giscard d'Estaing stated in an interview with *Le Monde* newspaper "Pour ou contre l'adhésion de la Turquie à l'union européenne" *Le Monde*, 9 November 2002. Available at <http://www.medeia.be/index.html?page=&lang=&doc=1298>

the idea of the cultural incompatibility of Turkey as a large state with an overwhelmingly Muslim population.

While Turkey is officially a secular republic, religion plays a far larger role in its political life than in most EU member states.²⁷ Furthermore, the state is heavily involved in managing religious affairs and while this state of affairs is not unusual in Europe, the Turkish state does impose certain restrictions on the practice of religions other than Sunni Islam which have been highlighted by groups opposed to its admission to the EU.²⁸ Others have rejected the notion of Turkish membership outright on the grounds that Europe's identity and foundations are Christian and that a mainly Muslim country is therefore, by its nature an inappropriate candidate for membership of the EU.²⁹ Nevertheless, since the rejection of its membership bid of April 1987 on human rights and economic grounds, Turkey has made strenuous efforts to bring its human rights standards up to the levels required by the EU. Restrictions on the use of the Kurdish language have been removed, the death penalty has been abolished as part of wide ranging legal and administrative reforms. This has allowed Turkey to make significant progress along the road to membership. A customs union with the EU was agreed in 1995 and in 1999 the Tampere European Council declared that Turkey was a candidate for membership. The Copenhagen European Council in late 2002 declared that negotiations with Turkey could begin if the December 2004 European Council decided (on the

(accessed 6 October 2006). Sjursen has noted how member states described the accession of the historically Christian states of Eastern and Central Europe as a process of "rejoining" a from which they had been artificially separated Europe while Turkish accession is seen as "joining" a Europe of which it had not previously been part .

²⁷ See A. Carkoglu and B. Rubin (eds.) *Religion and Politics in Turkey*, (London, Routledge, 2006).

²⁸ The Conference of European Churches (the CEC-KEK) which represents Protestant churches in Europe issued a report which was highly critical of restrictions on religious freedom in Turkey and which questioned whether Turkey could acceded to the Union in the absence of fundamental change in the situation in this regard. See *The Relation of the European Union and Turkey from the Viewpoint of the Christian Churches*, Discussion Paper, February 2004. Available at <http://www.cec-kek.org/pdf/EUandTurkey.pdf> (accessed 6 October 2006).

²⁹ Then Cardinal Ratzinger (now Pope Benedict XVI) argued that Turkey always represented another continent throughout history" and that accession by Turkey would be "a mistake". See "Ratzinger Asserts Vatican Stand against Turkey EU Membership" *Catholic News* 16 August 2004, available at: <http://www.cathnews.com/news/408/96.php> (accessed 6 October 2006).

basis of a report from the European Commission) that Turkey fulfilled the Copenhagen Criteria.³⁰

2.3.2 The Criminalisation of Adultery and the EU Response

In the autumn of 2004, the Turkish government presented its overhaul of the criminal code to parliament as part of its attempt to win the backing of the European Council (scheduled for later that year) for the opening of accession negotiations with the EU. Despite the limited nature of EU competence in this area, it was the criminal law as it related to the “*lifeworld*” issues of gender and sexuality, that received the greatest attention.³¹ Indeed as *Deutsche Welle* newspaper noted “*with pressure from the EU, women’s rights groups were able to outlaw rape in marriages and get old fashioned terms like “chastity”, “honor” and “moral” out of criminal law books.*”³² However, despite the fact that the Turkish Constitutional Court had abolished the crime of adultery in 1996 (on the grounds that it unfairly penalised women),³³ the 2004 reforms proposed that it be recriminalised. Prime Minister Erdoğan defended the measure on the grounds that the law represented a “*vital step*” towards preserving the family and “*human honour*”. He further argued that although Turkey wanted to join the European Union it did not have to adopt its “*imperfect*” Western morals.”³⁴ Although several EU member states retained laws criminalising adultery until relatively recently³⁵ the European Commission reacted strongly to this proposal with the Commission’s official spokesman stating that the proposal “*certainly cast doubts on the direction of Turkey’s reform efforts and would risk complicating Turkey’s European*

³⁰ See Copenhagen European Council 12 and 13 December 2002, Presidency Conclusions 15917/02 at page 5 para. 19. Available http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/73842.pdf (accessed 6 November 2006).

³¹ See ‘Turkey Changes Laws to Meet EU Standards’ *Deutsche Welle* 1 September 2004 at <http://www.dw-world.de/dw/article/0,2144,1314044,00.html> (last visited 19 June 2006).

³² *Ibid.*

³³ See ‘Verheugen Warns Turkey on Adultery Law’ *Deutsche Welle* 10 September 2004 at <http://dw-world.de/dw/article/0,1564,1324102,00.html> (last visited 19 June 2006).

³⁴ Quoted in ‘Turkey’s Adultery Ban Splits the Nation’ *The Age* newspaper, 7 September 2004 at <http://www.theage.com.au/articles/2004/09/06/1094322712399.html?from=storylhs> accessed on 19 June 2006.

³⁵ Irish law criminalised adultery until 1981, French law until 1975 and Austrian law until 1997. In the United States, 23 states have similar laws. See K Gajendra Singh “EU-Turkish Engagement: A Must for Stability of the Region”, South Asia Analysis Group Papers <http://www.saag.org/papers12/paper1127.html> accessed on 19 June 2006.

prospects.”³⁶ Certain Member States also expressed reservations with UK Foreign Secretary Jack Straw asserting that the proposal “*would create difficulties for Turkey*”.³⁷ However, although Turkish women’s groups had been amongst those most strongly opposed to the law,³⁸ the EU response did not stress the impact of the law on women or ideas of gender equality. Instead the response of Günther Verheugen, the Commissioner with responsibility for the Enlargement process, consisted of an uncompromising attack on the proposal which focused on the need to separate religious from legal norms. The Commissioner described the proposal to criminalise adultery as “*a joke*” and that he “[*could*] *not understand how a measure like this could be considered at such a time*” While stating that he was not “*defending adultery*” Verheugen went on to note that it was important that “*Turkey should not give the impression...that it is introducing Islamic elements into its legal system while engaged in a great project such as the EU*”.³⁹ The Commissioner further characterised such a move a completely out of step with Europe and as unacceptable to the EU.⁴⁰

According to Commissioner Verheugen therefore, the feature of the proposed change which was most unacceptable to the EU was not the repression of adultery. After all, the EU has very limited competence in this area and the Commissioner made it clear that he was “*not defending adultery*”. What was out of step with European values and inconsistent with membership of the EU was to attempt to introduce “*Islamic elements*” into the legal system. Faced with this reaction from the Commission and certain Member States, the proposal was withdrawn within a matter of days.⁴¹

³⁶ See “Adultery Fault Line with EU” *Turkish Daily News*, 18 September 2004, available at: <http://www.turkishdailynews.com.tr/archives.php?id=37707> (last visited 18 October 2006).

³⁷ See “Turkey Backs off Plan to Outlaw Adultery”, Associated Press, 14 September 2004, available at: <http://www.wwrn.org/article.php?id=7164&sec=36&con=54> (last visited 18 October 2006).

³⁸ See ‘Verheugen Warns Turkey on Adultery Law’ *Deutsche Welle* 10 September 2004 at <http://dw-world.de/dw/article/0,1564,1324102,00.html> (last visited 19 June 2006).

³⁹ *Ibid.*

⁴⁰ See ‘EU Warns Turkey Not to Recriminalize Adultery’ D. Wes Rist, 8 March 2005 <http://jurist.law.pitt.edu/paperchase/2005/03/eu-warns-turkey-not-to-recriminalize.php> (last visited 19 June 2006).

⁴¹ n. 32 above.

2.4 A Difference in Approach?

Therefore, the manner in which the Copenhagen Criteria have been interpreted by the institutions of the EU means that a measure of respect for a private zone of autonomy within which the individual citizen is free to define his or her own sexual existence without being forced to adhere to religious norms, is seen as a fundamental requirement of accession to the Union. As the EU's own practice of consulting extensively with religious organisations shows, this does not require a complete removal of religious influence from the lawmaking process. However, such influence has, in line the principle of balance between religious, cultural and humanist influences, to be constrained by the principles of personal autonomy, political pluralism and the respect for privacy rights. Accordingly, while religious bodies are welcome to contribute to the law-making process, religious claims to a monopoly on truth cannot be accommodated nor can religious dogma cannot be the sole determinant of the content of such laws, particularly when the demands of such dogma are inconsistent with the autonomy of the individual to determine his or her identity and private conduct. As the case studies show, these principles were applied to both Romania and Turkey as part of the Enlargement process.⁴²

However, there remain striking differences in the approaches adopted by the Commission in dealing with the two countries. In both cases religious elements in societies with single dominant religion (Sunni Islam and Orthodox Christianity respectively) had succeeded in pressuring the government into attempting to enact (or to retain) legislation giving religiously-influenced norms, which condemned certain private sexual behaviour, the force of law. In the Romanian case, the EU viewed this solely as a question of the human right of gays and lesbians to be left alone by the state. In the Turkish case however, the proposal was seen not as a human rights issue or even an issue of privacy, but was instead framed as an issue of the general relationship between religion

⁴² This analysis is further supported by the limited caselaw in this area. In EFTA Surveillance Authority Decision 336/94 it was held that restrictions imposed by Member States on slot-machines could not be justified solely on religious grounds, while the rulings of the Court of Justice in Case C-260/04 *Commission v Italy* [2007] ECR I-07083 (para. 35) and Case C-65/05 *Commission v Greece* make it clear that 'religious factors' can be taken into account by Member States exercising their margin of appreciation in regulating gambling. See the discussion in Chapter IV, Section Four.

and the law. While the problem with the Romanian law was that it violated gay and lesbian human rights, the problem with the Turkish legislation was, according to the Commission, that it appeared to be “*introducing Islamic elements into its legal system*”. Despite the leading role played by the Orthodox Church in the campaign to retain Article 200, Romania was never warned against introducing “Orthodox elements” into its legal system and the systemic relationship between the Orthodox Church and the Romanian State was assumed to be in accordance with acceptable norms. The attempt to criminalise adultery on the other hand was viewed as emblematic of a wider potentially systemic problem in the relationship between the law and religion in the Turkish State, the inclusion of Islamic elements in the legal system being seen as incompatible with the balance between religion, humanism and culture which characterises the public order of the EU. A right to be free from religiously inspired rules was upheld for “sinners” in both Romania and Turkey to be sure, but the manner in which EU framed its demands that this right be respected differed markedly.

2.4.1 Sexual Orientation Discrimination : A European Norm?

The difference in approach may of course be explained by the fact that homosexuality had already been the subject of debate within the Union for some years during which time a distinctive EU norm in relation to gay and lesbian rights had emerged. Although the Union’s acquisition of substantive powers in relation to sexual orientation discrimination post dated the controversy in relation to Romania, its institutions had since the early 1980s, been debating and formulating an approach to the issue of gay and lesbian rights which by 1998 had, in certain respects, become relatively liberal. By 1998, outright criminalisation had been condemned by the European Court of Human Rights, the European Parliament had voiced its support for gay and lesbian equality on several occasions and the treaties had been amended so as to enable the Union to legislate in this area.⁴³ There had been no similar

⁴³ In relation to the acquisition of powers in relation to sexual orientation discrimination see n.15 above. In relation to the activity of the European Parliament on this issue see “Resolution on Human Rights in the Soviet Union” of 17 May 1983 [OJ No. C 161 20.6.1983 pp 67 et seq., Document 1-1358/83, Rapporteur: Vera Squarcialupi at the request of the Committee on Social Affairs and Employment 13 February 1984. Available at:

process in relation to the laws regulating adultery which had not been the subject of any debate at EU level nor had adulterers either organised themselves or been recognised as a minority group to the same degree as gays and lesbians. It is therefore arguable that the Union's characterisation of the Romanian issue solely in terms of its human rights implications arose from the fact that the Union had already established a common approach on this issue under which discrimination against gays and lesbians was seen as a violation of human rights. This certainly chimes with Commissioner Verheugen's statement in the summer of 2001 that "*equal treatment of gays and lesbians is a basic principle of the European Union*".⁴⁴ As Romania was seeking to join a polity which increasingly defined itself as a "Community of Values", a failure to decriminalise homosexuality could be seen as a failure to adhere to the common value that the Union had established in relation to sexual orientation. An attempt to criminalise adultery did not involve such an established value and was therefore approached in a different manner from that of the criminalisation of homosexuality.

However, despite the Commissioner's assertion that equal treatment of homosexuals was "*a basic value of the European Union*", in the period in which the Commission was dealing with the issue of Article 200 of the Romanian Penal Code, acceptance of the principle of equal treatment of gays and lesbians in the EU was in fact quite limited. In its 1997 decision in *Grant v South West Trains*,⁴⁵ the ECJ specifically ruled that discrimination on grounds of sexual orientation was not prohibited on by the treaty and that gay and lesbian equality was not a fundamental principle of EU law. Indeed at paragraph 31 of the judgment the Court specifically stated:

"While the European Parliament, as Ms Grant observes, has indeed declared that it deplors all forms of discrimination based on an individual's sexual

<http://www.xs4all.nl/~heinv/hearingintergroup/documents/squarcialupi.pdf> (accessed 23 October 2006), and A3-0028/94 *Resolution on Equal Rights for Homosexuals and Lesbians in the EC*, 8 February 1994.

⁴⁴ n.24 above.

⁴⁵ [1998] ICR 449, Case C-249/96 *Grant v South West Trains* [1998] ECR I-00621.

orientation, it is nevertheless the case that the Community has not as yet adopted rules providing for such equivalence.”

While the Treaty of Amsterdam did provide the Union with competence to legislate in this area, it could only do so on the basis of unanimity and did not do so until late 2000. Even when it did finally act in this area, the EU deferred significantly to religious sensibilities giving religious bodies (including institutions such as healthcare and educational establishments whose purposes were not exclusively religious) scope to continue to discriminate on the basis of sexual orientation in the Employment Directive⁴⁶ and allowing member states not to recognise civil partnerships between same sex couples in the 2004 Citizenship Directive.⁴⁷ A norm relating to the equality of sexual orientations had not therefore, been definitively embraced by the Union at the time during which it pressured Romania to decriminalise homosexuality and was, at most, emergent and subject to continuing dispute.

2.4.2 Religion in General or Islam?

A second explanation for the difference of approach outlined above is that the EU saw, in the attempt by the Turkish authorities to criminalise adultery, something very different from that which they saw in the efforts of Romanian leaders to retain the ban on homosexuality. More specifically, the criminalisation of adultery may have been seen as representative of a wider desire to increase the influence of religion over the Turkish state to a degree which might threaten the balance between religious, humanist and cultural influences which underpins the liberal democratic nature of the Union's public order. The idea that a failure to maintain religious influence within certain bounds represents a potential threat to the Union's balance-based public order and to the liberal democratic system, is seen in other contexts. As will be shown below, both the law of the EU and of certain member states in relation to migration as well as the caselaw of the European Court of Human Rights

⁴⁶ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Article 4(2).

⁴⁷ Directive of the European Parliament and the Council 2004/58/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, articles 2(2)(b) and 3(2)(b).

suggest that the according to religious precepts of an overly influential role in public life represents a threat to the the public order, to the rights of others to freedom from religion and to the liberal democratic system of government in general. Furthermore, in both cases the law has been applied in such a way that suggest that this threat is seen as being present to a greater degree in Islam as opposed to other religions.

Turkey is, of course, a secular republic, however many in Turkey perceive the state's secularity to be under threat.⁴⁸ The army in particular has intervened on several occasions to "defend" the country's secular system from what it sees as the threat of Islamic movements. The Turkish government which sought to criminalise adultery was made of the AKP or Justice and Development Party. The AKP is the successor to the Welfare Party (*Refah Partisi*) a party which had been forced out of office in 1997 by the Turkish military and later banned for threatening the secular nature of the Turkish republic. The AKP's Islamist past has meant that although it now portrays itself as a moderate conservative party which supports democratic principles, it has been viewed with extreme suspicion both by Turkey's secular elite and by some EU governments. This past may have caused the EU (along with many in Turkey) to view the attempt to criminalise adultery as part of a wider strategy aimed at increasing the role of Islam in public life in Turkey and undermining the secular nature of the state. Of course, as shown in Chapter II, many current EU member states are far from officially secular with official state churches and close institutional and financial links between certain denominations being a prominent feature of the European constitutional landscape. Moreover, explicitly Christian parties are part of governments in several EU states such as Germany, Sweden and the Netherlands. However, EU law has tended to see in Islam, a greater threat to the notion of balance and therefore to the liberal democratic order, than other religions. Seen in this way, Commissioner Verheugen's statement that Turkey could not afford to give the impression that it was "*introducing Islamic elements into its legal system*" can be seen as reflecting a view on the part of the EU that an Islamically-influenced legal system might fail to respect

⁴⁸ See for example E. Özbudun *Contemporary Turkish Politics: Challenges to Democratic Consolidation*, (London, Lynne Rienner Publishers, 2000).

the degree of public and private autonomy by respect for the humanist elements of the Union's liberal democratic public order.

The compatibility of Islam with Western liberal democracy has been the subject of much debate in recent years. The role played in Islam by the sharia with its interventionist and conservative approach to issues of gender and sexuality, has been a prominent aspect of discussion in this area. Those who assert that a degree of incompatibility exists have focused on two main aspects. The first relates to the low level of secularisation experienced by largely Muslim societies. In a protracted process beginning with the Enlightenment and Reformation, the major Christian denominations in Europe, either voluntarily or after protracted conflict, have accepted significant limitations on the scope of religious authority in relation to matters of public policy.⁴⁹ Lewis argues that this process has not occurred to the same extent in the Muslim majority countries (which also provide many of Europe's immigrants). Such societies are he believes "*still profoundly Muslim, in a way and in a sense that most Christian countries are no longer Christian*".⁵⁰ The second (and possibly related) argument asserts that, mainstream Islamic theology is incompatible with the secular state and the notions of personal autonomy and distinction between public and private morality underlying the liberal democratic project. Joffé argues that "*representative democracy is seen as alien to Islam*"⁵¹ and that "*the holistic nature of normative Islamic society does not accept the premise of the socio-political atomism that is implicit in the democratic and capitalist projects*".⁵² Gabriel notes that "*in modern western societies many matters that are considered as more liable to moral scrutiny and judgment rather than legal investigation*" but that such matters "*are still within the ambit of law in Islamic societies*".⁵³ In a similar vein Lewis and Roy argue that "*few [...] practising Muslims are interested in a*

⁴⁹ n. 2 above.

⁵⁰ B. Lewis *The Crisis of Islam: Holy War and Unholy Terror* (Phoenix, London 2003) 14.

⁵¹ G. Joffé 'Democracy, Islam and the Cult of Modernism' in *Democratization* Vol.4, No.3, Autumn 1997, 134. Quoted in P. van Ham *European Integration and the Postmodern Condition* (London and New York, Routledge, 2001) 211.

