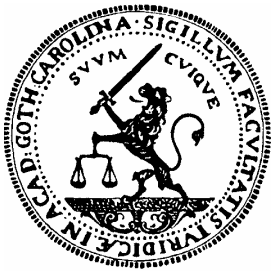

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What Happened to the Idea of a Secular Europe?

- An Emerging 'Law and Religion Policy' within the European Union-

Master thesis
30 credits

Supervisor: Xavier Groussot

Subjects:
'European Union Law' and 'Law and Religion'

Autumn 2009

Contents

Summary

The European Union is a secular entity. In the debate surrounding the Constitutional Treaty, strong voices were raised demanding a reference to the 'Christian heritage' of Europe. This never happened, instead, the preamble of the Lisbon Treaty accentuates that the Union is "[d]rawing inspiration from the cultural, religious and humanist inheritance of Europe." The latter opens up for a multi-religious understanding of the history of Europe, and, one would presume, also its future. Community law is constantly developed, renewed, and expanded. It is heading towards something much more than an economically motivated Union, instead a 'Soul for Europe', an identity, is being built. A Soul founded in common values and understandings. This thesis aims at finding the role of religion, from a legal perspective, in the creation of a truly European society.

Community law affects, in several ways, how the Member States organize religion. Churches and other religious organizations, in addition to religious individuals, fall within the scope of the freedom of movement. However, the Court of Justice has given the Member States a large margin of discretion when the latter relies on 'public policy' in order to limit the free movement for religious organizations and individuals. The principle of equal treatment serves as a foundation of how secondary law treats religion, in everything from Union policies in developing countries, to public administration. Above all, the principle can be seen in the emphasis of non-discrimination in employment policies. Two trends can be discerned in Community law regarding religion; first of all, as mentioned, a strong principle of equal treatment. Second, much is still left upon the Member States to decide, since the omissions and derogations are plentiful.

When European law tries to find new paths, and the Court of Justice develops European integration, the constitutional principles of the Member States often come to the forefront. In this thesis, it is stressed that these principles differ greatly, concerning State-Church relations. All European Constitutions are secular, in the sense that the State, in it self, is not religious. But the enforcement of this ideal ranges from a strict laical principle, where religion only belongs to the private sphere, to so called State churches. Is it then possible to find a common denominator, upon which a 'European Union' system of law and religion can be built? Furthermore, what is the role of normative values in European integration, and how can Europe find ways to accommodate groups of religious minorities, in an effective and open manner? Within the Union, a tendency towards a greater understanding of the role of religion in building a society can be distinguished. Declaration No 11 and the Dialogue with Churches and religious organizations, show that religion is, indeed, welcomed into the European public sphere.

Sammanfattning

Den Europeiska Unionen är en sekulär sammanslutning av Europeiska stater. I debatten kring det konstitutionella fördraget, som aldrig trädde i kraft, hördes starka röster som ville ha en hänvisning till Europas 'kristna arv'. Så skedde inte, men Lissabonfördragets ingress framhåller att Unionen har "inspirerats av Europas kulturella, religiösa och humanistiska arv". Det senare öppnar alltså upp för en multireligiös förståelse av Europas historia, och, antar man, även dess framtid. Europarätten utvecklas, förnyas och expanderar ständigt. Den är på väg mot något mycket mer än en ekonomiskt motiverad sammanslutning, istället försöker man skapa en 'Europeisk själ', en identitet, byggd på gemensamma värderingar och förståelser. Denna uppsats försöker ta reda på religionens plats i detta Europeiska samhällsbygge, från ett juridiskt perspektiv.

Gemenskapsrätten påverkar på flera sätt hur medlemsstaterna organiserar sitt förhållande till religion. Den fria rörligheten gäller även för kyrkor, religiösa organisationer och religiösa individer. Gränsen går vid allmän moral, säkerhet och ordning, i dessa fall har EG-domstolen gett medlemsstaterna en vid möjlighet att begränsa den fria rörligheten. Principen om likabehandling går som en röd tråd genom sekundärrätten, i allt från bestämmelser om hur Unionen ska agera i utvecklingsländer, till hur personal ska anställas vid Kommissionen och Rådet. Framförallt kommer den till uttryck i Gemenskapens arbete kring anti-diskriminering i arbetslivet. Man kan se två trender i Gemenskapens lagstiftning; som sagt en stark likabehandlingsprincip, men även många undantag som öppnar upp för medlemstaternas egna regler och traditioner, vad gäller religion, på de olika områdena.