⁵² *Ibid.*

⁵³ T. Gabriel 'Is Islam against the West?' in R. Geaves, T. Gabriel, Y. Haddad and J. Idleman Smith (eds.) *Islam and the West Post 9/11* (Ashgate, Aldershot, Hants, England, 2004) 15).

privatized faith as it is experienced by most Western Europeans and sometimes advanced as a model for Muslims".⁵⁴ All of these views of point to a potential incompatibility between Islam, as a faith based on an all-encompassing system of holy law (the Sharia) and the liberal democratic system acceptance of which is a prerequisite for EU membership. Indeed, the influential Muslim theologian Tariq Ramadan has argued that to require European Muslims to adopt the Western "privatised" approach to religion effectively requires Muslims to "*be Muslim without Islam*" and that such an approach is based on "*a widespread suspicion that to be too much a Muslim means not to be really and completely integrated into the Western way of life and its values*".⁵⁵ However, the idea that Islam is in some way incompatible with the modern state or liberal democracy is, notwithstanding its high levels of popular support,⁵⁶ highly controversial, with many commentators arguing that such views are tainted with orientalism and even racism.⁵⁷

The truth or otherwise of these assertions is not for this work to address. What is important for our purposes is to note that the campaign by the Romanian Orthodox Church to retain legislation criminalising homosexuality was viewed as an individual instance of interference by the state (albeit largely at the behest of religious authorities) with the privacy rights of a minority group. The

⁵⁴ J.S.Fetzer and J.C. Soper *Muslims and the State in Britain France and Germany* (Cambridge, Cambridge University Press, 2005) at 150 summarising the arguments made by Lewis in *Islam and the West*, Oxford University Press, Oxford, 1993 at 173-186 and O. Roy, *Vers un islam européen*, (Paris, Editions Esprit, 1999) 89-103.

⁵⁵ T. Ramadan, '*To Be a European Muslim*' (Leicester, Islamic Foundation, 1999) 184-185.

⁵⁶ A poll of French citizens done for the newspaper *Le Monde* in November 1989 showed that two thirds of French people had a very negative view of Islam, see S. Allievi, 'Relations between Religions' in B. Maréchal (ed.) *Muslims in the Enlarged Europe: Religion and Society*, (Leiden, Koninklijke Brill NV, 2003) at 323). A 1990 poll showed that 65% of Swedes had a negative view of Islam and 88% considered it to be incompatible with the democratic system (*Ibid.*). A Pew Research poll in 2006 interviewed some 14,000 people in 13 countries across the world. European respondents showed very high levels of hostility towards and fear of, Islam amongst Europeans. Relations between Muslims and Westerners were seen as 'generally bad' by 70% of Germans, 66% of French people, 61% of Spaniards and 61% of British people. Clear majorities in Germany, Britain and Spain also agreed that there was 'a conflict between being a devout Muslim and living in a modern society' (although a large majority of French respondents rejected this view). High percentages of respondent in all countries stated that they considered Muslims to be fanatical (Spain 83%, Germany 78%, France 50% and Britain 48%) (See 'The Great Divide: How Westerners and Muslims View Each Other' *Pew Research Foundation*. Released 22 June 2006 available at: <http://pewglobal.org/reports/display.php?ReportID=253>) (last visited 22 November 2006).

⁵⁷ See R. Geaves, 'Who Defines Moderate Islam 'post' September 11?' in R. Geaves, T. Gabriel, Y. Haddad and J. Idelman Smith (eds.) *Islam and the West Post 9/11* (Aldershot, Hants, England, Ashgate, 2004) at 66).

attempt by the formerly-Islamist governing party of Turkey to enact legislation criminalising adultery was, on the other hand, seen as representative of a far wider and more serious issue; the maintenance of the more general limitations on Islamic influence over the legal system which were seen as necessary for Turkey to remain eligible for EU membership (the introduction of “*Islamic elements*” into the Turkish legal system being seen by the Commission as *ipso facto* inconsistent with its desire to join the Union). This objection to “*Islamic elements*” contrasts strikingly with the acceptance by the Union of the specific invocation of Christian influence in the constitutions of EU member states such as Ireland, Germany and Spain whose constitutions, to varying degrees name the Christian God as a source of fundamental values or authority. Indeed, the government of the German State of Baden-Württemberg justified the retention of crucifixes in state schools, despite a ban on the Muslim headscarf on the grounds that human rights, democracy and German constitutional values derive from Christian norms.⁵⁸ If anything, the difference in treatment has become even clearer in more recent times. In May 2007, Enlargement Commissioner Olli Rehn, while discussing Turkish membership in the European Parliament, stated that “*if a country wants to become a member of the EU, it needs to respect the principle of democratic secularism, part of our Copenhagen Criteria*” thus identifying secularism as a part of the Criteria for the first time.⁵⁹ The Commissioner’s statement was supported by Dr Hannes Swoboda MEP, a Vice-President of the Party of European Socialists, despite his acknowledgement that there was no common approach to secularism amongst existing Member States and that the Union had not stressed secularism in previous Enlargements.⁶⁰ Thus the approach of the EU to these issues seems, at least in part, to be influenced by notions of a potential incompatibility between Islam and the values of liberal democracy which view

⁵⁸ J. Klausen, *The Islamic Challenge: Politics and Religion in Western Europe*, (Oxford University Press, Oxford and New York, 2005 at 177. Irish abortion law is also arguably heavily influenced by Catholic teaching in this matter.

⁵⁹ Olli Rehn, European Commissioner for Enlargement, Open Debate on Enlargement, European Parliament Foreign Affairs Committee, Brussels, 7 May 2007. Reference SPEECH/07/287 Date 07/05/2007, at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/287&format=HTML&aged=0&language=EN&guiLanguage=en> (last visited 1 August 2007).

⁶⁰ See ‘Democratic Secularism is a Copenhagen Criterion for Turkey’, *Turkish Daily News*, 10 May 2007, at <http://www.turkishdailynews.com.tr/article.php?newsid=72817> (last visited 1 August 2007).

Islamic influence over the legal system as more threatening to the European public order than Christian influence.

2.4.3 The European Convention on Human Rights, Islam and Militant Democracy

The perception the Islam and the role of sharia therein are inconsistent with the notions of personal autonomy, privacy and pluralism which underlie the European public order is also to be seen in several of the decisions of the European Court of Human Rights whose decisions, while not part of EU law, are very influential in determining the scope the Union's human rights obligations.⁶¹ Most notably, in the case of *Refah Partisi and Others v Turkey*⁶² the Grand Chamber of the Strasbourg court upheld the dissolution of the predecessor of Erdoğan's AKP by the Turkish Constitutional Court on the grounds that it was a "*centre of activities contrary to the principle of secularism*".⁶³ The European court's judgment reflected a profound fear of the political nature of Islam and made, in debates in which euphemism normally plays such a dominant role, strikingly clear pronouncements in relation to the role of sharia and Muslim values in European political life.

In 1995 the *Refah Partisi* won the largest number of votes (22%) in the Turkish general election. It subsequently entered into a coalition government with another party and its leader became prime minister. In May 1997 the Principal State Counsel at the Court of Cassation brought proceedings in the Turkish Constitutional Court to dissolve Refah, on the grounds that it was "*a centre of activities against the principle of secularism*". The application cited acts and speeches by leaders and members of the party which were alleged to show that the party aimed to introduce sharia law and to a theocratic regime both of which were said to be incompatible with a democratic society.⁶⁴

⁶¹ See Case C-540/03 *Parliament v Council* [2006] ECR I -05769.

⁶² (2003) 37 EHRR 1.

⁶³ Para. 12 *ibid.*

⁶⁴ See the summary of the facts of the case available at the Court's website at: <http://www.echr.coe.int/Eng/Press/2003/feb/RefahPartisiGCjudgmenteng.htm> (last visited 14 December 2006).

Refah applied to the European Commission on Human Rights in May 1998. In July 2001 the a Chamber of the Court held by four votes to three that there had been no violation of Article 11 of the Convention (which protects the right of freedom of association) and (unanimously) that no separate claim arose under Articles 9, 10, 14, 17 or 18).⁶⁵ Refah's lawyers appealed this decision to the Grand Chamber of the Court which unanimously held that the actions and speeches which formed the basis of the decision of the Turkish Court showed the party to have a long term aim of setting up a regime based on sharia. It further found that such a system would be incompatible with the democratic values of the Convention and that the opportunities which Refah had to put such policies into practice meant that its dissolution could be considered to have met a "*pressing social need*" and to have been within the restricted margin of appreciation afforded to Contracting States in this area.

The degree to which the Court viewed an Islamist political orientation as threatening to the European political order is shown by the fact that on the three previous occasions on which the Strasbourg institutions had been called upon to rule on the compatibility of the decision by the Turkish authorities to dissolve a political party (all non-religious parties), it found a violation of the Convention in each case.⁶⁶ Furthermore, it noted that the dissolution of a political party was "*a drastic measure*" and that such severe measures could be used "*only in the most serious cases*".⁶⁷ The Court noted that democracy was the "*only political model contemplated by the Convention and, accordingly, the only one compatible with it*".⁶⁸ It also appears to endorse a secular model of church-state relations in stating that had "*frequently emphasized the State's role as the neutral and impartial organizer of the exercise of various religions*" and characterizing the adoption of such a role as

⁶⁵ *Ibid.*

⁶⁶ See C. Moe 'Refah Partisi and Others v Turkey' *The International Journal of Not-for-Profit Law*, Vol.6 Issue 1, September 2003 at http://www.icnl.org/journal/vol6iss1/rel_moeprint.htm. The cases in question are: *United Communist Party of Turkey and Others v. Turkey* (133/1996/752/951), January 30, 1998; *Socialist Party and Others v. Turkey* (20/1997/804/1007), May 25, 1998; *Freedom and Democracy Party (ÖZDEP) v. Turkey* (Application no. 23885/94), December 8, 1999.

⁶⁷ n. 62 above, para. 133.

⁶⁸ *Ibid.* para. 86.

a “*duty*”.⁶⁹ Recalling previous decisions in which it had upheld limitations on the right to wear an Islamic headscarf in certain contexts⁷⁰ the Court declared that in the Turkish context:

*“the Convention institutions have expressed the view that the principle of secularism is certainly one of the fundamental principles of the State which are in harmony with the rule of law and respect for human rights and democracy. An attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one’s religion.”*⁷¹

Accordingly, the political order upheld by the Convention may require religions to adapt and submit to secular government in order to be covered by the protection provided to religion under the Convention system. The Convention instruments may therefore refuse even to recognise as religious (for the purposes of the protection of article 9), a movement which, like some interpretations of Islam, does not recognise the legitimacy (and supremacy within its sphere) of the secular state. In taking such an approach the Court seems to adopt a singularly “Western” view of religion. As Esposito points out, the notion of religion as a system of personal beliefs as opposed to a comprehensive phenomenon “*integral to politics and society*” is both “*modern and Western in origins*”.⁷² Moreover, he argues that such a view of religion causes secularist Westerners to view religions which do not adhere to such an approach, as “*incomprehensible, irrational, extremist, threatening*”.⁷³

The Court went on to declare explicitly its belief in the incompatibility of sharia with democracy and human rights noting in particular the issues of the pluralism of the public sphere and protection of private autonomy which have

⁶⁹ *Ibid.* para. 91.

⁷⁰ *Dahlab v Switzerland*, Application 42393/98, Judgment of 15 February 2001 and *Yanasik v. Turkey*, no. 14254/89, Commission decision of January 6, 1993, DR 74.

⁷¹ n. 62 above, para. 93.

⁷² J. Esposito, *The Islamic Threat: Myth or Reality* 2002, Oxford University Press, Oxford and New York, at 199.

⁷³ *Ibid.* 198.

also been a key element of the Union's approach to religion's participation in the public sphere.⁷⁴ It stated that:

“considers that sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it. [...] It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts. In the Court's view, a political party whose actions seem to be aimed at introducing sharia in a State party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention.” (emphasis added)⁷⁵

The Court further endorsed its essentially “Western” definition of religion and its view of limitations on the public role thereof as a necessary part of the European public order stating that “*freedom of religion, including the freedom to manifest one's religion by worship and observance, is primarily a matter of individual conscience,*” and that “*the sphere of individual conscience is quite different from the field of private law.*”⁷⁶

The degree to which Islamic religious law is identified as incompatible with the European public order envisioned by the Convention is striking. While elements of the Court's reasoning could be applied to religion in general, it is nevertheless clear that the danger to the democratic human rights based order protected by the Convention was seen by the Court as coming from Islam. The judgment specifically problematises sharia and notes specific elements of Islamic law which it sees as incompatible with the ideals of the Convention.

⁷⁴ See section 3 of Chapter III.

⁷⁵ n. 63 above, para. 123.

⁷⁶ *Ibid.* at para. 128.

⁷⁷ In particular the judgment highlights the manner in which it believe sharia violates the key Convention norms of privacy and personal autonomy.

Not only was sharia considered to be incompatible with European values, as Boyle points out the Refah party was dissolved not for actual attempts to introduce Islamic law “*but rather because of what it might do, should it, at some point in the future, become the outright party in power*”.⁷⁸ The threat posed by a party which was thought to harbour concealed desires to introduce Islamic was therefore considered by the Court to be such that the “drastic” measure of dissolving a political party which had won a plurality of votes in the most recent election was justified. In upholding the dissolution of a political party which had recently won a fair and free election on the grounds that its Islamic ideology represented a threat to the democratic order, the Court of Human Rights not only appeared to embrace the highly controversial notion of “*militant democracy*”⁷⁹ but also appeared to give implicit credence to the notion of the existence of a degree of incompatibility between political religion in general, political Islam in particular, and the liberal democratic norms on which the Council of Europe is based. The views of the Court of Human Rights on these questions has the potential to influence the approach of EU institutions to these matters to a significant degree.⁸⁰ Furthermore, the Strasbourg Court’s approach in this area is strikingly similar to the approach adopted by the EU to the adultery issue where the legislation in question was viewed as being representative of broader but concealed desires to introduce “*Islamic elements*” into the Turkish legal system.

⁷⁷ While explicitly Christian political parties in existing Member States may, due to the influence of their religious texts, have an similarly conservative approach to sexual morality, a desire to introduce biblical sexual morality into the secular law has not been attributed to them by European institutions.

⁷⁸ K. Boyle ‘Human Rights, Religion and Democracy: The Refah Party Case’, *Essex Human Rights Review*, Vol 1. No. 1.

⁷⁹ See for instance: P. Macklem, ‘Militant democracy, legal pluralism and the paradox of self-determination’ *International Journal of Constitutional Law* IJCL 2006, 4(3), 488-516, P. Harvey ‘Militant Democracy and the European Convention on Human Rights’ *European Law Review* E.L. Rev. 2004, 29(3), 407-420, M. Kocak and E. Orucu, ‘Dissolution of Political Parties in the Name of Democracy: Cases from Turkey and the European Court of Human Rights’ *European Public Law*, E.P.L. 2003, 9(3), 399-423.

⁸⁰ n.62 above.

The notion that EU law perceives Islam to be potentially threatening towards public and private autonomy and therefore to the balance between religion and humanism which characterises the Union's public order, does not rely merely on extrapolation from the approach of the institutions of the Council of Europe. It is also to be seen in developments in the law of migration both of the Union itself of individual EU member states which are the subject of the second set of case studies in this chapter.

3. Migration, Integration and the EU

This section will assess the development of the law of the EU governing migration and the rights of long-term residents from non-EU countries. It will show how EU law in these areas increasingly demands explicit reassurances from individual migrants that they are personally committed to the limitations on religious influence inherent in the Union's commitment to the notion of balance between religious, cultural and humanist influences which it regards as underpinning its liberal democratic values. The section will then examine similar developments in the law governing citizenship and the integration of migrants at Member State level (with particular emphasis on developments in the Netherlands and Germany) in order to show how emerging trends at this level have influenced and been facilitated by the Union's law in this area.

In recent years, the question of the integration of immigrant communities has been particularly prominent in European politics. Much of this concern has centred on a perceived incompatibility between what are seen as the liberal democratic values of Europe societies and the more intensely religious and conservative values adhered to by some Muslim immigrant communities. Kofeman has noted that the increased diversity of migration to Europe has led European states to create more complex systems which differentiate between migrants on the basis of their mode of entry and legal status and which grant differential access to civil, economic and social rights on this basis.⁸¹ This section argues that, in addition to distinguishing between migrants on the basis of mode of entry and legal status, the migration law of both the EU and several

⁸¹ E. Kofmann, 'Contemporary European migrations: civic stratification and citizenship' (2002) 21 *Political Geography* 1035.

Member States, has begun to differentiate between migrants on the basis of their adherence to certain values, with those who fail to hold certain “European” values being disfavoured in relation to the granting of citizenship and residence rights. Furthermore, just as the Commission sought a wider and more exacting standard of a-religiosity from Muslim Turkey than from Christian Romania, the migration laws of Member States and the EU have been applied to a greater degree to Muslim than non-Muslim immigrants.

This section further argues that one of the key “European” values in question is the acceptance of limitations on the public role of religion and of the legitimacy of a zone of individual freedom from religion and its prescriptive norms. It suggests that just as the EU saw a threat to “European norms” in the attempt by the Turkish government to criminalise adultery, EU migration and integration law, having been influenced by emerging trends at Member State level, sees the failure of *individual* immigrants to adhere to such norms (particularly in relation to gender and sexuality where the views of devout Muslims diverge most notably from those of indigenous Europeans), as a threat to public and private autonomy and therefore to the humanist elements of the Union’s public order. Under this view, the holding of private views becomes a matter of concern for the state which justifies the penalisation of the holding of such beliefs through withholding benefits such as citizenship or residence rights. Thus, in order to protect the privacy rights of personal autonomy of individual citizens guaranteed by its public order, the Union either interferes with, or facilitates efforts by individual Member States to interfere with, the private views and conduct of individual (generally Muslim) immigrants. This making of “windows into men’s souls” problematises not merely Islam, but individual Muslims who are required to demonstrate a personal commitment to certain ideas and whose private views and behaviour become public matters. Like the European Court of Human Rights’ embrace of the notion of “*militant democracy*” such an approach has the potential to undermine, to a degree, the private/public distinction which such laws are intended to protect.

3.1 The Union’s “Basic Principles on Integration”

In recent times both migration policy statements and substantive Community legislation in this area have increasingly emphasised the need for migrants to adopt “European values” and have viewed a failure to do so as a threat to European societies. Although less explicit than the measures adopted in the Netherlands and parts of Germany (which will be discussed below), the output of Community institutions has nevertheless, in common with the emerging law in these Member States, clearly seen a failure to restrict the public role of religious principles (particularly in relation to gender and sexuality) as a potentially threatening phenomenon which can be the subject of regulation in the interests of disempowered groups and the development of European society as a whole.

In 2003 the Commission began to monitor the integration policies of member states through its “*Synthesis Report on National Integration Policies*”.⁸² The European Council of June 2003 added to this development by stressing the need to for the “issue of the smooth integration of legal migrants into EU societies [to be] further examined and enhanced”.⁸³ The conclusions also stated that:

*“integration policies should be understood as a continuous, two-way process based on mutual rights and corresponding obligations of legally residing third-country nationals and the host societies.”*⁸⁴

However, the later development of this principle of mutuality indicates that dilution of the principle of freedom from religion is not what the Union had in mind in endorsing such mutuality. The conclusions of the European Council held at Brussels on the 4th and 5th of November 2004 called for the establishment of “*the common basic principles underlying a coherent European framework on integration*” which were to “*form the foundation for*

⁸² ‘2003 Synthesis Report on National Integration Policies’ Annex 1 to ‘*Communication on Immigration, Integration and Employment*’ Com (2003) 336 Final , p44 et seq. (section 2.6).

⁸³ Council of the European Union, Thessaloniki European Council, 19 and 20 June 2003, Presidency Conclusions 11638/03 POLGEN 55 at para. 9.

⁸⁴ *Ibid.*

future initiatives in the EU".⁸⁵ It then set out a list of basic minimum elements of such principles. This basic minimum restated the conclusion of the Thessaloniki Council that integration was "*a continuous, two-way process*" and stressed "*frequent interaction and intercultural dialogue*".⁸⁶ However, it supplemented these rather multicultural principles with an assertion that integration also "*implies respect for the basic values of the European Union and fundamental human rights*".⁸⁷ The delineation of the precise relationship between these potentially conflicting principles was left for the Justice and Home Affairs Council.

The Justice and Home Affairs Council met later the same month and, in a meeting chaired by Dutch Immigration Minister Rita Verdonk, agreed on the content of the "*Common Basic Principles for Immigrant Integration in the European Union*".⁸⁸ The principles noted that "*the precise integration measures a society chooses to implement should be determined by individual Member States*" but also stated the Union's interest in the issue, noting that "*The failure of an individual Member State to develop and implement a successful integration policy can have in different ways adverse implications for other Member States and the European Union*".⁸⁹ In a theme that would become more explicit in the principles themselves, it stated that such failure "*can have impact [sic] on the economy and the participation at [sic] the labour market, it can undermine respect for human rights (...) and it can breed alienation and tensions within society*".⁹⁰ The invocation of the state interest in the promotion of respect for human rights as a relevant factor in relation to immigrant integration is particularly relevant as the this interest provides the basis for the interference with the religious beliefs and cultural practices of individual immigrants which the principles on integration authorise.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ See: Press Release, 2618th Council Meeting, Justice and Home Affairs, Brussels, 19 November 2004. 14615/04 (Presse 321).

⁸⁹ *Ibid.* 16.

⁹⁰ *Ibid.*

The principles themselves clearly endorse a model of immigrant integration under which the religious beliefs of immigrants, in so far as they appear inconsistent with the notion of balance in relation to religion and may thereby affect the freedom from religion of others or cause the evolution of society in undesirable directions, are seen as a legitimate subject of state regulation. The first principle restates the conclusion of the Thessaloniki and Brussels Council's that "*Integration is a dynamic, two-way process of mutual accommodation by all immigrants and residents of Member states.*"⁹¹ However the explanation provided by the Council for this principle makes it clear that what is envisaged is not a process of mutual transformation of political, legal and cultural values. The explanation states that:

"the integration process involves adaptation by immigrants, both men and women, who all have rights and responsibilities in relation to their new country of residence. It also involves the receiving society, which should create the opportunities for the immigrants' full economic, social, cultural and political participation".⁹²

Therefore, integration is seen as a process of adaptation on the part of immigrants coupled with facilitation on the part of the native population. Native populations are required to facilitate the participation of immigrants in their societies but are not required to adapt their own values or culture. Immigrants on the other hand are under an obligation to engage in a process of "*adaptation (...) in relation to their new country of residence.*"⁹³

The second principle makes this point even more clearly. It states that "*Integration implies a respect for the basic values of the European Union*".⁹⁴ The explanation states that:

"Everybody resident in the EU must adapt and adhere closely to the basic values of the European Union as well as to Member State laws. The provisions

⁹¹ *Ibid.* 19.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

and values enshrined in European Treaties serve as both baseline and compass, as they are common to the Member States.”⁹⁵

The adherence to the values of the EU is therefore categorised as an individual duty to which residents must adapt if necessary. The explanation goes on to assert that:

“Member States are responsible for actively assuring that all residents, including immigrants, understand, respect, benefit from and are protected on an equal basis by the full scope of values, rights, responsibilities, and privileges established by the EU and Member State laws. Views and opinions that are not compatible with such basic values might hinder the successful integration of immigrants into their new host society and might adversely influence society as a whole.”⁹⁶

There are a number of important features of this principle. First, while the Member States are required to ensure that all residents (and not just immigrants) understand and respect the Union’s basic values, a failure to adhere to these values on the part of immigrants is seen as more serious on the basis that such a failure will “*hinder their integration into their new host society*” and “*might adversely influence society as a whole*”. Adherence to the Union’s basic values is seen under these principles as an important part of the society which the Union and its Member States are trying to build. More importantly, the principles make it clear that it is the holding of “*views and opinions that are not compatible with such basic values*” which constitutes the threat to immigrant integration and the construction of the kind of society desired by the Union and its member states. The mere holding of such views therefore generates a sufficient state interest to justify regulation by the law of the Member State or the Union. This approach clearly chimes with the approach of the governments of the Netherlands and certain German states outlined below which sees in the ongoing adherence to religiously–influenced conservative attitudes to sexuality and gender by certain immigrant

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

communities, a threat to the continued acceptance of key values. The idea that the promotion of certain values is an important goal of the state is also seen in other principles. Principle 5 notes the importance of education to immigrant integration and states that:

“Transferring knowledge about the role and working of societal institutions and regulations and transmitting the norms and values that form the binding element in the functioning of society are also a crucial goal of the educational system.”⁹⁷

Having defined individual adherence to certain views, opinions and values as an important goal for the state and as a potential site of legal regulation, the crucial question becomes how far the duty to accept such values should prevail over the rights of migrants to cultural and religious freedom. Principle 8 has a definite answer. It states that:

“The practice of diverse cultures and religions is guaranteed under the Charter of Fundamental Rights and must be safeguarded, unless practices conflict with other inviolable European rights or with national law.”⁹⁸

The requirement of respect for diverse religions and culture is therefore specifically subordinated to the need to protect “*other inviolable European rights*” or “*national law*”. This notable rejection of multiculturalism’s aversion to the imposition of host society standards on migrant communities is made even more explicit in the accompanying explanation which states:

“Member States [...] have a responsibility to ensure that cultural and religious practices do not prevent individual migrants from exercising other fundamental rights or from participating in the host society. This is particularly important as it pertains to the rights and equality of women, the

⁹⁷ *Ibid.* 21.

⁹⁸ *Ibid.* 23.

*rights and interests of children, and the freedom to practice or not to practice a particular religion.”*⁹⁹

The explanation also expresses a preference for the use of non-coercive measures as a means of “*addressing issues relating to unacceptable cultural and religious practices that clash with fundamental rights*” but goes on to state that “*however, if necessary according to the law, legal coercive measures can also be needed.*”¹⁰⁰ The Union’s policy framework for the integration of immigrants therefore, specifically subordinates the religious autonomy of individual migrants to the need to protect European basic values and the fundamental rights of others. While not naming any religion in particular, the framework does deliberately emphasise issues such as the equality of men and women which have been prominent in debates around the practice of Islam in Europe.¹⁰¹

3.2 The Refugee, Long-Term Residents and Family Reunification Directives

Although the basic principles are not binding the ideas underpinning them are clearly visible in the “hard law” enacted by the EU in this area. Indeed, the principles themselves are specifically referred to in the preamble to the directive establishing minimum standards for the granting of refugee status which anticipates the establishment of such principles in paragraph 36 which states that:

⁹⁹ *ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ This decisively non-multicultural approach and the importance of the idea of limitations on the public role of religion in this area have been further underlined by the statements of Commissioner Frattini in relation to the controversy which erupted in relation to the publication of cartoons by the Danish newspaper *Jyllands Posten* which were perceived as being insulting towards the prophet Muhammed by many Muslims. While recognising that ‘*it is important to respect sensitivities*’ the Commissioner went on to state: ‘*Equally, we have reaffirmed that our European society is based on the respect for the individual person’s life and freedom, equality of rights between men and women, freedom of speech and a clear distinction between politics and religion. We have said clearly and loudly that freedom of expression and freedom of religion are part of Europe’s values and traditions, and that they are not negotiable*’ (emphasis added). See the interview with Commissioner Fini in *Equal Voices* Issue 18 June 2006 published by the European Monitoring Centre on Racism and Xenophobia (EUMC). Available at: http://eumc.eu.int/eumc/index.php?fuseaction=content.dsp_cat_content&catid=4498115372af1 (accessed 6 October 2006).

*“The implementation of the Directive should be evaluated at regular intervals, taking into consideration in particular (...), the development of common basic principles for integration.”*¹⁰²

This section will show how in a number of directives relating to the legal status of immigrants, EU law has defined a failure on the part of individual immigrants to indicate acceptance of humanist influenced liberal and egalitarian values, as a threat to key public policy goals, particularly the right of individuals to live their lives in ways which conflict with religious doctrine. In particular, the directives in question legitimise actions on the part of individual Member States which seek to penalise those immigrants who fail to indicate their acceptance of limitations on the influence of religious principles on law and public policy and their acceptance of liberal democratic values such as pluralism and individual autonomy. Under this approach, the private views of immigrants become a legitimate site of state regulation notwithstanding the Union’s commitments to freedom of conscience.

Two directives in particular have been distinctly marked by the decidedly non-multicultural ideas on which the basic principles are based. In September 2003 the Council adopted a directive on the right to family reunification of third country nationals residing in the EU.¹⁰³ The preamble of the directive states that *“Member States should give effect to the provisions of this Directive without discrimination on the basis of sex, race, colour, [...] religion or beliefs, political or other opinions.”*¹⁰⁴

This would seem to indicate that the religious or political views of those seeking family reunification are not a basis on which such a benefit could be refused. However, the provisions of the directive to which this non-discrimination principle apply, indicate that such views can indeed be taken

¹⁰² 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 persons who otherwise need international protection and the content of the protection granted.

¹⁰³ Council Directive 2003/86/EC of 22 September 2003 on the right of family reunification. OJ L251/12 3.10.2003.

¹⁰⁴ *Ibid.* preamble to the directive at para. 5.

into account by Member States in considering applications under this directive. Paragraph 11 of the preamble states that:

“the right to family reunification should be exercised in proper compliance with the values and principles recognised by the Member States, in particular with respect to the rights of women and children; such compliance justifies the possible taking of restrictive measures against applications for family reunification of polygamous households”.

While the issue of polygamy is singled out, it is nevertheless made clear that the need to comply with *“the values and principles recognised by the Member States”* applies across the board.

The general grounds for refusal of family reunification are set out in the directive. Paragraph 14 of the preamble states that:

“the person who wishes to be granted family reunification should not constitute a threat to public policy or public security. In this context it has to be noted that the notion of public policy and public security covers also cases in which a third country national belongs to an association which supports terrorism, supports such an association or has extremist aspirations.”

Thus it is made clear that supporting an organisation which supports terrorism or holding certain political views (*“extremist aspirations”*) can be sufficient grounds for the refusal of family reunification. The substantive article of the directive dealing with refusal of applications for family reunification (Article 6) does not specifically mention the holding of extremist opinions as a ground for refusal stating instead that *“Member States may reject an application [...] on grounds of public policy, public security or public health”*¹⁰⁵ and that *“when taking the relevant decision, the Member State shall consider, [...], the severity or type of offence against public policy or public security committed by the family member, or the dangers that are emanating from such a person.”*

¹⁰⁵ *Ibid.* Article 6(1).

Taken together paragraph 14 of the preamble and the provisions of Article 6 endorse the view that the holding of certain opinions by migrants is seen as a threat to either public security or to public policy both of which are seen as dependent on the continued attachment of citizens to the liberal democratic system. This approach lies at the heart of recent changes in immigration law and policy at member state level which are outlined below. References to the rights of women in paragraph 11 of the preamble further support the view that such policies are necessary for the protection of certain groups who may be victimised should the “*extremist*” worldview of certain migrants increase its influence in the host society.

As well as endorsing the notion of private opinions of migrants as a valid subject for state regulation, the directive also contains measures designed to facilitate member state efforts to encourage integration on the part of their migrant populations. Article 4(1) provides that member states may require children over the age of 12 satisfy “*a condition for integration provided for by existing legislation on the date of implementation of this Directive*”. This is supplemented by a more general provision in Article 7(2) which provides that “*Member States may require third country nationals to comply with integration measures, in accordance with national law,*” thereby protecting the religion-related measures taken at member state level outlined below. The compatibility of certain cultural/religious practices with the aim of greater integration is directly addressed in Article 4(5) which states that “*In order to ensure better integration and to prevent forced marriages Member States may require the sponsor and his/her spouse to be of a minimum age, and at a maximum 21 years, before the spouse is able to join him/her.*”

Articles 4(1), 4(5) and 7(2) were all absent from the Commission’s initial draft of the Directive but were included at the behest of certain Member States. Germany and Austria pushed strongly for Articles 4(1) and (along with the

Netherlands,) 7(2) which were inserted in September 2001¹⁰⁶ and November 2002¹⁰⁷ respectively. Article 4(5) was inserted during the final stage of negotiations in February 2003 by the Dutch and German governments.¹⁰⁸ These three member states have, as will be shown below, taken a leading role in changing domestic immigration law in such a way that Muslim migrants in particular are required to give assurances that they are willing to place limits on the public and political role of their religion as a prerequisite for the granting of residence or citizenship rights.

These provisions have proved highly controversial. As noted above, many of the provisions which permitted the imposition of integration requirements were introduced by the Council at a very late stage in the legislative process. Indeed the insertion of the relevant provisions came so late that Parliamentary debates on the subject focused almost exclusively on the question of the acquisition of competence in the native languages of member states by immigrant populations. Furthermore, Article 4(6) which enabled Member States to place an age limit of 15 years on applications for reunification as minor children, was inserted after the consultation of the European Parliament which had advocated a less restrictive approach.¹⁰⁹ In December 2003, the Parliament applied to the Court of Justice to annul certain aspects of the Directive which, it alleged, violated the right to respect for family life and the non-discrimination principle both of which were asserted to form part of the general principles of law protected by the Court.

The Parliament did not seek the annulment of the directive as a whole but sought instead to have the provisions allowing for the imposition of integration conditions (along with a further provision allowing Member States up to three years to process applications) struck down and severed from the

¹⁰⁶ See Council document 12022/01 of 24 September 2001 see also K. Groenendijk 'Legal Concepts of Integration in EU Migration Law' *European Journal of Migration and Law*, Vol. 6 No. 2 2004 at 119.

¹⁰⁷ See Council document 14272/02 of 26 November 2002. For an account of the disputes amongst Member States in relation to this measure see Groenendijk, *ibid.* 119-120.

¹⁰⁸ See Council document 6912/03 of 28 February 2003. See also Groenendijk *ibid.*

¹⁰⁹ The Rapporteur backed the idea of language integration but balked at the idea that failure to meet it could result in a refusal of a permit. See the report of Baroness Ludford MEP (COM(2001)127-C5-0250/2001-2001/0074(CNS)) (A5-0436/2001).

rest of the directive which was to remain in force. The specific provisions challenged by the Parliament were:

- the final subparagraph of Article 4(1) enabling Member States to require that a child aged over 12 who arrives independently from the rest of his/her family, meet an integration condition before he or she is granted entry and residence.
- Article 4(6) which allowed Member States to request that applications under the Directive for reunification of minor children be submitted before the child reaches the age of 15.
- Article 8 which enables Member States to provide a waiting period of no more than three years between the making of an application and the issuing of a permit.¹¹⁰

The Advocate General advised the Court to dismiss the application on the grounds that it was not possible to sever the impugned provisions without altering the substance of the Directive and thereby trespassing on the territory of the Community legislature. In relation to the merits she found that the failure to consult the Parliament in relation to Article 4(6) rendered its adoption by the Council void¹¹¹ (though this point had not been argued by the Parliament's lawyers and was not taken up by the full court). She also found that Article 8 potentially permitted a situation where Member States could violate the fundamental rights of applicants under the directive by applying a waiting period of up to three years and that it was therefore contrary to Community law.¹¹² Most importantly for our purposes, the Advocate General upheld paragraph 4(1) as a proportionate means through which Member States can pursue their legitimate desire to "*to integrate immigrants as fully as possible*".¹¹³

The Grand Chamber of the Court issued its judgment at the end of June 2006.¹¹⁴ The Court resolved the admissibility question by holding that:

¹¹⁰ Case C-540/03 *Parliament v Council* [2006] ECR I-05769.

¹¹¹ *Ibid.* para. 59.

¹¹² *Ibid.* para. 105.

¹¹³ *Ibid.* paras. 112-113.

¹¹⁴ *Ibid.*

*“the fact that the contested provisions of the Directive afford the Member States a certain margin of appreciation and allow them in certain circumstances to apply national legislation derogating from the basic rules imposed by the Directive cannot have the effect of excluding those provisions from review by the Court of their legality as envisaged by Article 230 EC”.*¹¹⁵

and that the issue of severability could only be resolved by consideration of the substance of the case.¹¹⁶

As noted above, the European Court of Human Rights has adopted a very particular approach to the issue of Islam and liberal democracy. In its ruling in relation to the family reunification directive, the Court of Justice went out of its way to stress the importance of the role played by the European Convention of Human Rights in the determining the substance of the general principles which form part of EU law and which are upheld by the ECJ.¹¹⁷

Thus, the ECHR was recognised by the Court as being of special significance in the determination of the substance of the human rights norms protected in EU law. Furthermore, in its analysis of the provisions of the directive impugned by the Parliament, the Court showed a striking degree of deference to the decisions of the Strasbourg court. The judgment noted that the preamble to the directive states that it: *“respects the fundamental rights and observes the principles recognised in particular in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the Charter of Fundamental Rights of the European Union”.*¹¹⁸

Although it failed to ask the Court to annul Article 7(2) of the Directive which allows Member States to impose integration conditions on third country nationals, the Parliament argued that, in relation to the right to family life of applicants under the directive:

¹¹⁵ *Ibid.* para. 22.

¹¹⁶ *Ibid.* para. 29.

¹¹⁷ *Ibid.* para. 35.

¹¹⁸ *Ibid.* para. 38.

*“a condition for integration does not fall within one of the legitimate objectives capable of justifying interference, as referred to in Article 8(2) of the ECHR, namely, national security, public safety, the economic well-being of the country, the prevention of health of morals and the protection of the rights and freedoms of others”*¹¹⁹

which seemed to indicate a somewhat wider objection to such measures. The Court explicitly relied on several rulings of the Strasbourg Court in coming to its decision not to annul the relevant parts of the Directive. In particular it noted the decisions in *Sen v the Netherlands*, *Gül v Switzerland* and *Ahmut v the Netherlands* from which it concluded that Article 8 “may create positive obligations inherent in effective “respect” for family life” and that “regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; [in relation to which] the State enjoys a margin of appreciation.”¹²⁰

It found that Article 4(1) of the Directive merely partially preserved this margin of appreciation in circumstances where a child over 12 arrives independently of the rest of his or her family. Accordingly:

*“the final subparagraph of Article 4(1) of the Directive cannot be regarded as running counter to the right to respect for family life. In the context of a directive imposing precise positive obligations on the Member States, it preserves a limited margin of appreciation for those states which is no different from that accorded to them by the European Court of Human Rights.”*¹²¹

The Court specifically endorsed the compatibility of integration conditions with the ECHR in paragraph 66 where it stated that: “It does not appear that such a condition is, in itself, contrary to the right to respect for family life set

¹¹⁹ *Ibid.* para. 42.

¹²⁰ *Ibid.* para. 54.

¹²¹ *Ibid.* para. 62.

out in Article 8 of the ECHR(...) In any event, the necessity for integration may fall within a number of legitimate objectives referred to in Article 8(2) of the ECHR". This does not however indicate that there Member State discretion in this area is unfettered as the Court points out in paragraph 70:

*"The fact that the concept of integration is not defined cannot be interpreted as authorising the Member States to employ that concept in a manner contrary to general principles of Community law, in particular to fundamental rights. The Member States which wish to make use of the derogation cannot employ an unspecified concept of integration, but must apply the condition for integration provided for by their legislation existing on the date of implementation of the Directive in order to examine the specific situation of a child over 12 years of age arriving independently from the rest of his or her family."*¹²²

The directive does therefore act as a kind of "stand still" measure with Member States being unable to introduce further restrictions in this area. However the stand still provision as the Court made clear, applies only in relation to the relatively narrow area of the directive and does not affect the right of individual states to introduce other restrictive measures in the immigration arena in general. Moreover, the idea of compulsory integration, including a duty to adhere to "European" or national values (which was already a feature of national legislation in certain Member States), was not, of itself contrary to Community law.