När Europarätten försöker ta nya vägar och Domstolen utvecklar den Europeiska integrationen, så hänvisas ofta till medlemsstaternas konstitutionella principer. I uppsatsen framhålles att dessa principer skiljer sig mycket åt när det gäller förhållandet mellan kyrka och stat. Alla konstitutioner i Europa är sekulära, i den meningen att staten, som sådan, inte är religiös. Men sättet detta är genomfört på skiftar väldigt. Från ett starkt åtskiljande mellan den publika och privata sfären, där religionen hör hemma i den senare, till utpräglade statskyrkosystem. Kan man då hitta gemensamma nämnare, som Unionens egna förhållningssätt till religion kan bygga på? Dessutom, finns det plats för normativa värderingar i den Europeiska integrationen, och hur kan Europa hitta sätt att tillvarata religiösa minoriteters rättigheter på ett effektivt och öppet sätt? Det finns en tendens mot en ökad förståelse för religionens roll i samhällsbyggandet, genom en organiserad dialog med kyrkor och religiösa organisationer, och genom Deklaration Nr 11 som manifesterar att religionen är välkommen i det Europeiska offentliga rummet.

Preface

My interest in the topic of ‘law and religion’ has emerged during several long, intense discussions with my dear and beloved friends. During late nights, drinking large cups of coffee, eating good food, and sipping glasses of red wine, they have helped me grasp further aspects of this interesting subject. This thesis would not have happened without them. To you all, I am grateful!

But, most of all, my family deserves my deepest gratitude for their support, encouragement and patience during these last years! Tack till Er, mamma, pappa och Mikael!

Abbreviations

AG	Advocate General
BEPA	The Bureau of European Policy Advisors
CFR	Charter of Fundamental Rights of the European Union
EC	Treaty establishing the European Community
ECHR	European Convention on Human Rights and its Protocols
ECJ	The European Court of Justice
ECtHR	The European Court of Human Rights
ESC	European Social Charter
EVS	European Values Study
FRA	Fundamental Rights Agency
GMO	Genetically Modified Seed
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
NRM	New Religious Movements
TEU	The Treaty on European Union
UDHR	The Universal Declaration of Human Rights
UN	The United Nations

1 Introduction

> "We must obey God rather than men!"[1]
>
> "A country needs one religion as foundation for its law."[2]
>
> "Law is in every culture *religious in origin*. Because law governs man and society, because it establishes and declares the meaning of justice and righteousness, law is inescapably religious in that it establishes in practical fashion the ultimate concerns of a culture… Second it must be recognized that in any culture *the source of law is the god of that society*. If law has its source in man's reason, then reason is the god of that society. If the source is an oligarchy or in a court, senate, or ruler, then that is the god of that system … Modern humanism, the religion of the State, locates law in the State and thus makes the State, or the people, as they find expression in that State, the god of that system."[3]

The European Union is a secular entity. The Treaties do not mention the Trinity, Jesus, the Bible or a divine order. How each Member State wants to organize religious matters lies solely on that Member State in question. Does this mean that the EU never legislates on matters of religious importance? Certainly not. Community law covers such various areas as labor law, criminal law, migration law, establishment of corporate bodies and organizations, media law and family law, all of which touch upon religious matters to a greater or lesser extent. When doing so, which principles are followed and is there as system in the application of the law? These are some of the questions I will try to answer in the following chapters.

What is the (ultimate) source of law? This is one of the most hotly debated questions, and transcends beyond just the legal academic sphere. The dividing line lies between an essentialist approach to law and a constructivist, or a positivistic, line of thinking. Can we *find* law, because it already exists, in nature, in mankind, or because is it given to us by God(s)? Or do we *make* law, through acts of Parliament or other norm giving institutions? Law, it has been said, is ultimately religious in origin. The ultimate source of law, or of right and wrong, and of ethics, can either be divine and transcendent, or it can be earthly and temporary, in nature. Is the source of law, in a given society, ultimately a Holy Scripture or some outstandingly wise individual(s), like a King or a Highest Court? Or is the base of our legal system an abstract principle, such as 'the Rule of

[1] Acts, chapter 5, verse 29, New International Version. According to Acts, the words used in defence by Peter and the other apostles, when prosecuted by the Sanhedrin and the High Priest, for teaching in the name of Jesus.
[2] The words uttered, according to the myth, at Allting in Iceland at the year 1000, when the Icelandic Vikings converted to Christianity and abandoned the Old Norse gods.
[3] Ahdar, Rex J.; *The inevitability of Law and Religion: An Introduction*, in Ahdar, Rex J. (ed.); *Law and Religion*, Aldershot, Ashgate, cop. 2000, p. 1. (Cursive in original.)