The Grand Chamber also rejected the Parliament's arguments in relation to Article 4(6) on the basis that an age limit on applications interfered with family life and was discriminatory. The Council argued that encouraging immigrant families to bring their children at a young age in order to facilitate their integration was a legitimate objective under Article 8(2) ECHR.¹²³ The Court held that *"It does not appear that the contested provision infringes the right to respect for family life set out in Article 8 of the ECHR as interpreted*

¹²² *Ibid.* para. 70.

¹²³ *Ibid.* para. 79.

by the European Court of Human Rights” and that the fact that Article 5(5) of the Directive requires Member States to take the best interests of the child into account meant that: “Article 4(6) cannot be regarded as running counter to the fundamental right to respect for family life”.¹²⁴

Article 8 of the Directive was upheld on similar grounds. The Court held that the provision:

*“preserves a limited margin of appreciation for the Member States by permitting them to make sure that family reunification will take place in favourable conditions, after the sponsor has been residing in the host State for a period sufficiently long for it to be assumed that the family members will settle down well and display a certain level of integration. Accordingly, the fact that a Member State takes those factors into account and the power to defer family reunification for two or, as the case may be, three years do not run counter to the right to respect for family rights set out in particular in Article 8 of the ECHR as interpreted by the European Court of Human Rights.”*¹²⁵

The judgment is notable in several respects. First the ECJ endorses integration of immigrant communities as a legitimate objective which can be pursued by states under Article 8(2) of the ECHR. It seems willing to uphold relatively substantial interferences with the Article 8 rights of immigrants in order to enable to Member States to pursue the integration policies which they see fit. Moreover, the Court’s heavy reliance on the judgments of the Strasbourg Court in order to determine the content of the Union’s fundamental rights guarantees may prove important for the future development of the EU law as it relates to the interaction of questions of religion, integration and the right of states to require adherence to certain religion-related norms from individual immigrants. The primary reason given by the Court for upholding the three impugned provisions of the directive was that each complied with Article 8 of the ECHR as interpreted by the Strasbourg Court. The ECJ judgment therefore appears to indicate that legislation which appears to comply with the standards

¹²⁴ *Ibid.* para. 90.

¹²⁵ *Ibid.* para. 98.

set down by the Strasbourg court will, almost inevitably, not be found to be in violation of the fundamental rights norms which form a part of EU law. The judgment in the *Refah Partisi* case indicates that the Court of Human Rights is willing to uphold extensive interferences with ECHR rights in order to defend the liberal democratic order, including the principles of public and private autonomy, from what it sees as the threat of political Islam. Should EU law follow this approach, interference by Member States with rights to religious liberty and to privacy in the defence of “European” values are unlikely to fall foul of EU human rights norms.

The approach adopted by the Council in relation to the family reunification directive has been repeated in a second directive which established the rights of third country nationals who are long-term residents of the EU.¹²⁶ Like the family reunification directive, the preamble to the long term residents directive which was adopted in late 2003, contains a paragraph noting that Member States should not discriminate, *inter alia*, on grounds of religious or political beliefs in giving effect to the directive.¹²⁷ However, it also subordinates this duty to a requirement that third country nationals seeking to use the terms of the directive “should not constitute a threat to public policy or public security”.¹²⁸ Article 5(2) of the directive specifically states that “*Member States may require, third country nationals to comply with integration conditions, in accordance with national law*”.

Article 6 provides the grounds on which long-term resident status may be refused. It states that “*Member States may refuse to grant long-term resident status on grounds of public policy or public security*.”¹²⁹ Member States therefore, can refuse long term resident status on the ground that the applicant is a threat to public policy or public security. At the same time, Article 5 makes it clear that applications may be refused if integration conditions are not met. A failure on the part of migrants to integrate is, as a permissible ground

¹²⁶ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long-term residents OJ L16/44 23.1.2004.

¹²⁷ *Ibid.* para. 5 of the preamble.

¹²⁸ *Ibid.* para. 9. Para. 21 also mentions public policy and public security as relevant factors along with public health.

¹²⁹ *Ibid.* Article 6(1).

for refusal of status under ground 6, therefore seen as a threat to either public policy or public security. Furthermore, Article 9(3) makes it clear that long-term resident status can be withdrawn from those who constitute a threat to public policy while Article 12 permits the expulsion of such people provided they are shown to constitute “*an actual and sufficiently serious threat to public policy or public security.*”¹³⁰

As with the family reunification, the requirement contained in Article 5(2) was not present in the Commission’s initial draft of the legislation but was inserted by Member States. Indeed, at the insistence of the Austrian and German governments the phrase “*integration measures*” was strengthened to “*integration conditions*” in order to emphasise that failure to adhere to such conditions could potentially result in a refusal of the relevant permit.¹³¹ The Court of Justice’s ruling in relation to the family reunification directive make it unlikely that such provisions will be held to fall foul of the Union’s human rights commitments.

Therefore, in the light of both the statement of basic principles and the ruling of the ECJ in the family reunification case, the directives passed in this area clearly provide space within EU law for member states to take active steps to regulate the religious views of individual migrants and to refuse concrete legal benefits to those migrants whose views do not adhere to the fundamental values of the Union or individual member state. By categorising a failure on the part of such migrants to adhere to the fundamental values of the Union as a threat to public policy and/or public security, EU legislation provides justification for laws aimed at limiting the degree to which those who adhere to conservative religiously-influenced norms in relation to gender and sexuality can either attempt or even simply desire to enshrine such norms in public policy. As Groenendijk points out, previous migration related legislation in the Union had focused on integration primarily as something which could be encouraged by enhancing the residence status of immigrants and providing for equal treatment. Regulation 1612/68 for instance (which

¹³⁰ *Ibid.* Article 12(1).

¹³¹ See Groenendijk n. 107 above, 122-123.

enshrines free movement of EU citizens) does not allow for any integration tests and restricts language examinations to situations where a knowledge of the language of the relevant member state is necessary to carry out the relevant employment.¹³² However, since 2003, EU law has increasingly adopted an approach under which “*the lack of integration or the assumed unfitness to integrate are grounds for refusal of admission to the country*”.¹³³ The heavy reliance by the Court of Justice on the jurisprudence of the Court of Human Rights in order to determine the limitations that the fundamental rights norms of the EU will place on such a policy substantially lessens the likelihood of large scale interference with this policy on the part of the ECJ.

4. Developments at Member State Level

4.1 The Netherlands

The increasing emphasis placed by EU law on integration and adoption of “European Values” by immigrants has occurred against a background of similar developments at Member State level. In recent years several member states have radically overhauled their approach to migrant integration and have placed the question of religion at the centre of such changes. The approach of the Netherlands to these issues of religion, migration and citizenship has been extremely influential. The Netherlands is a country with a libertarian and egalitarian approach to questions of sexuality. Prostitution and pornography are tolerated while same sex marriage has been legal since 2001. It also has a Muslim population of over one million (out of a total of approximately 16 million). A series of events in the late 1990s and early 2000s the murders of and death threats against figures such as Pim Fortuyn, Theo van Gogh and Ayaan Hirsi Ali who were severely critical of Muslim attitudes towards gender, sexuality and freedom of expression.

These trends and events led to a situation where “*old-style multiculturalism*” was as Fukuyama says, “*widely seen as a failure in Holland*”.¹³⁴ Dutch government policy changed radically to deal with these concerns. In 2000,

¹³² *Ibid.* 116.

¹³³ *ibid.* 113.

¹³⁴ F. Fukuyama ‘Europe vs. Radical Islam’ in *Policy Review*, 27 February 2006.

2002 and 2003 legislative changes were introduced which required applicants for naturalisation to indicate their “*integration*” into Dutch society by means of a series of exams examining knowledge of Dutch society and the Dutch language.¹³⁵ Worries that the “importation” of spouses by Muslim immigrants from their countries of origin was hampering integration efforts led to an increase in the minimum age after which spouses could benefit from family reunification. Tighter rules were introduced providing that religious preachers from abroad had to attend integration courses in which Dutch values would be explained to them. Most strikingly, a new test for immigrants with accompanying explanatory video was introduced in 2006.

The immigration test required immigrants to answer a series of questions about the Netherlands such as its provincial structure and the role of the monarchy. It also requires immigrants to show an awareness of Dutch norms in relation to sexual liberalism and gender equality. Questions in the exam ask how people should react if they see two men kissing or whether hitting women or female circumcision are acceptable practices.¹³⁶ Those who wish to sit the exam are required to take extensive language classes and are sent an instructional video which shows footage of topless bathing and a same-sex couple kissing. Those who pass the test will be required to swear allegiance to Holland and its constitution within five years.

The claim that the test is aimed at Muslims is strengthened by the fact that immigrants from non-European “Western” countries such as the United States, Canada and Australia are exempt.¹³⁷ Muslim groups severely criticised the proposal. The Islamic Human Rights Commission, a British-based

¹³⁵ Royal Decree of 14 April 2002, *Staatsblad* 2002, no. 197, Royal Decree of 15 March 2003 *Staatsblad* 2003, Royal Decree no. 118 on the entry in to force of the Act of 21 December 2000, *Staatsblad* 2000, no. 618.

¹³⁶ See ‘The Civic Integration Exam Abroad’ published by Immigratie-en Naturalisatiedienst (the Dutch Immigration and Naturalisation Service), available at: http://www.ind.nl/en/Images/bro_inburgering_tcm6-105967.pdf (last visited 7 June 2007). In particular see page 23 which specifies that in addition to EU citizens, American, Canadian, Australian, New Zealand, Japanese, Norwegian and Swiss nationals are exempt from the test. See also ‘Holland Launches the Immigrant Quiz’ *The Sunday Times*, 12 March 2006 at <http://www.timesonline.co.uk/article/0,,2081496,00.html> (last visited 16 June 2006).

¹³⁷ “Dutch Immigration Kit Offers a Revealing View” *The New York Times*, 17 March 2006 at <http://www.iht.com/articles/2006/03/16/news/dutch-5852942.php> (last visited 6 October 2006).

organisation, described the test as “*Islamophobic*” and said that it sent out a message that “*Muslims are not only unwelcome ... but those that are already [in the Netherlands] do not conform to a uniform idea of what should be a citizen*” [sic].¹³⁸ It also alleged that “*this type of treatment denies primarily Muslims, but in fact also many others, the rights to freedom of religion, belief and expression and political thought.*”¹³⁹ Dutch theologian Karen Steenbrink of Utrecht University also criticised the video on the grounds that it was “*offensive to Muslims*” and noted that topless bathing is in fact rarely seen in the Netherlands”.¹⁴⁰ Emecmo, a group which represents Moroccans in the Netherlands described the video as provocation rather than education and said it was clearly intended to stop Muslim immigration.¹⁴¹ This was denied by the government. Rita Verdonk the then immigration minister asserted that “*It is important to make clear demands of people. They need to subscribe to our European values, respect our laws and learn the language.*”¹⁴²

Religion in general and Islam in particular have therefore been prominent elements in the debate around the new Dutch policy in relation to immigration. While part of the overall objective of these measures has been to decrease immigrant numbers (visa fees were also significantly increased), the central role accorded to gender and sexuality in the measures adopted demonstrate that an equally important objective of the policies in question has been to make acceptance of sexual liberalism, gender equality and the restriction of religious influence on public policy into prerequisites for the acquisition of Dutch citizenship. While it is clearly unable to determine the political and religious views of established citizens, the Dutch government has made it clear that, in so far as immigrants are concerned, Dutch citizenship is available only

¹³⁸ See Arzu Merali of the Islamic Human Rights Commission quoted at <http://www.islamweb.net/ver2/archive/article.php?lang=E&id=123732> 6 April 2006, (last visited 16 June 2006).

¹³⁹ *Ibid.* The film however received the backing of Mohammed Sini, chairperson of Islam and Citizenship (a national Muslim organisation) who described homosexuality as ‘a reality’ and who called on immigrants ‘to embrace modernity’. See ‘Netherlands Issues Immigration Test’ *Washington Times*, 16 March 2006 at http://www.washingtontimes.com/world/20060315-100027-7407r_page2.htm (last visited 23 October 2006).

¹⁴⁰ *Ibid.*

¹⁴¹ n.136 above.

¹⁴² See ‘Europe Raises the Bar for Immigrants’ *The Boston Globe*, 22 May 2006 at http://www.boston.com/news/world/europe/articles/2006/05/22/europe_raises_bar_for_immigrants/ (last visited 1 May 2007).

to those who are willing to accept these values or who are, at the very least, willing to place limitations on their desires to see religious norms hostile to such values reflected in public policy. The tests clearly make the holding of certain views by individual migrants the subject of a degree of state regulation. The focus on requiring acceptance of gay relationships or the freedom of women to wear revealing clothing indicates that what is being sought is acceptance on the part of individuals of the right of others to engage in conduct thought sinful by many religions (most notably mainstream Islam). A failure to adhere to such libertarian values can result in a denial of the right to live in the Netherlands.

As both the exemption of “Western” immigrants from the tests and the reactions of Muslim leaders show, these requirements are either aimed at or prove most challenging for, Muslim immigrants and represent an implicit but clear assertion by the Dutch government that adherence to the values of many of the current interpretations of the Islamic religion are incompatible with Dutch citizenship. As Klausen’s research has shown, even amongst otherwise moderate Muslims, many do find it difficult to accept the concept of gay rights,¹⁴³ yet this is exactly what the Dutch government now requires them to do on pain of denial of the right to immigrate to the Netherlands. Under this approach, the protection of the personal autonomy and freedom from religion of Dutch gays and lesbians is seen as requiring a degree of interference with the personal autonomy of those who cannot or will not confine their disapproval of homosexuality to the private sphere.

¹⁴³ Klausen’s survey of European Muslims who were actively engaged in civic life (a group which she acknowledges to be made up of a disproportionate number of moderate and more western-oriented Muslims) also showed little evidence of an acceptance of sexual liberalism on the part of European Muslims. Even interviewees who expressed views which were otherwise liberal were unequivocal in their opposition to greater toleration of homosexuality, with some going as far as suggesting that no secular state had the right to impose toleration of gays and lesbians on Muslims (J. Klausen, *The Islamic Challenge: Politics and Religion in Western Europe*, (Oxford University Press, Oxford and New York, 2005). See interview with young Danish Imam at pages 15 and 16, the opposition of the Muslim Council of Britain to gay rights at page 34, the description of the opposition of ‘the voluntarists’ to all gay rights at page 92). Hussein attributes some of the decline in support for the Labour Party amongst British Muslims to the Blair government’s support for gay rights legislation (D. Hussein ‘The Impact of 9/11 on British Muslim Identity’ in R. Geaves, T. Gabriel, Y. Haddad and J. Idleman Smith (eds.) *Islam and the West Post 9/11* (Ashgate, Aldershot, Hants, England, 2004) 120.

4.2 Germany

The Dutch approach to these issues has been very influential both on the policies of other member states and on the approach of EU policy and legislation in this area. In Germany changes in the nationality laws which came into force on 1 January 2000 loosened the link between blood line and nationality but made “proof of commitment to the values of the Basic Law”¹⁴⁴ a prerequisite of citizenship. There is at least some evidence that elements of Islamic belief and practice are seen potentially inconsistent with these values. Klausen has noted how the requirement has been “a sticking point” for many German Muslims. Moreover, the federal agency for the protection of the Constitution (*Bundesamt Für Verfassungsschutz*) has blacklisted Milli Görüs, one of the largest Muslim organisations in Germany describing its as an “Islamist” organisation whose social work amongst the young is “*disintegrative...antidemocratic and antiwestern*”.¹⁴⁵

The CDU Federal minister for the Interior Wolfgang Schäuble praised the new Dutch immigration regulations saying that Germany “*can learn from the Netherlands*”.¹⁴⁶ Under German law individual states have power to assess whether potential citizens truly accept the principles of the Basic Law to which federal law requires them to sign an oath of allegiance. The state of Baden-Württemberg was the first to use these powers to propose a citizenship which examined the compatibility of the values of aspirant citizens with “German values”. It was quickly followed by the State of Hesse which proposed a similar examination. Tests in both states were again clearly aimed at assessing the degree to which Muslims were willing to separate religious attitudes towards gender and sexuality to the private sphere and to accept liberal notions of individual self-determination. Indeed in Baden-Württemberg the state government explicitly mentioned Muslims as the targets of the new policy.¹⁴⁷ Questions in the Hesse examination for example, asked immigrants “*A woman should not be allowed to move freely in public or travel unless*

¹⁴⁴ *Ibid.* Klausen, 21.

¹⁴⁵ *Ibid.* 43.

¹⁴⁶ See ‘Testing the Limits of Tolerance’ *Deutsche Welle* 16 March 2006 at: <http://www.dw-world.de/dw/article/0,2144,1935900,00.html> (last visited 16 June 2006).

¹⁴⁷ See ‘New Rules for Muslims in German State Blasted’ *Deutsche Welle*, 5 January 2006 at: <http://www.dwworld.de/dw/article/0,2144,1840793,00.html> (last visited 2 June 2006).

escorted by a close male relative. What is your standpoint on this?” and “What possibilities do parents have to influence their sons” or daughters” choice of partner? Which practices are forbidden?”.¹⁴⁸ Similarly, the Baden-Württemberg test asked questions relating to forced marriage (“What do you think of the fact that parents forcibly marry off their children?”), homosexuality (“Does the holding of office by open homosexuals disturb you?”) and women’s rights (“Do you think that a woman should obey her husband and that he can beat her if she is disobedient?”)¹⁴⁹. Both tests also focused on other issues seen as particularly relevant to Muslims. The Hesse test examined attitudes towards Israel (“Explain the term “Israel”’s right to exist”“) and Holocaust denial (“if someone described the Holocaust as a myth or a fairytale, how would you respond?”)¹⁵⁰ while the Baden-Württemberg exam asked whether the September 11th hijackers were “terrorists or freedom fighters”.¹⁵¹

As in the Netherlands, the proposals were severely criticised for interfering with private attitudes and stereotyping Muslims.¹⁵² Volker Beck, a leading member of the Green Party noted that the anti-gay attitudes of Baden-Württemberg’s (Christian) interior minister meant that “he himself would probably fail the test”.¹⁵³ The Federal Parliament took up the issue in February 2006 with the CDU minister for integration policy Maria Böhmer noted how “the United States gives courses in the constitution, history, culture and values of the country”.¹⁵⁴ In May 2006 the federal and state governments worked out a series of guidelines which fell short of introducing a federal immigration test but which included an “integration course” which was intended to focus on

¹⁴⁸ See: ‘Becoming German: Proposed Hesse Citizenship Test’ *Der Spiegel* 5 September 2005 at: <http://service.spiegel.de/cache/international/0,1518,415207,00.html> (last visited 2 June 2006). The guidelines for the test provided by the Baden-Württemberg government can be accessed at: <http://www.baden-wuerttemberg.de/de/Meldungen/171636.html> (last accessed 10 October 2007).

¹⁴⁹ n.142 above. See also the guidelines provided by the Baden-Württemberg government *ibid*.

¹⁵⁰ *Ibid*.

¹⁵¹ See ‘Europe Raises Bar for Immigrants’ *Boston Globe*, 22 May 2006 at: http://www.boston.com/news/world/europe/articles/2006/05/22/europe_raises_bar_for_immigrants/ (last visited 2 June 2006)

¹⁵² See ‘How To Be a German’, *Inter Press Service News Agency*, 31 May 2006 at: <http://www.ipsnews.net/news.asp?idnews=33203>. (last visited 3 June 2006)

¹⁵³ n.147 above.

¹⁵⁴ n. 148 above.