Recognition', presented by H.L.A. Hart, or the 'Grundnorm', given by Kelsen? Does 'Law' contain an essential element, or does man, alone, construct it? Transposing this line of thinking to the field of religion and morals, we have to ask; does religion belong within our legal systems at all? Does it belong within the European legal order? Furthermore, is the answer 'yes', because it is a part of 'the rule of law', an essential aspect of the legal system? Or is the answer 'yes', because we give it a place through legislation and legal practice? These questions will not to be answered in this paper, but may function as a backdrop for the discussions that follow.

The relationship between the European Union and religion is an intricate one. It touches upon many levels, such as questions of competence, national identity, fundamental rights, and fundamental freedoms. It raises questions of the economic policy of integration, as a starting point of European integration, and whether this point of departure has developed into a 'social citizenship model'[4] in which the EU acts as the guarantor for fundamental human and social rights. Moreover, I would argue that the role of religion in Europe has changed. It can no longer be forced out the backdoor of society. In present days the importance of religion is evident in the debate in media, in controversies such as the discussion on the Islamic veil in public places, and in international politics. The importance of understanding the role of religion in international politics is apparent in such various conflicts as the one in Northern Ireland, the war in former Yugoslavia, and the seemingly never-ending conflict in Israel/Palestine. Not to mention the aftermath of the terrorist acts in New York in September 2001, and the increasing numbers of migrants in Europe. The European Union, working in a global world, needs a greater understanding of religion, both at a macro- and micro level, in the international realm, as well as in the domestic one.

The way to view religion in the European Union, just as in a specific State, is two-folded. One aspect is the freedom of religion, namely, the idea that a State has an obligation to respect, individually and collectively, the right of a person to choose his or her worldview. The other aspect is religion in the public sphere. What, if any, role do Church(es), religious organizations and religious leaders have in a society? In the legislative process, in the symbols of a society, in the sources of law? What is the core of a society, and what rules govern it? In order to answer those questions, we must look beyond hard law, and assess the soft law and instruments to gain understanding of a more whole picture of religion in the public sphere. Not until we have required such an understanding can we fully comprehend the *actual* need of religious freedom within a given society.

The Union is based on the principle of *equal liberty*, a principle that can be substantiated in the criteria's for accession to the Union, Articles 7(1) and 49 TEU.

[4] See discussion in Bell, Mark; *Anti-Discrimination Law and The European Union*, Oxford, Oxford University Press, 2002, p. 12 ff.

> "A State's legal order and social culture must be founded on this conception of the individual and there must be no internal segregation, such as irreconcilable religious, ethnic or social divisions, that leads to legal inequality among individuals."[5]

It goes without saying that the principle of equal liberty must be respected within the Union and not only on the level of the Member States. When assessing the Union's responsibility to protect freedom of religion, one must divide the different Institutions' responsibility. The European Court of Justice has, within the limits of its jurisdiction, the responsibility on a micro-level, in each specific case, to make freedom of religion manageable and operational. However, the legislators must facilitate said freedom at the meso- and macro-levels as well. In order to create an atmosphere of religious freedom, a broader understanding of the phenomenon of religion, and how it functions in reality, is needed.[6] The principle of *equal liberty* is not merely a principle high up on a pedestal; it must be facilitated and understood, in a general way as well as on a case-by-case basis.

On the international level, a new approach to freedom of religion is emerging. It contains three aspects, all which have to do with religion in the public sphere. First, one must identify the *potentially problematic aspects*; potential clashes between a secular State and religious groups and individuals, as well as clashes between groups adhering to different religions. Second, an emerging awareness of the *positive contributions* religion can provide has been noticed. This aspect includes an apprehension of the contribution of religious thinking to ethical understanding and in a construction of civil society. The third, and last, aspect, stresses an awareness that the *duty to protect freedom of religion* in the public sphere must contain more than a simple absence of interference of public authority.[7] It will be argued, throughout this paper, that this new approach holds true also for the European Union.