“the German constitution and German values such as gender equality.”¹⁵⁵ In June 2008 the federal government introduced a citizenship test which required applicants to demonstrate knowledge of German legal and political structures. Although the test did not itself address issues of conscience and religion, it left in place the requirement that potential citizens demonstrate a commitment to upholding the values of the German constitution.¹⁵⁶

4.3 Other Member States

The French government has adopted a similar approach. As far back as the year 2000, the government began to seek assurances from Muslim groups in relation to their commitment to “French Values”. In January of that year the minister for the interior Jean Paul Chevènement concluded an agreement with Muslim organisations which sought to establish principles on which a structured relationship with state institutions could be based. The French Government proposed that all Muslim groups participating in the exercise would be obliged to sign up to a statement of “Fundamental Principles”¹⁵⁷ which:

*“Solemnly confirmed their attachment to the fundamental principles of the French Republic and especially [...] to freedom of thought and religion, to Article 1 of the Constitution which affirms the secular character of the Republic and the respect this principle accords to all beliefs and finally to the provisions of the law of 9 December 1905 concerning the separation of the churches and the State”*¹⁵⁸

¹⁵⁵ n. 152 above.

¹⁵⁶ See “Germany to Introduce Controversial New Citizenship Test” *Der Spiegel*, 11 June 2008, (last visited 17 June 2008).

<http://www.spiegel.de/international/germany/0,1518,559021,00.html>

¹⁵⁷ See S. Ferrari ‘The Secularity of the State and the Shaping of Muslim Representative Organizations in Western Europe’ in J. Cesari and S. McLoughlin (eds.) *European Muslims and the State* 2005, Ashgate, Aldershot, England at 16-17. The statement was called ‘*Principes et fondements juridiques régissant les rapports entre les pouvoirs public et le culte musulman en France*’ and is available at:

www.pourinfo.ouvaton.org/immigration/dossierchenement/chevenement.htm. Cesari also notes that: ‘Many Muslim representatives considered the request to sign this declaration a demonstration of suspicion’ see: J. Cesari 2002 ‘Islam in France: The Shaping of a Religious Minority’ in Y. Yazbeck Haddad *Muslims in the West from Sojourners to Citizens*, (Oxford, Oxford University Press, 2002) 40.

¹⁵⁸ Ferrari, *ibid.* My own translation. The original French version reads: ‘conferment solennellement leur attachement aux principes fondamentaux de la République française et

Other religious groups were not required to make similar declarations. Chevènement justified this targeting of Islam on the grounds that the country was faced with an “*exceptional*” situation and that unlike Christianity, Islam:

*“has experienced neither the Renaissance or the Reformation. Certainly, Islam does distinguish between the religious and temporal domains. However, there is no shortage of Muslims to show that this distinction calls for a level of coordination [between the two domains] and consequently permanent involvement of religion in the temporal sphere.”*¹⁵⁹

Cesari notes that several Muslim organisations considered that this request showed that they were viewed with suspicion by the French authorities.¹⁶⁰

In 2003 media attention in relation to the question of the role of Islam in French society focused on a law to ban the wearing of “ostentatious” religious symbols in public schools which was widely seen as targeting the Muslim headscarf. However, in the course of proposing this ban to parliament, then Prime Minister, Jean-Pierre Raffarin placed the issue of the headscarf into the wider context of immigration, citizenship and common values saying *“Integration is a process that presupposes a mutual wish to [integrate], a shift towards certain values, a choice of a way of life, a commitment to a certain view of the world proper for France.”*¹⁶¹ At the same time he announced that the government would be introducing a “*contract*” for immigrants under

notamment [...] à la liberté de pensée et à la liberté de religion, à l’art. 1 de la constitution affirmant le caractère laïque de la République et respect par celle-ci de toutes les croyances et enfin aux dispositions de la loi du 9 décembre 1905 concernant la séparation des Eglises et de l’Etat’

¹⁵⁹ My own translation. The original French version is: à la différence du christianisme, n’a connu ni la renaissance ni la Réforme. Certes, l’Islam distingue le domaine religieux et le domaine mondain. Mais il ne manque pas de musulmans pour faire observer que cette distinction appelle une coordination et, par conséquent, une implication permanente du religieux dans le mondain.’ From speech of Minister Chevènement of 28 January 2000 available at: www.pourinfo.ouvaton.org/immigration/dossierchenement/chevenment.htm. See Ferrari *Ibid.*

¹⁶⁰ Many Muslim representatives considered the request to sign this declaration a demonstration of suspicion and lack of trust a quote from J Cesari 2002 at 40 ‘Islam in France: The Shaping of a Religious Minority’ in Y Yazbeck Haddad *Muslims in the West from Sojourners to Citizens*, (Oxford, Oxford University Press, 2002).

¹⁶¹ Klausen., n 144 above, 176.

which learning the French language and “*attachment*” to France and French values would be preconditions for the granting of residence permits.¹⁶² The announcement of measures to encourage immigrants to adopt French values at the same time as legislation targeting the headscarf on the basis of its incompatibility with secular values was being introduced, gives the clearest possible indication of the thinking of the French authorities. Along with their colleagues in other EU member states, they viewed (rightly or wrongly) elements of Islam (and in particular those relating to gender and sexuality), as incompatible with native values. Furthermore, the solution to such incompatibility lay in the adoption by immigrant communities of the secular values whose acceptance was to become prerequisite of citizenship. Thus in a move which certain commentators have seen as at least partly prompted by the importance accorded to integration in the EU directives on long term residents and family reunification,¹⁶³ France amended its 1945 law to require immigrants to satisfy a condition of “*Republican Integration*”.¹⁶⁴ In July 2008, the Conseil d’Etat upheld a refusal to grant French nationality to a woman on the grounds that her “*radical*” practice of Islam, which included the wearing of a niqab, was incompatible with the basic values of French society including gender equality.¹⁶⁵

The trend towards incorporating an acceptance of the idea of the right of freedom from religion as part of citizenship can also be seen in other member states. In 2002 for example, Austria introduced a compulsory “*Integration Agreement*” as part of reforms of its Aliens Act¹⁶⁶ while in 2005 Britain introduced a “*Life in the UK Test*” which examines the knowledge of applicants for British citizenship of British values, culture and history. Included in the tests are questions probing acceptance of principles such as the

¹⁶² *Ibid.* at 123-124. These measures were introduced in April 2006.

¹⁶³ See S. Barbou des Places and H. Oger ‘Making the European Migration Regime: Decoding Member States’ Legal Strategies’ *European Journal of Migration and Law*, Vol. 6 No.4 2004, 361.

¹⁶⁴ See article 6(3) of Loi no. 2003-1119 du 26 novembre 2003 relative a la maitrise de l’immigration, au séjour des étrangers en France et a la nationalité, *Journal Officiel* no 274, 27 novembre 2003).

¹⁶⁵ Section du contentieux, 2me et 7ème sous-sections réunies. Séance du 26 mai 2008.

Lecture du 27 juin 2008, Mme. M. Available at :http://www.conseil-etat.fr/ce/jurispd/index_ac_ld0820.shtml (last visited 19 July 2008).

¹⁶⁶ *Ibid.* 360.

gender equality and importance of tolerance.¹⁶⁷ In late 2006, then Prime Minister Tony Blair stressed the importance of these principles in a speech in which he criticised a “*new and virulent form of ideology associated with a minority of our Muslim community*” and warned migrants that “*our tolerance is part of what makes Britain, Britain. Conform to it; or don't come here*”.¹⁶⁸

These laws have focused on actual or perceived resistance amongst Muslim populations to gender equality and sexual liberalism which have become emblematic of wider fears around the willingness of some Muslims to respect the notion of an individual right to a zone of freedom from religious norms. The response of some European governments has been to stipulate acceptance of liberal values in these areas as a prerequisite of citizenship in order to test the willingness of Muslim immigrants to accept limitations on the use of religious precepts as a basis for public policy (on the basis that it is in relation to areas such as gender and sexuality that religiously inspired views are strongest) and thus to accept the kind of limitations on public religion which have evolved in Europe over recent centuries. These countries see in the religious views of certain migrants, a threat to the humanist and liberal characteristics of their societies and the rights to privacy and individual self-determination which such societies uphold. Their desire to protect these humanist and liberal elements (which is seen as important both culturally and as a means to protect certain groups such as women and homosexuals), renders the private views of potential citizens and residents a legitimate subject of legal regulation. Therefore, the linking of acceptance of the principle of freedom from religion to the granting of citizenship or residence rights, potentially interferes, in the name of protecting the privacy and autonomy of one set of individuals, with the privacy and autonomy of those who hold views which are condemnatory towards the conduct of others.

¹⁶⁷ See: ‘Core British Values’ BBC News, 17 May 2006 http://news.bbc.co.uk/2/hi/programmes/politics_show/4988946.stm (last visited 27 November 2006) and also ‘New UK Citizenship Testing Starts, BBC News, 1 November 2005 at: http://news.bbc.co.uk/2/hi/uk_news/politics/4391710.stm (last visited 27 November 2006).

¹⁶⁸ See: ‘Conform to Our Society Says PM’ *BBC News* 8 December 2006. Available at: http://news.bbc.co.uk/2/hi/uk_news/politics/6219626.stm (last visited 11 December 2006).

These developments have influenced EU law in this area in two ways. First, EU legislation has been careful not to impinge upon the ability of member states to regulate the religious beliefs of migrants.¹⁶⁹ Second in both substantive legislation¹⁷⁰ and in its broader statements of policy¹⁷¹ the Union has endorsed the view of a failure to adopt certain “European Values” and to confine one’s religious convictions to the private sphere, as a threat to public policy justifying legal intervention. Furthermore, EU law has in turn influenced national laws with certain member states using what has been termed the “alibi” of restrictive European legislation in relation to integration matters to introduce such an approach into national law.

5. Conclusion

As has been shown in previous chapters, the notion of balance between religious and humanist influences is a central element of the approach of EU law to the role of religion in its public order. The EU’s approach to the issues of Enlargement and immigration demonstrate that it regards this notion of balance as requiring certain limitations on religious influence over law and politics which are therefore seen as necessary elements of membership of the Union. In particular it has evinced a concern that certain kinds of religious identities might pose a threat to core elements of this balance such as pluralism in the public sphere as well as to the key liberal democratic values of personal autonomy, equality and respect for privacy. The history of the Crusades and Inquisition as well as more contemporary examples such as law and government in modern day Saudi Arabia and Iran, show that religion can both provide the basis for many serious violations of human rights and exercise a degree of control of the political and personal spheres which is incompatible with liberal democratic values. As the judgment of the Court of Human Rights in *Refah* rightly pointed out and as the restrictions on the role of religion in the political arena outlined in Chapter III underline, the enactment of “divine” law as the basis of the legal system is inconsistent with the openness to change, pluralism and equal participation in public debate

¹⁶⁹ See the provisions of the family reunification and long-term residents directives allowing for the imposition of integration conditions by individual member states above.

¹⁷⁰ See discussion of the grounds for refusing status in the directives above.

¹⁷¹ See JHA council policy statement n. 89 above.

necessary to liberal democratic systems. As a polity committed to balance in religious matters and to the protection of fundamental rights, the EU is entitled and possibly obliged, to ensure that those states that seek to join it impose the limitations on religious influence over law and politics necessary for liberal democratic values to thrive. Its dealings with Romania and Turkey, demonstrate that the Union has used the Copenhagen Criteria on Enlargement to ensure that applicant states balance their desire to promote religious morality through law with respect for notions of individual equality and autonomy. The introduction of a mechanism to deprive those states which fail to respect fundamental rights norms in Article 7 of the Nice Treaty¹⁷² provides the possibility that such requirements will be more actively imposed on existing Member States, as is indicated by the Commission's 2005 warning to the Polish government that that risked losing voting rights in the Council should it fail to respect gay rights.¹⁷³

In the area of immigration, the approach of the Union has shown similar concerns. It has encouraged Member States to require migrants to the Union to indicate that they accept the principles of the autonomy of the public sphere and individual private autonomy and the limitations on the reflection in law of the conservative, interventionist and patriarchal approaches of many religions to issues of gender and sexuality which such principles entail, as a prerequisite to the granting of residence rights or citizenship. This approach does involve a significant degree of interference with individual religious liberty and with the private views and identity rights of individual migrants. However, in an approach analogous to the "*militant democracy*" espoused by the Court of Human Rights in *Refah*, the Union has permitted Member States to interfere with private views and individual autonomy in order to secure respect for these principles in relation to issues such as gender and sexuality. Indeed, in the context of migration, states regularly select migrants on the basis that they have certain desirable traits (the youthful, highly skilled and those with

¹⁷² Article 7, TEU, as amended, Council of the European Union, Brussels, Consolidated versions of the Treaty on European Union and the Treaty on the functioning of the European Union, 15 April 2008, 6655/08.

¹⁷³ See "EU Warns Poland on Gays", 26 October 2005, available at: <http://www.365gay.com/newscon05/10/102605poland.htm> (accessed 6 April 2007).

cultural or ethnic ties to certain states are often granted favourable treatment under immigration laws). It is not therefore, inherently objectionable for EU Member States to select migrants on the basis of commitment to certain basic values or for the Union to encourage the selection of migrants committed to the values of its own public order such as respect for a the notion of balance between religious and humanist influences.

However, the policing of these limitations on religious influence over law is rendered complex by the Union's attempts to distinguish between religious claims which are parts of Member State cultures and those that are political in nature. The facilitation of religion under the EU's public order has included the promotion of religious morality as part of a broader public morality which Member States are entitled to promote as part of their cultural autonomy. This has enabled faiths which are culturally-entrenched at Member State level to promote their religious notions of morality as part of national cultural identity. On the other hand, similar claims on the part of outsider religions which are not seen as part of national culture to the same extent are seen as political and therefore as representative of a desire to subject the political arena to religious domination. Such religions are therefore seen as potentially threatening to a public order which regards balance between religious, humanist and cultural influences as requiring limitations on religious influence over the public sphere. Indeed in relation to Turkey, a desire to promote the Islamic values seems to have been regarded as unacceptable despite Islam's status as the dominant national religion and major element of Turkish culture, thus giving the impression of a degree of incompatibility between the Union's public order and Islam itself rather than merely political Islam. In a similar vein, the retention by immigrants (and particularly Muslim immigrants) of views hostile to notions such as gay rights or gender equality are seen as evidence of a failure to accept the limitations on religious influence over law and society inherent in the EU's public order rather than private religious beliefs.

It may well be the case that European believers in religions which are culturally entrenched within EU Member States have come to accept limitations on their influence over law as a result of historic exposure to the

secularising forces that have marked European history.¹⁷⁴ The cultural role of such faiths may therefore be less threatening to the notion of balance between religious and humanist influences than the public ambitions of faiths whose followers' expectations of legal and political influence have had less exposure to such forces, particularly as the influence of such insider religions over law is felt only as part of wider national cultures most of which have been marked by intensive secularisation. It is certainly true that the passing of laws on explicitly religious grounds would damage the ability of adherents of minority faiths and non-believers to take part in the political process in a meaningful way, even if the resulting laws respected the principle of personal autonomy. Accordingly, and in the light of the fundamental importance of the principle of equal dignity in the public sphere, the greater intensity of the Union's restrictions on religious influence in the political sphere compared to those applied in relation to national culture, are not necessarily unjustifiable. However, the fact that the sometimes similar claims of insider and outsider faiths are treated in a different manner does raise serious issues of equal treatment and risks exposing the EU to charges of discrimination. There is however no easy solution to the Union's difficulties in this regard. It is committed to respecting Member State cultural autonomy which includes the promotion of partly religiously influenced notions of public morality. At the same time it has a strong humanist tradition which requires that religious influence in the public sphere be limited. The Union's attempt to adhere to both of these principles has led to a degree of unequal treatment between insider and outsider faiths. However this inequality is reflective of the reality that some faiths maintain a privileged position at Member State level and the pluralist nature of the Union's public order means that such privilege will inevitably be seen, to some degree, at EU level.

¹⁷⁴ Indeed several commentators have noted that rejection of 'live and let live' privatised religion is not restricted to Muslim immigrants by any means but is in fact prevalent amongst immigrants of many religions. See G. Davie 'Religion in Britain: Changing sociological assumptions' *Sociology*, 34/I:113-128. She further argues that the difference in attitude to religion of native Europeans and immigrant communities 'has led to persistent and damaging misunderstandings' (*ibid*). See also P. Norris and R. Inglehart *Sacred and Secular: Religion and Politics Worldwide* Cambridge University Press, Cambridge, 2004

Chapter VII: Conclusion

1. Introduction: Religion and Humanism: The Twin Pillars of the Union's Public Order

2. The Effects of an Identity-Based Approach to Religion

3. Competing Identities Limiting Religious Influence within the EU Legal Order

4. The Problems, Power and Limits of Religion's Cultural Role

5. Conclusion

1. Introduction: Religion and Humanism: The Two Pillars of the Union's Public Order

This thesis has been an endeavour to provide a broader account of the relationship between religion and the public order of the European Union. It has sought to go beyond issues of religious freedom to consider the complex relationships between religion, individual rights, democracy and collective (particularly national) identities seen in the context of the EU's *sui generis* and highly pluralist legal order. It has demonstrated how, in a context of increasing religious and cultural diversity in Europe, the EU has constructed a public order which aims to balance the two major influences on contemporary European approaches to the relationship between religion, law and state; a mainly Christian religious tradition and a humanist tradition which sprang from, but nevertheless has often come into conflict with, Christianity.¹ These two traditions are present in the legal systems of all Member States.² However, the relative importance accorded to each, along with the degree of cultural identification with particular faiths, varies greatly from country to country.³ The EU lacks the authority to reconstruct the relationship between the state, the law and religion in a fundamental fashion. It is therefore required to devise an approach which synthesises the national traditions of its Member States.

¹ These two influences are discussed in the work of LeGoff discussed in section 2 of Chapter II.

² See section 4 of Chapter II which details the contemporary role of religion in EU Member States.

³ *Ibid.*

The Union's public order seeks to uphold its commitment to balancing its religious and humanist traditions and to give scope to Member States to continue to pursue their own particular relationships to religion, by treating religion as a form of identity. Approaching religion in this way contributes to balance between these traditions by restricting religious influence in the political arena while facilitating religion's cultural role, in particular its role in national cultures. In line with predominant anthropologically-focused approaches, culture in general and therefore religion's cultural role, is seen under EU law as separate, to a degree, from the rationalism of the political sphere and the economic imperatives of the market.⁴ This cultural role allows religion to be recognised as part of the EU's public order in its own right. Although protection of religion's cultural role does allow it to achieve a degree of facilitation within both the market and the political arena, including recognition of religion's historical role in defining communal moral standards,⁵ such facilitation must also respect and adapt to the commercial needs of the market and to the strong humanist and secular elements, including respect for individual autonomy, which are part of the same public order and which restrict religious influence over law and politics.⁶ This balancing of religious and humanist influences is seen as part of Europe's ethical identity and inheritance and as normatively desirable in its own right.⁷

2. The Effects of an Identity-Based Approach to Religion

Treating religion as a form of identity impacts on the nature of the role played by religion within the EU legal order. Identity covers both individual self-definition ("who am I?") and broader shared identities which provide a framework for and give meaning to, individual identities and choices ("what

⁴ EU legislation has repeatedly recognised that cultural goods and activities must not be treated solely on the basis of their commercial value and that culture is entitled to protection from the free market (see section 3.1 of Chapter V). See also the discussion in section 4 of this chapter.

⁵ EU law has recognised that religious bodies make a "particular contribution" to policymaking and has facilitated religious participation in this field (see section 3 of Chapter III).

⁶ Facilitation of the religious identity of employees under EU law is limited by the need to respect the commercial nature of the market (see section 2.3.1 of Chapter V). The Union has made it clear that religious domination of the public sphere and excessive interference with private autonomy in order to promote religious norms are incompatible with EU membership (see Chapter VI).