1.1 Aim and Delimitations

My aim is, in wide terms, to explore the role of religion within the European Union legal order. At the constitutional level, this includes questions of competence and of division of powers between the Union and the Member States. In substantive matters, I want to explore if, and then to what extent, Community law affects and includes matters of religious importance, and more exactly, how Community law deals with religious peculiarities. In

[5] Von Bogdandy, Armin; *Constitutional Principles* in Bogdandy, Armin von and Bast, Jürgen (eds.) and Max Planck Institute for Comparative Public Law and International Law; *Principles of European Constitutional Law*, Oxford and Portland, Oregon, Hart Publishing, 2006, p. 14.
[6] Van Bijsterveld, Sophie C.; *Freedom of Religion*, in O'Dair, Richard and Lewis, Andrew, (eds.); *Current Legal Issues Volume 4 – Law and Religion*, Oxford, Oxford University Press, 2001, p. 308.
[7] *Ibid.*

more narrow terms, I want to see if there is an emerging 'State-Religion policy' within the Union legal order itself, self-standing from the one of the Member States.

A few delimitations are in order. The subject of this thesis is, by its very nature, an explorative journey through unmapped land. It is not aimed at solving problems, but at highlighting potential problems. It might sometimes seem as I take hypothetical examples, never to occur before a Court, and especially never before the Court of Justice. However, even if that might be true in some sense, one must not forget that unthinkable question always arise in law, and when you think you solved most potential problems within an area, there are always ten more popping up the next day. It is my sincere conviction that we will see more problems arising in the field of 'law and religion' within the EU, since the scope of Union law is expanding on a day-by-day basis. The *acquis communitaire* is constantly changing, developing and growing. And as new areas fall with in the scope of European law, a greater awareness of national religious traditions as well as fundamental rights protection, within the Union, is necessary.

1.2 Outline and Method

In the chapter '*What Role does Religion Play in European Society?*' I will start by introducing the discipline of 'Law and Religion', in which I include problems of defining religion and the pluralistic outcome of different religions present within one State. This chapter also includes two overviews, one I call 'historical-constitutional', and one more 'sociological'. The first one of these I found necessary in order to grasp the discussion of religion within the Union. The Treaty on the European Union, and the Court of Justice when trying to find a new path for Community law, refers to the 'constitutional principles' of the Member States. It is important for the discussion in chapters four and five to have at least a basic understanding of the diversity, and maybe unity, in the European Constitutions, when it comes to State-Religion relations. Naturally, my aim has not been to present a thorough examination, for this the subject is too grand and wide. My ambition will instead be to introduce the main ideas, to serve as a common understanding for further discussion. As for the sociological overview my goal is to present some aspects of European religiosity today. I find this useful for the further study and in order to grasp the potential legal problems arising in European courts.

The following chapter '*Freedom of Religion Serving as a Minimum Criterion'* presents what I view as the fundament of my discussion. The European Convention of Human Rights binds the Member States of the Union, and is enshrined in the Community legal order in Article 6 (2) TEU. Article 9 of the Convention, which protects the freedom of religion and belief, must thus serve as the foundation of the discussion. In due course I will mention international law, but my main focus will be the European sphere.

Chapters four and five are the main focus of my thesis. Here, I will elaborate more extensively on the European Union and Religion, from two different angles. Chapter four, *'A Substantive Look at Religion within the European Union'*, primarily concerns case law of the Court of Justice that has, in one way or another, touched upon religious issues. In presenting case law I will answer the question of to what extent religion and religious peculiarities fall within the scope of Community law. In addition, this chapter also includes an overview of harmonizing measures, which deals with religion. The outcome will be a discussion of to what degree there is an emerging 'law and religion' policy of the European Union itself. The other angle, chapter five, '*A Constitutional Look at Religion within the European Union'*, focuses on constitutional matters, in a wide sense. This involves matters of competence, division of powers and a discussion of the theory of 'constitutional pluralism', put into a 'law and religion' setting.