⁷ The Preamble to the Lisbon Treaty recognises both religious and humanist influences as elements of its constitutional values (see section 2 of Chapter III). For a discussion of the importance of the principle of balance in EU law (see section 5.2 of Chapter III).

am I?”). While respecting individual self-definition can be seen as a humanist goal (albeit one with which individual religions may agree), protecting collective identities can, in addition to respecting human choices, involve valorising factors such as national or religious identities which are seen as having significance beyond subjective human experience and is not necessarily therefore entirely humanist in its orientation. The fact that viewing religion as a form of identity covers both of these individual and collective aspects can pose problems for religions in terms of the coherence of the demands which they may make of the law, as the individual identity rights underpinning individual claims to facilitation of religious identity may clash with the collective identity rights through which a particular religion may seek to play a broader role by, for example, operating public institutions such as schools and hospitals or by promoting the use of the law to enforce its theological norms.

The form of the recognition accorded to religion by EU law as a consequence of its status as a form of identity, is marked by these tensions. As a form of identity, religion can claim a degree of protection from the law. Such protection can involve the defence of individual religious identity rights, as in relation to the prohibition on discrimination on religious grounds in employment.⁸ However it can also involve claims for the protection of collective rights which restrict such individual identity rights, as in the case of the rights to promote particular notions of public morality⁹ or to operate religious institutions in accordance with the ethos of a particular faith.¹⁰ Religion’s status as a form of identity also enables it to claim a degree of special treatment under the law. In individual terms this is seen in the prohibition of indirect discrimination on religious grounds which enables individuals to be treated in accordance with their religious characteristics rather than in the same way as all other individuals.¹¹ Such claims to differential treatment are also seen at a collective level where Member States are permitted to invoke religious elements of their cultural identity in order to

⁸ See section 2.2 of Chapter V.

⁹ See section 4 of Chapter III.

¹⁰ See section 2.3 of Chapter V.

¹¹ See section 2.2 of Chapter V.

derogate from EU law duties on grounds of public morality¹² and are also permitted to excuse religious institutions from the duty to respect the identities of employees in order to promote the identity of such institutions.¹³ The Union's recognition of religion as a form of identity also entitles religion to a place in Civil Society where it has been recognised as making a "particular contribution" and has been facilitated on this basis.¹⁴

3. Competing Identities Limiting Religious Influence within the EU Legal Order

EU law therefore enables religion to influence law both through its status as an element of individual identity, which entitles it to protection on grounds of respect for individual autonomy and on the basis of its role in collective identity, particularly national cultural identity, which permits facilitation of religion's institutional role and its contribution to notions of public morality. However, these roles are limited by other elements of the Union's public order, including the importance of the market economy and those which reflect Europe's strong humanist and secular traditions of protecting individual autonomy and of questioning and limiting religious influence over law and politics. Indeed the strong, though not exclusively, humanist orientation of an identity-based approach to religion, means that restrictions on the facilitation of religion are likely to be greater when the facilitation in question involves greater intrusion with key elements of human identity.

Therefore, in relation to the interests of the competitive market, which is a relatively impersonal, technical phenomenon and is somewhat removed from core issues of identity, the facilitation of religious identity is permitted to demand relatively significant accommodation. Although in certain instances EU law has recognised religion as an economic choice,¹⁵ it has repeatedly stated that culture is not a purely commercial matter and by recognising religion as an element of national culture, has suggested that there are limits on

¹² See section 4 of Chapter III.

¹³ See section 2.3 of Chapter III.

¹⁴ See section 3 of Chapter III.

¹⁵ See the discussion of the ruling in *Steymann v Staatssecretaris van Justitie* Case 196/87 ECR [1988] 06159 in section 2.1 of Chapter V where religious choices were characterised as economic choices by the Court of Justice.

extent to which religious and cultural actions can be quantified and transacted.¹⁶ Direct discrimination on religious grounds in matters of employment is not permitted even when such discrimination could be necessary to protect the commercial interest of an employer.¹⁷ Even in relation to indirect discrimination, an employer must show an “*intolerable burden*” or show an inability to perform “*the essential functions*”¹⁸ of a post in order to restrict the religious identity rights of an employee.

In contrast, in relation to the public sphere, which is of vital importance to notions of equality of citizenship, equal respect and dignity,¹⁹ religious claims to special treatment have been restricted to a far greater degree. Indeed, as the Union’s commitment to respecting religion as an element of identity is merely the predominant mechanism through which it puts its wider commitment to balancing Europe’s religious and humanist traditions into operation, EU law has made it clear, both internally and externally, that the facilitation of religious identity must give way to the protection of the autonomy of the public sphere and the equality of all participants therein. Internally, this approach is seen in the framework provided by the Union to enable religious bodies to contribute to law and policy making. While the EU recognises the “particular contribution” of religious bodies, it has refused to grant religious bodies similar exemptions from the principle of mutual respect for all identities to those it provides in relation to the rights of religious institutions in the context of the labour market and has required religions to make their contributions to lawmaking through structures which require them to acknowledge the legitimacy of different religious choices and forms of identity and which therefore preclude the assertion of claims to a monopoly of truth on the part of particular faiths.²⁰ Externally, this principle has been seen in relation to the

¹⁶ See the discussion of EU legislation in this area in section 3.1 of Chapter V.

¹⁷ See section 2 of Chapter V.

¹⁸ Section 2.3.1 of Chapter V.

¹⁹ See for instance J. Rawls *Political Liberalism*, (New York, Columbia University Press, 1993) and R. Dworkin, *Taking Rights Seriously*, (Cambridge Mass., Harvard University Press, 1977).

²⁰ The structures provided by the Union in this regard are open to all religious and philosophical groups, including secularist and humanist groups. Such structures cannot therefore readily accommodate contributions based on the claims on the part of a particular faith to a monopoly on truth (see section 3 of Chapter III).

Union's approach to Enlargement and particularly in relation to the requirements it has sought from Turkey concerning the limitation of religious influence over the Turkish legal and political systems.²¹

In a similar vein, the Union has also required that religious influence over law be limited by the need to respect the principle of private autonomy which has a strong tradition in European humanism. The leading religious traditions in Europe continue to seek to mould the law in accordance with their theological convictions, particularly in areas such as sexuality and the beginning and end of life which are closely linked to individual identity and autonomy.²² The EU's identification of respect for personal autonomy as a key element of the Union's public order and of EU membership has placed restrictions on the degree to which religious bodies can realise such goals. The commitment of EU law to personal autonomy is manifested both in the protection of the right of individuals to choose between national moral frameworks through free movement rights²³ and through the Union's fundamental rights commitments which have been interpreted so as to require Member States to refrain from legislating to force compliance with religious, or indeed, cultural norms to a degree which impinges on individual autonomy to too great an extent. Thus the criminalisation of private adult sexual conduct such as adultery or homosexuality by candidates for EU membership has been identified as inconsistent with accession to the Union.²⁴

These restrictions underline the limitations on the political role of religion inherent in the notion of balance between Europe's religious and humanist traditions. They are based on the recognition of the particular characteristics of religion as a form of identity. In particular, the facts that religion is such a powerful form of identity and that religious arguments are neither amenable to debate on rational grounds nor accessible to non-believers, mean that

²¹ The Union has required Turkey to maintain its secular system as a condition of membership and has warned it against introducing "Islamic elements" into its legal system while the European Court of Human Rights has made it clear that theocracy is repugnant to the European Convention on Human Rights (see section 3.2 of Chapter V and section 2.3 of Chapter VI).

²² See section 4.2 of Chapter II.

²³ See section 4 of Chapter III.

²⁴ See section 2 of Chapter VI.

unrestricted religious influence over the political arena could both preclude the meaningful participation of all groups in the political process and violate the anti-totalitarian principles of personal autonomy and privacy which have been central to Europe's postwar legal order. Europe's humanist tradition requires that facilitation of religion cannot go so far as to override the notion of the individual as autonomous in private matters and as an equal in the legal and political arenas. The fundamental importance of humanist ideas (some of which may be shared by particular faiths) to Europe's legal order means that religions which are seen as failing to respect these principles of public and private autonomy are not merely excluded from the public role and influence accorded to religion by EU law. Such religions are in fact seen as threats to the Union's public order and have faced restriction on this basis.²⁵ Indeed, despite (or perhaps, because of) the importance placed on the notion of individual autonomy by the Union, EU law has been willing, in the context of immigration policy, to require individual migrants to indicate their willingness to respect gender equality and gay rights thus interfering with the personal autonomy of individuals whose religious beliefs are seen as inconsistent with respect for public and private autonomy and therefore as threatening to the limits on religion inherent in the EU's public order.²⁶ This apparently contradictory approach highlights the ambivalent nature of the relationship between many forms of religion and private autonomy within the EU legal order. On the one hand, religious identities can be protected on the basis of their status as elements of identity which our respect for individual autonomy requires us to protect. Religious identities can however face restriction on the basis of collective interests. Such collective interests can relate to the preservation of the autonomy of the public sphere or promotion of principles such as gender equality. However, such collective values can also include religious ideas which are recognised as part of public morality. Religion can

²⁵ See the failure of the Union to intervene in relation to the suppression of religions such as Scientology even in areas governed by EU law (section 3.2.2 of Chapter V), the identification of religions which seek restrictions on freedom of speech or the introduction of Sharia as contrary to the Union's public order (section 3.2.1 of Chapter V and section 2.4 of Chapter VI) and the Union's principles on immigrant integration require Member States to ensure that individual migrants subjugate religious objections to a duty to respect private autonomy in relation to issues of gender and sexuality (section 3 of Chapter VI).

²⁶ See sections 3 and 4 of Chapter VI.

therefore be both a beneficiary of the protection of private autonomy and a reason for the curtailment of such autonomy.

4. The Problems, Power and Limits of Religion's Cultural Role

It is at this point that the Union's cultural identity framework for dealing with religion's public role becomes problematic. As national cultures have been recognised by EU law as being entitled to protection from market forces, recognising religion as an element of national culture entitles the practices of those faiths which are culturally entrenched to a greater degree of protection than those of "outsider" faiths and provides scope for the promotion of religious morality through law on grounds of cultural autonomy. In relation to the protection of public and private autonomy, the approach adopted by the EU faces significant difficulty in distinguishing between the reflection in law of religious ideas on the basis of religion's role in cultural identity and political attempts to use law and the political process to enforce compliance with religious teachings. The Union's recognition of the reflection in law of religious teachings which are predominant in a particular Member State as a legitimate exercise of cultural autonomy, enables the promotion of religious norms through law on the part of culturally entrenched faiths.²⁷ Accordingly such "cultural" attempts to influence the law to religious ends are not seen as representative of a desire on the part of religion to dominate the public sphere or to pursue theocratic agendas. On the other hand, equivalent attempts on the part of outsider religions which are not similarly culturally entrenched are seen as political, not cultural and are therefore restricted by the limitations²⁸ on religion's political role imposed by the Union's public order. Furthermore, the fact that such outsider religions are seen as having political aims means that they are susceptible to being regarded as potential threats to the non-theocratic nature of the Union's public order and to restriction on this basis. Such an approach raises serious issues of equal treatment.

²⁷ See section 4 of Chapter III. Note however the limitations of such national public morality on the basis of respect for individual autonomy and free movement rights described in section 5 of Chapter III.

²⁸ See n. 25 above.

Such fear of the consequences of enabling outsider religions to play the same public role as culturally entrenched faiths is part of a broader context in which the relationship between religion, law and state in Europe is in a state of flux due the pressure which increasing religious diversity has placed on established patterns of dealing with religion. In particular, the common European pattern of church-state relations based on an exalted symbolic status for particular faiths moderated by shared cultural conceptions around religion's role in society which limit the political influence granted by such status, has come under some pressure as European populations come to be made up of larger numbers of people whose religious experience has not been marked to the same degree by the religion-limiting influences of European history.²⁹ In such a context, the symbolic status granted to religion by the state, or previously largely symbolic laws relating to matters such as blasphemy, have come to be seen in a new light as the cultural consensus which limited their impact breaks down. Therefore, just as the unused and symbolic powers of the British monarchy would be threatened by the arrival to the UK of significant numbers who genuinely believed in monarchical government, similarly the symbolic status of European religions has been called into question by the increase in the number of adherents to religious traditions whose relationship to politics and law has not been moulded by the same conflicts and compromises which influenced the relationship between culturally entrenched forms of Christianity and the state in Europe.

The European Union has therefore had to develop its balance and identity focused approach to religion and to distinguish between cultural and political religious influence over law in this context where increasing cultural diversity is contributing to the highlighting of the ambiguities and contradictions of the established system. Addressing the issues of unequal treatment which the current approach entails could involve a "levelling up" of religious influence where restrictions on religion's political influence are relaxed in order to

²⁹ Davie has argued that the difference in attitude to religion of native Europeans and immigrant communities "has led to persistent and damaging misunderstandings, not least amongst groups whose religious commitments form the very core of their existence and for whom a pick-and-mix, live-and-let-live attitude simply will not do" G. Davie, "Religion in Britain: Changing Sociological Assumptions" *Sociology*, 34/1:113-128.

enable outsider religions to achieve a comparably broad role to that of insider faiths. It could also involve a degree of “levelling down” under which the influence of insider religions over law is more strictly controlled with consequent restriction of Member State derogations from EU law obligations on cultural grounds.

To date no consensus has emerged in this regard. Some have argued that the more muscular religiosity of many immigrants may lead to a process in which the secular elements of the European public order are made more explicit. Indeed an un-named German politician quoted by Klausen in her study of politically active European Muslims, predicted that the result of the increased presence of Muslims in Europe will be the institution of greater separation between church and state.³⁰ However, such an outcome is far from inevitable. Powerful voices have spoken out against the notion of a more secular Europe and have called for a reassertion of Europe’s Christian identity³¹ while the Catholic Church has, at times, used controversies such as that surrounding the publication of cartoons of the Prophet Mohammed in the Danish press, to push for measures to restrict freedoms such as the right to ridicule religion which emerged from past conflicts between Christianity and secular forces in Europe.³²

The option of “levelling up” and significantly reducing restraints on religious influence over law and politics brings with it major drawbacks. Such an approach is inconsistent with the overall notion of balance between religious and humanist influences which underpins the overall approach of the EU in this area. As non-believers cannot contribute meaningfully to the formation of laws justified on religious grounds, it also risks compromising the ability of all groups to participate in public debate. Furthermore, given that major European

³⁰ J. Klausen, *The Islamic Challenge: Politics and Religion in Western Europe* (Oxford and New York, Oxford University Press, 2005) 179.

³¹ See Charter III, sections 2 and 3, in particular the arguments of J.H.H. Weiler in *Un Europa Cristiana* (Milano, Biblioteca Universale, 2003).

³² See “Intervention of the Holy See at the ordinary session of the United Nations Human Rights Council on Religious Freedom, Address of H.E. Msgr. Silano M. Tomasi, Geneva, 22 March 2007” Available at: http://www.vatican.va/roman_curia/secretariat_state/2007/documents/rc_seg-st_20070322_religion_en.html (accessed 1 May 2007).

religions such as Roman Catholicism and mainstream versions of Islam, retain ambitions to use the law to enforce compliance with their teachings in relation to “lifeworld” matters, “levelling up” risks imperilling the valuable European tradition of protection of privacy and individual autonomy.³³ On the other hand, to attempt to cure the political inequalities which result from the ill-defined nature of the boundary between the cultural and political realms by insisting on absolute equality of religions in the cultural arena represents the kind of radically multiculturalist approach which has not found favour with European electorates in recent times³⁴ and which would deny the right of nation states to develop their own cultural identity. Such an approach would be politically impossible for the EU and would violate its longstanding and valuable commitments to pluralism and to respecting the cultural autonomy of its Member States.

A degree of unequal treatment may therefore be inevitable. The Union is an organisation of limited competence with limited authority to reshape European approaches to religion. Whether or not the continuing privileged status of particular faiths in various Member States is desirable and whether or not such status promotes inequality in the public sphere, it is a reality with which the Union must live and one which it has specifically undertaken to respect.³⁵ By defining religion’s role as cultural, EU law recognises religion as part of a specific and particular identity shared by a particular society (or for the purposes of EU, a particular Member State) which need not necessarily be shared by others.³⁶ As respecting the cultural identity of Member States is acknowledged by the Union as one of its duties, its definition of the

³³ See section 4.2 of Chapter II. See also the Vatican’s opposition to a United Nations motion calling for an end to the criminalisation and punishment of individuals on the grounds of their sexual orientation, “The Pope’s Christmas Gift: A Hard Line on Church Doctrine”, *Time Magazine*, 3 December 2008.

³⁴ Parties running on anti-multiculturalist platforms have had significant success in the Netherlands and Denmark. Policies in relation to immigration have increasingly stressed integration over multiculturalism in recent years (see section 4 of Chapter VI).

³⁵ Article 17(1), Consolidated Version of the Treaty on the Functioning of the European Union, OJ C 115/47 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF>. See discussion in Chapter III, sections 2 and 3.

³⁶ Inglis and Barker both note how such specificity and particularism are intrinsic to cultural identity. See F. Inglis, *Culture* (Cambridge UK and Malden MA, USA Polity Press, 2004) 28-29. See also C. Barker “Culture” in *The SAGE Dictionary of Cultural Studies* Sage. (London, New Dehli, Sage, Thousand Oaks, 2004) 45. Similarly Taylor’s

institutional role and the influence over public morality matters granted by a Member State to a particular religion as a cultural matter, means that such particularities do not have to be characterised as appropriate for all Member States, or as justifiable in rational terms, but are protected purely as a result of their status as a part of the identity of that Member State. However, the Union does not merely passively reflect Member State religious identities. The characterisation of religion's influence over law as a cultural matter also involves the characterisation of this role as non-political and non-ideological in nature. Gramsci³⁷ and Zizek³⁸ have noted the degree to which cultural norms and practices are thought of as non-political and non-ideological. Of course, as both authors acknowledge, such ostensibly non-ideological and non-political matters are in fact far from ideologically and politically neutral. Nevertheless, within the explicitly political context of the public sphere, the Union has been notably less accommodating of the particularism and exemption from the requirements of rational justification and general applicability which it is content to accommodate in relation to cultural claims on law, including such claims with religious aspects, and has thereby reinforced the notion of cultural claims as being non-political in nature, or at the very least, less of a threat to the autonomy of the public sphere than purely religious claims.³⁹ By adopting this approach, the Union establishes some limits on religion's role within the overtly political public sphere and provides some protection to the principle of formal political equality between religions and between individuals. Though it cannot ensure the equal influence of all religious traditions, the distinction drawn by the EU's public order between the cultural and political elements of religion's influence over law, enables it to oblige religious participants in its own public sphere to provide rational and generally applicable justifications for their claims and to recognise the validity of the contributions and claims of other forms of identity.⁴⁰ Although it does not impose the same constraints on

³⁷ Gramsci speaks of culture as "a network of cultural values and institutions not normally thought of as political" see A. Gramsci, *Selections from the Prison Notebooks*, (New York, International Publishers, 1971) 238.

³⁸ Zizek argues in relation to cultural norms that "in a given society certain features, attitudes and norms of life are no longer perceived as ideologically marked, they appear as neutral" see S. Zizek, *In Defence of Lost Causes*, (London, Verso, 2008) 21.

³⁹ See chapters III, V and VI.

⁴⁰ See section 3 of Chapter III. This separation of the political from the religious has been cited by Habermas and Derrida as one of the foundation elements of a common European identity,

religious claims made under the guise of Member State cultural autonomy, this approach also permits the EU to require Member States to maintain the autonomy of their public spheres from the explicit domination of any particular faith without removing religious elements of Member State identity.⁴¹ Thus, by distinguishing between explicitly religious claims and cultural claims which may include religious elements, the Union attempts to reconcile the notion of balance between religious and humanist influences and the limitations on religious influence over the public sphere which this principle entails, with respect for the role of religion in Member State identity.