'Future Challenges' will be the last of the main chapters. The European Charter of Fundamental Rights will be the primary focus, but the Lisbon Treaty will also play a role. A background to the Charter will be given, but the emphasize will be on the problems arising from the Charter, especially the question of an emerging consensus concerning values, morals, and, not the least, religion.

An analysis will be performed throughout my paper; hence, I will finish by simply giving some concluding remarks.

As far as method goes, I have chosen to use a traditional legal method for the most part of this thesis. I analyze Union law, both primary and secondary law, and case law of the Court of Justice, in addition to the European Convention of Human Rights and case law of the European Court of Human Rights, in the light of doctrine. In chapter two, and particularly in the subchapter with the sociological overview, I have chosen to draw, extensively but not solely, on the work of the prominent British sociologist of religion, Professor Grace Davie. She has worked substantially with, and published on, European religiosity in the modern times, and I have found her work valuable and comprehensive. Naturally, there are other scholars who might have been of interest, but it is beyond the scope of my thesis to present them all. Instead, I find that Davie is able to relate to, and put into context, the work of her colleagues. In her work, Davie falls back on the studies made by the European Values Study (EVS)[8]. The EVS is a cross-national survey of human values, using a social science methodology, which has been conducted in Europe since 1981. It is beyond both my knowledge and the scope of this master thesis in law to draw directly on the Survey; thus I have been forced to rely on others interpretation of it.

[8] For further information and access to comprehensive studies see; http:// www.europeanvaluesstudy.eu/, 2009-09-01, at 17:16.

2 What Role does Religion Play in European Society?

2.1 'Law and Religion'– an Introduction

In order to understand the multitude, and the importance, of legal problems surrounding religion, one must first comprehend the phenomenon of religion itself. Religion can be viewed as "a value determining people's attitude towards life in general in a broad sense, and life in particular in its individualistic sense"[9]. It is not, however, as easily defined as being a specific set of opinions or as a peculiar expression of those opinions in a liturgy. The way religion manifests itself is a very complex sociological feature, which includes a legal infrastructure. Religion influences media, convictions, and social structures, such as families and accepted behavior. Behind the most visible expressions, lies a deeper conviction. To use the words of Bloss:

> "Religious objectives are, in the first place, to offer coherent patterns of worldviews, of values and norms, vision of humanity and its fate, visions and explanations of life and God(s); they concern ways of associating with others and of dealing with fundamental questions of philosophy, and provide ethical awareness and ideological approaches."[10]

What do we talk about when we talk about 'religion'? It is important to keep in mind that there is no once-and-for-all determined definition of religion. There is no definition on the international level, or on the European one. Arguments have even been raised that the lack of definition at the international level is beneficial, because of three reasons. First, that to draft a definition that would encompass all kinds of varieties of world religions, and at the same time so specific to be able to be used in a case-by-case application would prove almost impossible. Second, the absence of a definition helps the minority religions, since they do not risk to be left out by the specific instrument that was supposed to protect them. Third, an international definition would risk being biased by a traditional, Western, understanding of religion, and would exclude for example the New Age movement and the New Religious Movements, which in Western eyes blend religion and philosophy.[11] If solely defining religion, as a belief in a God or

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[9] Bloss, Lasia; *European Law of Religion – organizational and institutional analysis of the national systems and their implications for the future European Integration Process*, New York University, School of Law, New York, Jean Monnet Working Paper 13/03, p. 11.

[10] *Ibid*, p. 12

[11] Edge, Peter W.; *Religion and Law: an Introduction*, Aldershot, England, Ashgate, 2006, p. 29. Even the doctrine on the First Amendment to the United States Constitution, concerning the principles of Non-Establishment and Free Exercise, provides a wide variety of definition and anti-definitions. The hardships of both accommodating a variety of uncommon religious practices, in order to fulfill the right of Free Exercise, and at the same time not undermine the legitimacy of legislation in the 'secular' sector, is well described in

gods, one would exclude Buddhism, which is recognized a world religion, since Buddhism focuses on a way of life and not on a particular god. To a large extent writers on Christianity, Islam and Judaism tend to describe religion in a (mono-)theistic manner, as God who created the world and still governs it. Not only Buddhism are excluded from that definition, but also many so called New Religious Movements and the post-Enlightment idea that God created the world, gave it reason but then left it to govern itself. The latter idea is prevailing among people both in Europe and in North America.[12]