Although this approach does inevitably involve a degree of inequality between insider and outsider faiths, such a situation is not immutable and routing religious claims through the notion of culture can help to ensure a greater degree of inclusion of minority groups than would otherwise be the case. While national cultural identities do have strong links to the past, culture is an evolving phenomenon which is constantly subject to change and development, as occurred for example in relation to gender equality when longstanding patriarchal European traditions were replaced by more egalitarian approaches. While individual religions can also evolve and can encompass widely divergent world views, participation in this evolutionary process is only open to those who accept the divinely-inspired nature of that religion's founding text or basic beliefs. Participation in the process of cultural evolution and change is not necessarily similarly restricted and can be open to the contributions of all. Even in a society in which a particular faith has been dominant, the cultural role of this dominant faith may evolve and take on board the viewpoints and traditions of minority groups. Such developments will however have to take place at Member State level and cannot be imposed by EU law whose public order will therefore continue to be influenced by the religious particularities of its Member States.

see Mai 2003, in English in J. Habermas and J. Derrida, 'February 15, or What Binds Europeans Together: A Plea for a Common Foreign Policy, Beginning in the Core of Europe', *Constellations* 10:3, 2003, 291-7.

⁴¹ See section 3.2 of Chapter V and section 2.3 of Chapter VI.

Furthermore, in a Union of 27 states, no one cultural approach may claim automatic acceptance at EU level, meaning that the possibility of exclusion of those who dissent from particular national cultural norms from public debate at EU level is significantly reduced. Moreover, cultural claims in respect of EU law relate largely to claims for exemptions and derogations from Community law obligations on the part of individual states. Such derogations are limited in effect to such states and do not therefore involve the same degree of risk of the imposition of a particular cultural approach on all as would be posed by the acceptance in the law-making arena of religious truth claims whose effects would not be similarly restricted. The Union's embrace of the principles of the autonomy of the public sphere, and the protection of fundamental rights, particularly individual private autonomy, as both basic principles of its public order and as prerequisites of EU membership, also provide a bulwark against large scale expansion of the influence of a particular faith over law and political life and the subjugation of individual autonomy to the promotion of collective religious and cultural goals at Member State level, thereby promoting the degree of pluralism necessary for cultural evolution to remain an open and reflexive process. These requirements do show that certain constraints on Member State choices regarding the relationship between religion, the individual and the law, including those which are culturally-based, are part of the Union's public order. While these features do not entirely cure the inequality caused by the Union's facilitation of religion's cultural influence over law, in the light of the EU's limited authority and commitment to respecting Member State autonomy, they may represent the maximum degree of regulation of such relationships of which the Union is capable.

5. Conclusion

The relationship between religion and the Union's public order revealed by these chapters is unmistakably linked to a Christian humanist tradition which seeks to balance Europe's dual tradition of largely Christian religiosity on one hand, with a strong humanist tradition that stresses notions of individual autonomy and the separation of religion and law on the other. The identity-focused framework through which the Union pursues this balance recognises religion as an element of communal identity and thus as a contributor to the

definition of shared norms. Such an approach enables the pursuit of religious goals and the promotion of religious morality through law. On the other hand, this approach also limits religious influence over law by restricting the degree to which claims to religious monopolies on truth can be asserted in the political sphere and by its emphasis on respect for choice and identity rights which strengthens claims to individual autonomy and freedom from religious norms. This gives the Union a public order which both facilitates the predominantly Christian cultural role of religion in influencing law but which is also avowedly non-theocratic. Such a public order is therefore able to accommodate the requirements of cultural and legal pluralism which are particularly important in the light of the diversity of approaches to the relationship between religion and law shown by the Member States. Although this approach comes at the cost of a degree of inequality between religions, such a situation is the inevitable outcome of the Union's limited authority and need to defer to the cultural autonomy of its Member States.

This thesis contributes to our knowledge both of the Union and to debates in relation to the relationship between religion, politics, the state and the law in liberal democracies. The highlighting of the difficulties of adhering to a principle of equal treatment of religion in the light of the differing cultural roles and theological and political ambitions of various faiths, raises interesting issues for further study, particularly comparative studies. The thesis has highlighted the pluralism of the Union's constitutional order and the significant facilitation of religion's cultural and political role which the EU law provides. It therefore shows that the EU's approach to the regulation of religion does not represent the kind of secularist break with the past which some have alleged.⁴² However, it also demonstrates that the humanist tradition of challenging and limiting religious influence over law and politics is a key element of the Union's public order which precludes the reversal of principles such as respect for the autonomy of the public sphere and for individual autonomy in the private sphere as well as the limitation of the accommodation of religious

⁴² See n. 24 above. See also, *The Catholic Communications Office*, "Address of Cardinal Sean Brady to the Humbert Summer School" 24 August 2008, available at: <http://www.catholiccommunications.ie/Pressrel/24-august-2008.html> (accessed 8 October 2008).

claims to a monopoly of truth in the political arena. In recent years, religion has come to occupy a level of importance in global politics which would have shocked the legions of sociologists who confidently predicted its demise.⁴³ Some have proclaimed the return of religion to the political sphere.⁴⁴ Others have argued that immigration and demographic factors make it inevitable that European democracies will have to accommodate and accord greater political and legal power to religious movements in the future.⁴⁵ Although this thesis has demonstrated that the European Union's public order is far from strictly secular, the Union may well prove to be a limiting factor on should such a broad return of religious influence come to pass. In particular, the Union's recognition of the legitimacy and worth of Europe's humanist tradition and its commitment to individual autonomy are inconsistent with wholesale enforcement of religious morality by legal means on the basis of either explicitly religious or cultural claims. As importantly, its adherence to strict formal neutrality in its own public sphere, its identification of the autonomy of the public sphere from religious influence as a necessary condition of accession and its valorisation of religion on the basis of its significance to human identities and consequent unwillingness to facilitate the assertion of religious claims to truth in public debate, all establish the notion of a degree of separation between religion and the law as an indispensable element of Europe's public order. Indeed, the weakness of the Union's own cultural identity and the diversity of the identities of its Member States mean that EU law is created within a political system within which no one religious or cultural tradition can assume automatic acceptance. In this sense it can be seen as encouraging participants in its political sphere to repackage particularist religious or cultural arguments into forms which are, in theory, accessible to all, including those who do not share such a cultural or religious background. Therefore, despite the significant accommodation of the religious and cultural particularities of its Member States that it offers, such a public order is a

⁴³ P. Berger and G. Weigel (eds.) *The Decsecularization of the Modern World: Resurgent Religion and Modern Politics* (Grand Rapids Michigan, Erdemans Publishing Company and Public Policy Center, 1999).

⁴⁴ *Ibid.*

⁴⁵ See for instance, G. Davie, "Religion in Britain: Changing sociological assumptions" *Sociology*, 34/1:113-128, B. Bawer, *While Europe Slept: How Radical Islam Is Destroying the West from Within*, (New York, Doubleday, 2006) and *The Sunday Times*, "Down with Godless Government" 22 April 2007.

promising environment for the promotion of ideas such as that of public reason which require religious justifications for law to be “translated”⁴⁶ so that they are in principle accessible to those with differing religious views. The Union may therefore help to maintain the reflexivity of European culture while acting as a bulwark against any theocratic tendencies which may emerge in the future and is likely to be an important site in future conflicts in relation to religion’s role in European liberal democracies.

⁴⁶ For discussion of this notion of translation see J. Habermas, “Religion in the Public Sphere” *European Journal of Philosophy*, 14:1 1-25 (2006).

Bibliography

Books and Articles

W. M. Abbott (ed.) *The Documents of Vatican II* (Piscataway, American Press, 1966).

H. Alfeyev 'Christian Witness to Uniting Europe: A View from a Representative of the Russian Orthodox Church' *The Ecumenical Review*, January 2003.

S. Allievi, 'Relations between Religions' in B. Maréchal (ed.) *Muslims in the Enlarged Europe: Religion and Society*, (Leiden, Koninlijke Brill NV, 2003).

R. Asen "Toward a Normative Conception of Difference in Public Deliberation" *Argumentation and Advocacy* 25 (Winter) 115-129 (1999).

S. Barbou des Places and H. Oger 'Making the European Migration Regime: Decoding Member States' Legal Strategies' *European Journal of Migration and Law*, Vol. 6 No.4 2004.

C. Barker, "Culture" in *The SAGE Dictionary of Cultural Studies*, (London, New Delhi, Thousand Oaks, Sage 2004).

D. Barrett (ed.), *World Christian Encyclopedia: A Comparative Study of Churches and Religions in the Modern World AD 1900-2000* (New York, Oxford University Press, 1982).

B. Bawer, *While Europe Slept: How Radical Islam Is Destroying the West from Within*, (New York, Doubleday, 2006).

J. Bengoetxea, N. MacCormick and L. Moral Soriano, "Integration and Integrity in the Legal Reasoning of the European Court of Justice" in G. de Burca and J.H.H. Weiler (eds.) *The European Court of Justice*, (The Academy of European Law, European University Institute, Oxford, Oxford University Press, 2001).

P. Berger, *A Far Glory: The Quest for Faith in an Age of Credulity*, (New York, Free Press, 1992).

P. Berger and G. Weigel (eds.) *The Decsecularization of the Modern World: Resurgent Religion and Modern Politics* (Grand Rapids Michigan, Erdemans Publishing Company and Public Policy Center, 1999).

K. Boyle 'Human Rights, Religion and Democracy: The Refah Party Case', *Essex Human Rights Review*, Vol 1. No. 1.

S. Bruce, *From Cathedrals to Cults: Religion in the Modern World* (Oxford, Oxford University Press, 1996).

W. Cantwell Smith, *"The Meaning and the End of Religion"* (New York, The Macmillan Company, 1963).

A. Carkoglu and B. Rubin (eds.) *Religion and Politics in Turkey*, (London, Routledge, 2006).

J. Casanova, *Public Religions in the Modern World* (Chicago and London, University of Chicago Press, 1994).

J. Césari 2002 'Islam in France: The Shaping of a Religious Minority' in Y. Yazbeck Haddad *Muslims in the West from Sojourners to Citizens*, (Oxford, Oxford University Press, 2002).

J. Césari, A. Caeiro and D. Hussain *Islam and Fundamental Rights in Europe* Final Report, October 2004, European Commission, DG Justice and Home Affairs Centre National de la Recherche Scientifique, Ecole Pratique de Hautes Etudes, Groupe de Sociologie des Religions et de la Laïcité.

D. Chalmers, "The Mistakes of the Good European?" in S. Fredman (ed.) *Discrimination and Human Rights The Case of Racism* (Academy of European Law, European University Institute, Oxford University Press, 2001).

J. Cox, "Master Narratives of Long-Term Religious Change" in H. McLeod and W. Ustof (eds.) *The Decline of Christendom in Western Europe, 175-2000* (Cambridge University Press, Cambridge, 2003).

C. Crouch "The Quiet Continent: Religion and Politics in Europe" in D. Marquand and R. L. Nettle (eds.) *Religion and Democracy* (Oxford, Blackwell Publishers, 2000).

P. Cumper, "The Rights of Religious Minorities: The Legal Regulation of New Religious Movements" in P. Cumper and S. Wheatley (eds.), *Minority Rights in the "New" Europe*, (The Hague: Martinus Nijhoff Publishers, 1999).

S. Cvijic and L. Zucca, "Does the European Constitution need Christian Values?" OJLS Vol. 24, No. 4 (2004), 744.

K. Dalacoura, *Islam, Liberalism and Human Rights: Implications for International Relations*, (London and New York, I B Tauris, 1998).

G. Davie, "Religion in Britain: Changing sociological assumptions" *Sociology*, 34/I:113-128.

G. Davie, *Religion in Europe: A Memory Mutates* (Oxford University Press, Oxford, 2000).

G. Davie, *Europe: The Exceptional Case: Parameters of Faith in the Modern World* London, Darton, Longman Todd, 2002).

- G. Davies “Morality Clauses and Decision Making in Situations of Scientific Uncertainty: the Case of GMOs”, *World Trade Review* (2007), 6:2, 249-263.
- A. Dershowitz, *Rights from Wrongs: A Secular Theory of the Origins of Rights* (New York, Basic Books, 2004).
- R. Dworkin, *Taking Rights Seriously*, (Cambridge Mass., Harvard University Press, 1977).
- H. Dezinger (ed.) *The Sources of Catholic Dogma*, (B. Herder Book Company, 1957).
- É. Durkheim, *The Elementary Forms of the Religious Life* (Oxford and New York, Oxford World’s Classics, Oxford University Press, 2001).
- R. Dworkin *Taking Rights Seriously* (Cambridge, MA, Harvard University Press, 1977).
- Z. Enyedi, “The Contested Politics of Positive Neutrality in Hungary” In: J.T.S. and Z. Enyedi (eds.) *Church and State in Contemporary Europe. The Chimera of Neutrality*. (London: Frank Cass, 2003).
- J. Esposito, *The Islamic Threat: Myth or Reality*, (Oxford and New York, Oxford University Press, 2002).
- C. Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford and New York, Oxford University Press, 2001).
- M. Evans, *Religious Liberty and International Law in Europe*, (Cambridge, Cambridge University Press, 1997).
- A. Ferrari, “Religions, secularity and democracy in Europe: for a new Kelsenian pact” *Jean Monnet Papers Series*, (New York University School of Law, 2005).
- S. Ferrari ‘The Secularity of the State and the Shaping of Muslim Representative Organizations in Western Europe’ in J. Cesari and S. McLoughlin (eds.) *European Muslims and the State* (Aldershot, England, Ashgate, 2005).
- J.S.Fetzer and J.C. Soper *Muslims and the State in Britain France and Germany* (Cambridge, Cambridge University Press, 2005).
- E. P. Foley, *Liberty for All: Reclaiming Individual Privacy in a New Era of Public Morality*, (New Haven, CT, Yale University Press, 2006).
- M. Foley, *The Silence of Constitutions*, (London, Routledge, 1989).

- S. Fredman “Combating Racism with Human Rights: The Right to Equality” in S. Fredman (ed.) *Discrimination and Human Rights The Case of Racism* (Academy of European Law, European University Institute, OUP, 2001).
- F. Fukuyama ‘Europe vs. Radical Islam’ in *Policy Review*, 27 February 2006.
- L. Fuller *The Morality of Law* (New Haven, Yale University Press, 1969).
- T. Gabriel, “Is Islam against the West?” in R. Geaves, T. Gabriel, Y. Haddad and J. Idleman Smith (eds.) *Islam and the West Post 9/11* (Aldershot, Hants, England, Ashgate, 2004).
- K. Gajendra Singh, “EU-Turkish Engagement: A Must for Stability of the Region”, South Asia Analysis Group Papers, <http://www.saag.org/papers12/paper1127.html>.
- R. Geaves, ‘Who Defines Moderate Islam ‘post’ September 11?’ in R. Geaves, T. Gabriel, Y. Haddad and J. Idleman Smith (eds.) *Islam and the West Post 9/11* (Aldershot, Hants, England, Ashgate, 2004).
- K. Groenendijk ‘Legal Concepts of Integration in EU Migration Law’ *European Journal of Migration and Law*, Vol. 6 No. 2 2004.
- T. J. Gunn *Adjudicating Rights of Conscience under the European Convention on Human Rights* in J. D. Van Der Vyver and J. Witte J (eds) *Religious Human Rights in Global Perspective: Legal Perspectives* (Hague, Boston, London, Martinus Nijhoff Publishers, 1996).
- J. Habermas “Intolerance and Discrimination” *I.CON*, Volume 1, Number 1, 2003, 2.
- J. Habermas, “Religion in the Public Sphere” *European Journal of Philosophy*, 14:1 1-25 (2006).
- L. Halman and T. Pettersson, “Differential Patterns of Secularization in Europe: Exploring the Impact of Religion on Social Values” in L. Halman and O. Riis (eds) *Religion in Secularizing Society*, (Leiden, Boston, Brill, 2003).
- L. Halman and O. Riis (eds), *Religion in Secularizing Society: The Europeans’ Religion at the End of the 20th Century* (Leiden, Boston, Brill, 2003).
- D. Hervieu-Léger, *La Religion pour mémoire* (Paris, Le Cerf, 1993).
- D. Hervieu-Léger, *Vers un nouveau christianisme* (Paris, Le Cerf, 1993).
- C. Hillion ‘The Copenhagen Criteria and Their Progeny’ in C. Hillion (ed.) *European Enlargement: A Legal Approach* (Hart Publishing, Oxford, 2004).
- A.O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States*, (Cambridge, MA: Harvard University Press, 1970).

C. Hitchens *God is Not Great: How Religion Poisons Everything*, (New York, NY, Twelve Books, 2007).

F. Inglis, *Culture* (Cambridge UK and Malden MA, USA Polity Press, 2004).

T. Jansen, "Europe and Religions: the Dialogue between the European Commission and Churches or Religious Communities", *Social Compass* 47(1), 2000, 103-112.

G. Joffé 'Democracy. Islam and the Cult of Modernism' in *Democratization* Vol.4, No.3, Autumn 1997. 134.

P. Jones, "The Ideal of the Neutral State" in R. Goodin and A. Reeve (eds.) *Liberal Neutrality* (London: Routledge 1989).

J. Klausen, *The Islamic Challenge: Politics and Religion in Western Europe*, (Oxford University Press, Oxford and New York, 2005).

M. Kocak and E. Orucu, 'Dissolution of Political Parties in the Name of Democracy: Cases from Turkey and the European Court of Human Rights' *European Public Law*, E.P.L. 2003, 9(3), 399-423.

E. Kofmann, 'Contemporary European migrations: civic stratification and citizenship' (2002) 21 *Political Geography* 1035.

J. Le Goff, *The Birth of Europe* (Malden MA and Oxford UK, Blackwell 2005).

B. Lewis *The Crisis of Islam: Holy War and Unholy Terror* (London, Phoenix, 2003).

N. MacCormick, "The Maastricht Urteil: Sovereignty Now" (1995) 1 *European Law Journal* 259.

P. Macklem, 'Militant democracy, legal pluralism and the paradox of self-determination' *International Journal of Constitutional Law* IJCL 2006, 4(3), 488-516.

J.T.S. Madeley "European Liberal Democracy and the Principle of State Religious Neutrality" in J.T.S. Madeley and Z. Enyedi (eds.) *Church and State in Contemporary Europe: The Chimera of Neutrality* (London, Frank Cass Publishing, 2003).

B. Maréchal (ed.) *Muslims in the Enlarged Europe: Religion and Society*, (Leiden, Koninklijke Brill NV, 2003)

D. Martin, *A General Theory of Secularisation*, (Oxford, Blackwell, 1978).

D. Martin, *On Secularisation: Towards a Revised General Theory* (Aldershot, Hampshire, UK, Ashgate, 2005).

B. Massignon, "Les relations des organismes Européens religieux et humanistes avec les institutions de l'Union Européenne: Logiques nationales et confessionnelles et dynamiques d'europeanisation" in *Croyances religieuses, morales et éthiques dans le processus de construction européenne*, Commissariat General du Plan, (Institut Universitaire de Florence, Chaire Jean Monnet d'études Européennes, 2002).

G.Th. Mavrogordatos, "Orthodoxy and Nationalism in the Greek Case" in J.T.S. Madeley and Z. Enyedi (eds.) *Church and State in Contemporary Europe: The Chimera of Neutrality* (London, Frank Cass Publishing, 2003).