An evident danger of a too narrow definition of religion is that it would exclude minority religions. In fact, if a court applies a narrow concept of religion, it might very well exclude those religions which are most in need of protection – due to their minority in numbers and/or in power. In a State, which sees itself as the guarantor of one 'true' religion, defining religion is not a problem. All believers in other faiths, which do not follow the State religion, are heathens or commit heresy – hence, not worthy of protection. It is not until a State, or States come together such as in the European Union, wants to stay tolerant and open, that the problem of definition begins. How to find a definition that is not too narrow, as to exclude those who are in need of protection, nor as wide as to become non-manageable and unenforceable? This problem of over- and under inclusiveness directly responds to the problems of accommodating both minority and majority beliefs.

Provisions, which aim at protecting freedom of religion in International (human rights) law, such as Article 9 of the European Convention on Human Rights (ECHR) and Article 18 of the International Covenant on Civil and Political Rights (ICCPR), often focus on the liturgical and theological aspects of religion. Liturgy and other visible explicit aspects of religion and religious adherence are, nevertheless, only one (small) aspect of religion. Thus, criticism must be raised towards the one-viewed approach to religion, so often performed by international human rights instruments. One leading twentieth-century theologian, Paul Tillich, has defined religion as an individual's or a community's 'ultimate concern'. The definition relates to the "fundamental convictions for which people are willing to make sacrifices and, indeed, if necessary, to give their lives".[13] This definition might seem plausible and manageable, but problems arise when trying to apply it in a specific case. Would it be of 'ultimate concern' for a Jewish man to require kosher meat while in prison, when his religion allows him to eat non-kosher meat under extreme circumstances? And, would it be possible for a drug-addict to require his need for heroin to be met, since, from his perspective, it is his 'ultimate concern'? So, even if the 'ultimate

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Sadurski, Wojciech; *On legal Definitions of 'Religion'*, in Sadurski, Wojciech (ed.); *The International Library of Essays in Law and Legal Theory, Areas 7, Law and Religion*, Aldershot, Dartmouth, cop. 1992, p. 834ff.

[12] Berman, Harold J.; *Comparative Law and Religion*, in Reimann and Zimmerman (eds.), *The Oxford Handbook of Comparative Law*, Oxford, Oxford University Press, 2006, p. 743.

[13] *Ibid*, p. 744.

concern' approach might function very well in a commonly held discussion, in a case-by-case application, severe problems occur.

Should the definition of religion include a mentioning of the 'supernatural', or something 'transcendent'? This could lead to discussions on actual theology and metaphysical statements, and could blur the idea that such questions should be kept out of the courtrooms altogether. Perhaps this lies at the core of the problem of defining religion. It does not stem from the liberal ideas of individual autonomy or non-discrimination, but instead from the specific problems of a secular court dealing with statements of metaphysical realities.[14] The dividing line between the metaphysics, which the court should not deal with, and the reality, which it does indeed have jurisdiction over, is not so easily distinguished. The modern, Western, post-Enlightment idea of separating private and public, and keeping religion in the private realm, have difficulties dealing with a pluralistic definition of religion, which does not follow a traditional monotheistic line of believing.

In classical comparative law writings, the impact religion has had on legal systems is hardly mentioned. If mentioned at all, the focus has been on 'non-Western' law, such as 'Islamic law', 'Hindu law' and 'Judaic law'. The religious roots of Western legal traditions have long been neglected.[15] Berman argues "it is generally considered that each of the major Western legal systems is fundamentally secular in nature, except for those special parts of them that are explicitly religious, such as the Canon law of the Roman Catholic and the Anglican churches".[16] The explanation to why this distinction between 'religious' and 'secular' is so strong in Western legal tradition, is, according to Berman, an outcome of Western Christian beliefs themselves. In the twelfth to sixteenth century, Roman Catholic law began to distinguish itself as 'spiritual', contrary to the 'worldly' and 'secular' law of the kings, feudal lords and cities. Some areas of law stayed within the realm of the Church, such as family law, education, and relief of poverty. This development, combined with the Protestant Reformation in the sixteenth century, where kings became heads of the Protestant churches and thus heads of 'spiritual' law as well, has led to different outcomes within different legal systems. Berman shows the importance:

> "Thus more comprehensive national legal systems emerged in which secular authorities regulated in diverse ways matters that had previously been considered to be subject to spiritual law. The degree and character of such secularization in the various families of Western legal systems is an important key to the differences and similarities among them."[17]

[14] Edge, p. 32.
[15] See Berman, in Reimann and Zimmerman (eds.), pp. 739f. He stresses that the leading text of Comparative Law, Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (translated by Tony Weir, 3rd edition, 1998) only devotes about twenty pages to religious legal systems, namely, Islamic and Hindu law; *ibid* at 303-322.
[16] Berman, in Reimann and Zimmerman (eds.), p. 740.
[17] *Ibid*, p. 742.

In order to understand the impact of this Western, and European, distinction between the secular and the religious, the distinct roles of State and Church, examples can be drawn from other legal and religious traditions. Both Talmudic and Islamic law give religious authorities competence over what non-Jews and non-Muslims would call secular matters, namely, dietary laws and laws on clothing. In the same way, other religious cultures, such as Hinduism, Buddhism and different African religions, do not differentiate between law and morals, or between morality and religion. Judaism's *Torah* and Islam's *Shari a* are both moral principles and legal rules, as well as *Dharma*, a concept in Buddhism and Hinduism, functions both as a spiritual and as a legal concept.[18] One must, however, question the presentation of 'non-Western' and 'European law' as non-religious law. Judaic law, such as Talmudic law, has a long-standing presence in Europe, and has played an important role for the Jewish Diaspora in Europe and in the creation of a Jewish identity. Likewise, Islamic law has been present in Europe throughout history, at various times and to different degrees, but increasingly so considering the growing Muslim population through immigration in the twentieth century and till present day. Not to mention the great impact Christianity has had on the development of European legal systems.[19]

A religious person would inevitably live under more than one legal system. The national legal system, to which the individual belong, either through citizenship or habitat, is the primary source of legal norms, which require abidance. In addition, a person can invoke international law, human rights treaties and, to a certain extent, international agreements, if legally binding. If the individual is a citizen of a European country, he or she may invoke the European Convention of Human Rights, either directly in the national procedure or as a last resort of appeal. Furthermore, if the individual not only is a citizen of an European country, but, more specifically, of an European Union Member State, he or she has acquired European Union citizenship, and, hence, is able to invoke certain rights and freedoms. Already after this examination one sees the complex legal situation one person finds him- or herself in. If adhering to a certain religion, additional normative rules apply. Said religion might require a certain moral behavior, certain dietary requirements to be kept, certain clothing in daily life or when celebrating religious cults. Certain holidays are to be celebrated in certain manners, including refraining from specific activity during those holidays.

Some of these rules of the religious legal system coincide with the State's national legal system; some are directly adverse to it. Some areas, such as religious clothing and dietary requirements, are for the most part considered to fall within the private sphere of the individual, and only in certain cases do they fall within State regulations of the public sphere. But these clashes between the private and public realms do increase in numbers, with a

[18] *Ibid*, p. 746.
[19] For the discussion on the influence of Christianity on the development of Western legal systems, see the classical elaboration by Berman, in Berman, Harold J.; *The Interaction of Law and Religion*, London, Abdingdon Press, 1974, pp. 49-76.

growing number of different religious groups and individuals. Traditionally, a Sikh man must wear a *kirpan*, a knife worn as a symbol of baptism. Does this fall within the scope of religious freedom, since it is a religious artifact, or does it fall under a prohibition on carrying knives in public places, prevailing in most European States? Similarly, as required by some Muslim groups, a Muslim girl should wear a headscarf, from the age of puberty. The size and how much the scarf is suppose to cover differ greatly depending on which Muslim tradition the woman belongs to, but in either case it might be prohibited by national legislation banning religious symbols in public places, such as schools. What balance should be struck? Should individual religious freedom or national majority cultures prevail, in the regulation of the public sphere? What is the outcome for the individual religious man or woman? If he or she holds the religious legal rules as more worthy of abiding, national rules will not be obeyed. National rules will simply threaten with a time bound punishment, whereas the religious rules have more severe consequences, more timeless and eternal than any national system can ever claim to have. On the other hand, religious rules do change according to the surrounding society. Religious claims change, otherwise they would not survive. Dogmas, despite what many claim, are not static.