A.J. Menendez, "Review of A Christian Europe", *European Law Review*, 30, No. 1, February 2005, 133.

Y. Meny and A. Knapp, *Government and Politics in Western Europe* (Oxford, Oxford University Press, 1998).

J. S. Mill, *On Liberty*, (London, Wordsworth Classic Edition, 1996).

M. Minkenberg, "The Policy Impact of Church-State Relations: Family Policy and Abortion in Britain, France and Germany" in J.T.S. Madeley and Z. Enyedi (eds.) *Church and State in Contemporary Europe: The Chimera of Neutrality* (London, Frank Cass Publishing, 2003).

T. Modood, 'Anti-Essentialism, Multiculturalism and the 'Recognition' of Religious Groups' *Journal of Political Philosophy*, 6, (1998) 378.

C. Moe, 'Refah Partisi and Others v Turkey' *The International Journal of Not-for-Profit Law*, Vol.6 Issue 1, September 2003.

S. Monsma and C. Soper, *The Challenges of Pluralism; Church and State in Five Democracies* (Oxford: Rowman and Littlefield, 1997).

P. Norris and R. Inglehart, *Sacred and Secular: Religion and Politics Worldwide* (Cambridge, Cambridge University Press, 2004).

E. Özbudun, *Contemporary Turkish Politics: Challenges to Democratic Consolidation*, (London, Lynne Rienner Publishers, 2000).

E. Petersmann "Constitutional Economics, Human Rights and the WTO" (2003) 58 *Aussenwirtschaft* 49.

D.R. Phelan, 'The Right to Life of the Unborn v the Promotion of Trade in Services', (1992) 55 *MLR* 670.

M. Procter and M. Hornsby-Smith, "Individual Context Religiosity, Religious [sic.] and Values in Europe and North America" in L. Halman and O. Riis

(eds.), *Religion in Secularizing Society: The Europeans' Religion at the End of the 20th Century* (Brill, Leiden, Boston 2003).

T. Ramadan, *'To Be a European Muslim'* (Leicester, Islamic Foundation, 1999).

J. Rawls, *A Theory of Justice*, (Cambridge, MA, Harvard University Press, 1971).

J. Rawls *Political Liberalism*, (New York, Columbia University Press, 1993).

J. Raz, *The Morality of Freedom* (Oxford, Clarendon Press, 1988).

J. T. Richardson and M. Introvigne ""Brainwashing Theories in European Parliamentary and Administrative Reports on "Cults" and "Sects"" *Journal for the Scientific Study of Religion* 40 (2): 143-168.

G. Robbers, "State and Church in the European Union" in G. Robbers (ed.) *State and Church in the European Union*, (Baden Baden, Nomos Verlagsgesellschaft 1996).

G. Robbers (ed.), *State and Church in the European Union*. (Baden-Baden, Nomos, 2005).

O. Roy, *Vers un islam européen*, (Paris, Editions Esprit, 1999).

O. Roy, *Secularism Confronts Islam* (translated by George Holoch) (New York, Columbia University Press, 2007).

M. Rynkowski, "Remarks on Art. I-52 of the Constitutional Treaty: new Aspects of the European Ecclesiastical Law?" *German Law Journal* Vol. 6 No. 11, 1 November 2005.

D. Sassoon *The Culture of the Europeans: From 1800 to the Present*, (Harper Collins, London, 2006).

H. Sjursen 'Enlargement in Perspective: The EU's Quest for Identity'. Paper given as part of the European Institute Research Seminar series, at the London School of Economics, 24 May 2006.

R. Stark and L.R. Iannaccone, "A supply-side reinterpretation of the "secularization" of Europe", *Journal for the Scientific Study of Religion*, 33(3) (1994).

C. Taylor, "Liberal Politics and the Public Sphere", Discussion Paper 15, (London, The Centre for the Study of Global Governance, London School of Economics, 1995) 19.

C. Taylor, *A Secular Age*, (Cambridge MA, Harvard University Press, 2007).

P. van Ham *European Integration and the Postmodern Condition* (London and New York, Routledge, 2001).

M. Weber *The Protestant Ethic and the Spirit of Capitalism* (New York, Scribner's, 1930 [1904]).

G. Weigel *The Cube and the Cathedral: Europe, America and Politics without God* (New York, Basic Books, 2005).

J.H.H. Weiler, *Un'Europa Cristiana: Un saggio esplorativo*, (Milan, BUR Saggi, 2003).

A. Williams, *EU Human Rights Policies: A Study in Irony* (Oxford, Oxford University Press 2004).

D. Yamane, *The Catholic Church in State Politics: Negotiating Prophetic Demands and Political Realities* (Lanham, Rowman and Littlefield Publishers, 2005).

Cases of the European Court of Justice and the Court of First Instance

29-69 *Stauder v City of Ulm* [1969] ECR 419

11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125

4/73 *Nold v Commission* Case [1974] ECR 491

36/75 *Rutili v Ministre de l'Interieur* [1975] ECR 1219

130/75 *Prais v Council* Judgment of 27 October 1976

33/77 *Bouchereau* [1977] ECR 1999

44/79 *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727

115 & 116/81 *Adoui and Cornouaille v. Belgian State* ECR [1982] 01665

300/84 *van Rosmaalen v. Bestuur van de Bedrijfsverenigingen* [1986] ECR 3097

121/85 *Conegate Limited v. HM Customs and Excise* ECR [1986] 01007

24/86 *Blaziot v Belgium* [1988] ECR 379

196/87 *Steymann v Staatssecretaris van Justitie* ECR [1988] 06159

374/87 *Orkem v Commission* [1989] ECR 3283

5/88 *Wachauf v Bundesamt für Ernährung und Fortwirtschaft* ECR [1989] 02609

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

C-260/89 *ERT* ECR [1991] I-02925

C-159/90 *SPUC v. Grogan* [1991] ECR I-4685

C-189/91 *Kirsammer-Hack v Sidal* [1993] ECR I-6185

C-275/92 *Her Majesty's Customs and Excise v Schindler* ECR [1994] I-01039

C-249/96 *Grant v South West Trains* [1998] ECR I-00621

C-285/98 *Kreil v. Germany*, [2000] ECR I-69

C-377/98 *Netherlands v Council* [2001] ECR I-7079

C-54/99 *Association Eglise de scientologie de Paris and Scientology International Reserves Trust v The Prime Minister* ECR [2000] I-01335

C-268/99 *Jany and Others v. Staatssecretaris van Justitie* [2001] ECR I-8615

C-299/99 *Koninklijke Philips Electronics NV v Remington Consumer Products Ltd.* ECR [2002] I-05475

C-109/01 *Akrich v Secretary of State for the Home Department* ECR [2003] I-09607

C-36/02 *Omega Spielhallen* [2004] ECR I-9609

C-540/03 *Parliament v Council* [2006] ECR I -05769

C-14/04 *Dellas v Premier Ministre* [2005] ECR I-10253

C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981

C-260/04 *Commission v Italy* [2007] ECR I-07083

C-300/04 *Eman v College van Burgenmeester en Wethaiders van den Haaq*, [2006] ECR I-08055

C-355/04 *P Segi et al v Council* Judgment of the Court (Grand Chamber) of 27 February 2007

C-65/05 *Commission v Greece* Judgment of the Court (Second Chamber) of 26 October 2006

C-17/05 *B. F. Cadman v Health & Safety Executive* ECR [2006] I-09583

C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad*

C-411/05 *Palacios de la Villa v. Cortefiel Servicios SA* Judgment of the Court (Grand Chamber) 16 October 2007

C-116/06 *Sari Kiiski v Tampereen kaupunki* Judgment of the Court (Fourth Chamber) of 20 September 2007

C-275/06 *Promusicae v Telefónica de España SAU*, Judgment of the Court (Grand Chamber) of 29 January 2008

Cases from the European Court and Commission of Human Rights

Ahmad v UK (1982) 4 EHRR 126

Arrowsmith v. UK (Application 7050/75), Comm. Rep 1978, 19 DR 5

C. v UK Application 10358/83 DR 37

Chappell v UK Application 12587/86

Choudhury v UK Application 17439/90

Church of Scientology v Sweden Application 7895/77 16 Dec and Rep (1979)
The Church of Scientology and 128 of Its Members v Sweden Application 8282/78 (1980) 21 D&R 109

Church of Scientology Moscow v Russia (Application 18147/02) Judgment of 5 April 2007

Dahlab v Switzerland, Application 42393/98 Judgment of 15 February 2001

Darby v Sweden (1990) 13 EHRR 774

E & GR v Austria Application No. 9781/82 37 Eur Comm'n HR Dec & Rep 42 (1984)

Hasan and Chaush v Bulgaria (2002) 34 EHRR 1339

I.A. v Turkey (Application no. 42571/98) Judgment of 13 September 2005

Iglesia Bautista "el Salvador" and Ortega Moratilla v Spain 1992 Application 17522/90

Kalaç v Turkey 41 Eur Ct HR (Ser A) 1199 (1997-IV)

Karaduman v Turkey, Application 16278/90, Commission. decision of 3 May 1993, DR 74

Khan v UK Application 11579/85

Knudsen v Norway (1986) 8 EHRR 45

Kokkinakis v Greece (1994) 17 EHRR 397

Manoussakis and Others v Greece (18748/91) [1996] ECHR 41 (26 September 1996)

Omkaranda and the Divine Light Zentrum v Switzerland Application No 8118/77, 25 Eur Comm'n HR Dec & Rep 105 (1981)

Otto Preminger Institut v Austria (1994) 19 EHRR 34

Refah Partisi and Others v Turkey (2003) 37 EHRR 1

Rommelfanger v Federal Republic of Germany 1989 62 DR 151

Sahin v Turkey (2005) 41 EHRR 8

Stedman v UK (1997) 23 EHRR CD 168

Thlimmenos v Greece (2001) 31 EHRR 15

Valsamis v Greece 2 ECt HR Ser A 2312 (1996-VI)

Wingrove v UK (1996) 24 EHRR 1

X v Austria Application 1718/62

X v Austria Application 8652/79 26 Dec and Rep 89 (1981)

X v Netherlands Application 1068/61

X. and Church of Scientology v Sweden Application No. 7805/77. 16 DR 68

Yanasik v. Turkey, no. 14254/89, Commission Decision of January 6, 1993, DR 74

Zengin v Turkey Application 1448/04, Judgment of 9 October 2007

Cases from Australia

Church of the New Faith v Commissioner for Pay-Roll Tax (Vic), 154 CLR 120, 173 (1983)

Cases from France

Conseil constitutionnel, Decision of 19 November 2004, 2005-505, The Treaty establishing a Constitution for Europe.

Conseil d'Etat, Section du contentieux, 2^{me} et 7^{ème} sous-sections réunies. Séance du 26 mai 2008. Lecture du 27 juin 2008, Mme. M.

Cases from Germany

Krucifix II BverfGE 93, 1 (1995).

Cases from Ireland

Flynn v Power [1985] IR 648

Norris v The Attorney General [1984] IR 36

Cases from the United Kingdom

R. (Amicus and others) v. The Secretary of State for Trade and Industry [2004] EWHC 860

R. v Human Fertilisation and Embryology Authority, ex parte Blood [1997] 2 All ER 687

Cases from the United States of America

US v Seegar 380 US 163. 180-1 (1965)

Wisconsin v Yoder, 406 US 203, 215-216 (1972)

Thomas v Review Board of the Indiana Employment Security Division, 450 US 707, 714 (1981)

Thomas v Review Board of Indiana Social Security Division, 450 US 707, 714 (1981)

News Reports (alphabetically by publication name)

The Age, 'Turkey's Adultery Ban Splits the Nation' 7 September 2004

Associated Press, "Turkey Backs off Plan to Outlaw Adultery" 14 September 2004

BBC News, "God Missing from EU Constitution" 6 February 2003

BBC News, 'New UK Citizenship Testing Starts 1 November 2005

BBC News, 'Core British Values' 17 May 2006

BBC News, 'Conform to Our Society Says PM' 8 December 2006

The Boston Globe, 'Europe Raises the Bar for Immigrants' 22 May 2006

Catholic News, "Ratzinger Asserts Vatican Stand against Turkey EU Membership" 16 August 2004

Conscience, June 2006, "Slovak Government Falls over Concordat with Vatican"

Dernieres Nouvelles d'Alsace, 20 October 1996

Deutsche Welle, 'Turkey Changes Laws to Meet EU Standards' 1 September 2004

Deutsche Welle, 'Verheugen Warns Turkey on Adultery Law' 10 September 2004

Deutsche Welle, 'New Rules for Muslims in German State Blasted' 5 January 2006

Deutsche Welle, 'Testing the Limits of Tolerance' 16 March 2006
Equal Voices, Issue 18 June 2006 published by the European Monitoring Centre on Racism and Xenophobia

The European Consortium for Church and State Research Newsletter, "The EU and the Cartoons of the Prophet Mohammed" Year 7 Issue 7 July 2007

The Guardian, "Bishop Urged to Resign after Diocese Loses Gay Bias Case" 19 July 2007

Inter Press Service News Agency, 'How to Be a German' 31 May 2006

International News Report 'Anti-Gay Nations May Not Join European Union' 31 July 2001

Le Monde, "Pour ou contre l'adhésion de la Turquie à l'union européenne" 9 November 2002

Newsweek, "The New Crusade; Fighting for God in a Secular Europe, Conservative Christians, the Vatican and Islamic Militants" 1 November 2004

The New York Times, "It's Still No Breeze for Gays, Even Diplomatic Ones" in 17 October 2001

The New York Times, "Dutch Immigration Kit Offers a Revealing View" 17 March 2006

Reuters News Agency "Romanian Orthodox Church Denounces Homosexuality" 13 September 2000

Der Spiegel, 'Becoming German: Proposed Hesse Citizenship Test' 5
September 2005

Der Spiegel, "Germany to Introduce Controversial New Citizenship Test" 11
June 2008

The Sunday Times, 'Holland Launches the Immigrant Quiz' 12 March 2006

The Sunday Times, "Down with Godless Government" 22 April 2007

Turkish Daily News, "Adultery Fault Line with EU" 18 September 2004

Turkish Daily News, 'Democratic Secularism is a Copenhagen Criterion for
Turkey' 10 May 2007

U.S. Newswire, "Catholics Join European NGOs in Coalition in Appeal to
Convention Not to Give Religion Unfair Influence in Constitutional Treaty" 22
May 2003

Washington Times, 'Netherlands Issues Immigration Test' 16 March 2006

365gay.com, "EU Warns Poland on Gays", 26 October 2005
<http://www.365gay.com/newscon05/10/102605poland.htm>

Official Declarations Resolutions and Reports Council of the European Union

European Council in Copenhagen, 21-22 June 1993, Conclusions of the
Presidency, SN 180/1/93 REV 1

Council document 12022/01 of 24 September 2001

Council document 14272/02 of 26 November 2002

Council document 6912/03 of 28 February 2003

Council of the European Union, Thessaloniki European Council, 19 and 20
June 2003, Presidency
Conclusions 11638/03 POLGEN 55

Press Release, 2618th Council Meeting, Justice and Home Affairs, Brussels, 19
November 2004. 14615/04 (Presse 321)

Council of Europe

Parliamentary Assembly of the Council of Europe, Recommendation 1202 of 2
February 1993 on religious tolerance in a democratic society.

Parliamentary Assembly of the Council of Europe, Recommendation 1805 of 29 June 2007 on blasphemy, religious insults and hate speech against persons on grounds of their religion

The European Convention

Draft Treaty Establishing a Constitution for Europe, 18.7.2003

European Commission

Regular Report from the Commission on Romania's Progress towards Accession, European Commission, 1998

European Governance: A White Paper COM (2001) 428

Commission Regular Report of 2002 COM(2002)700

'2003 Synthesis Report on National Integration Policies' Annex 1 to '*Communication on Immigration, Integration and Employment*' Com (2003) 336 Final

"How Does a Country Join the EU?" European Commission, DG Enlargement, 2008, available at:

http://ec.europa.eu/enlargement/questions_and_answers/background_en.htm

Turkey 2005 Progress Report SEC (2005) (1426)

Eurobarometer 66 (2006) *Standard Eurobarometer: Public Opinion in the European Union*

European Parliament

"Resolution on Human Rights in the Soviet Union" of 17 May 1983 OJ No. C 161 20.6.1983

Document 1-1358/83, Rapporteur Vera Squacialupi at the Request of the Committee on Social Affairs and Employment, 13 February 1984

Resolution A3-0028/94 "Resolution on Equal Rights for Homosexuals and Lesbians in the EC" 8 February 1994

Resolution B4- 0824 en 0852/98, adopted 17 September 1998

Resolution A5- 0050/2000 adopted 16 March 2000

Resolution A5- 0223/2001, adopted 5 July 2001

Organisation of the Islamic Conference

Cairo Declaration on Human Rights in Islam, Nineteenth Islamic Conference, of Foreign Ministers in Cairo, 5 August 1990

United Nations

United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, Proclaimed by General Assembly resolution 36/55 of 25 November 1981

Report of Abdelfattah Amor, Special Rapporteur on Religious Intolerance to the UN Commission on Human Rights, 22 December 1994, E/CN.4/1995/91.

Official Publications from Belgium

Enquête parlementaire visant à élaborer une politique en vue de lutter contre les pratiques illégales des sectes et le danger qu'elles représentent pour la société et pour les personnes, particulièrement les mineurs d'âge, 2 vols. (Brussels: Chambre des Représentants de Belgique, 1997)

Official Publications from France

Les sectes en France. Rapport fait au nom de la commission d'enquête sur les sectes (Paris: Les Documents d'information de l'Assemblée Nationale, 1996).

Official Publications from Germany

The Scientology Organisation, paper submitted by the German delegation at the OSCE Seminar on Religious Freedom, Warsaw, 16-19 April, 1996

'*Religionsfreiheit heute - zum Verhältnis von Staat und Religion in Deutschland.*' Rede von Bundespräsident Johannes Rau beim Festakt zum 275. Geburtstag von Gotthold Ephraim Lessing in der Herzog-August-Bibliothek zu Wolfenbüttel. wolfenbüttel, 22.1.2004

Official Publications from the Netherlands

'*The Civic Integration Exam Abroad*' Immigratie-en Naturalisatiedienst (the Dutch Immigration and Naturalisation Service) 2007.

Official Publications from the Vatican

The Syllabus of Errors, Proposition 15, The Holy See, 8 December 1864

Doctrinal Note on Some Questions Regarding the Participation of Catholics in Political Life The Congregation for the Doctrine of the Faith, 16 January 2003

"*Post-Synodal Apostolic Exhortation Ecclesia in Europa of His Holiness Pope John Paul II to the Bishops, Men and Women in the Consecrated Life and All*

the Lay Faithful on Jesus Christ Alive in His Church the Source of Hope for Europe", 28 June 2003

Publications of Non-Governmental Organisations

Abortion Law, History and Religion, Childbirth by Choice Trust

ACCEPT Country Report on the Status of LGBT, Accept Romania, 2008.

The Great Divide: How Westerners and Muslims View Each Other Pew Research Foundation. 22 June 2006 *The Future of Europe, Political Commitment, Values and Religion: Contribution of the COMECE*

Secretariat to the Debate on the Future of the European Union in the European Convention, COMECE, Brussels, 21 May 2002.

The Relation of the European Union and Turkey from the Viewpoint of the Christian Churches, Discussion Paper, Conference of European Churches, February 2004

The Treaty Establishing a Constitution for Europe: Elements for an Evaluation, COMECE, 11 March 2005

Equality for Lesbians and Gay Men, A Report of ILGA Europe The International Lesbian and Gay Association, June 1998

World Legal Survey, The International Lesbian and Gay Association, November 2006