The question, which often comes to the forefront when discussing religious freedom, is the question of prohibition of discrimination on the basis of religion. In the European Union, the principle of equal treatment, irrespective of religion or belief, is a general principle of Community law, and is established in secondary law through 'the Framework Directive'[20]. One reason behind anti-discrimination law is that certain characteristics of a human being are un-chosen; hence individuals should be protected from differential treatment because of them. Is the same true for religion and religious adherence? Can one view religion as an inherent, given and obligatory condition for an individual, thus granting it a stronger legal standing-point, than, say, a certain political view that is by most people seen as a chosen worldview?[21] The discussion might prove important, for example in the anti-discrimination law discussion, but maybe more specifically for the alleged right to conscientious objection. The latter is not as evident in the ECtHR jurisprudence, but as developed below, a striking new feature of the Charter of Fundamental Rights of the European Union (CFR). From whose point of view is religion an inherent characteristic? A religious individual might very well consider him- or herself obligated to follow his or her religion, not always out of comfort but out of a conviction of a 'true worldview', from a belief of a higher rule. Then, what the State considers a religiously neutral legal norm might have severe consequences for a single individual.

[20] Council Directive 2000/78/EC of November 27, 2000 establishing a general framework for equal treatment in employment and occupation, (2000) O.J. L303/16. Further developed on in chapter four.

[21] For a further discussion, see Bradney, Anthony; *Politics and Sociology: New Research Agendas for the Study of Law and Religion*, in O'Dair, Richard and Lewis, Andrew, (eds.); *Current Legal Issues Volume 4 – Law and Religion*, Oxford, Oxford University Press, 2001, p. 74.

The presented considerations are just a few examples of a complex social and legal situation both the individual and the collective are faced with. The present legal systems try to find new solutions to existing and arising problems, but have a hard time adjusting to a late modern pluralistic society.

2.2 European Religion – a Historical and Constitutional Overview

Europe has been described as the cradle of secularism, the evidence that a secular society is the positive and inevitable outcome of a modern society. This image, both of a secular Europe and of a modern society, is starting to change. Religion plays just as an important role as before modernity, however, dressed in different clothing and using another way of communicating. The assumption that secularism is a necessary feature of any modern society is challenged. Secularism is instead seen as a specific European phenomenon, not a universal process, but rather belongs to a relatively short and particular period of European history. It is "one strand of what it means to be European".[22] In this subchapter I will elaborate on what this strand means, namely, the interaction of religion and society on a continent which saw the uprising and creation of Christianity, and of secularism, but now holds a multitude of religious expressions, Christians and non-Christian.

What do the European countries have in common? Historically speaking, three factors have been highlighted, when discussing the unity of a European identity: a Judeo-Christian monotheism, Greek rationalism, and Roman organization.[23] The factors have been shifting, reinforced and withdrawn several times during the course of the last two millennia, but they inevitably form a background of what we today view as 'European life'. Yet, it is not enough to solely find the factors of a common European heritage, in order to understand the interaction of law and religion in the European Union, one must also stress the differences between the geographical, linguistic, cultural, and religious areas of the continent. For the sake of my analysis I will focus on the religious aspects, but religion is not a self-standing factor, it must be seen in relation with the other aspects of societal change.

The first great split within Christendom happened in the eleventh century, the divergence between the Catholic, Western Europe and the Orthodox, Eastern Europe. The second great split started with the beginning of the Reformation in the sixteenth century, and culminated in the thirty years of war, during the seventeenth century. An outcome of the Peace of Westphalia in 1648 was the important principle of *cuius regio eius religio*; the ruler decides the religion of his country. The principle made religion, in Europe, a

[22] Davie, Gracie; *Religion in Modern Europe – A Memory Mutates*, Oxford, Oxford University Press, 2000, p.1.
[23] Davie, p. 5.

matter of internal affairs and politics, not of international conflicts.[24] The division, which was the end result of the Westphalian compromise, of the European continent into primarily Catholic countries, primarily Protestant countries, and some which are mixed, is inseparable from the emerging of the nation State as the dominant factor of European political life. The emergence of the concept of 'State' is not as easily explained as simply an outcome of the Reformation and the Westphalian Peace; indeed, it has its background in several and intricate sociological, political and religious issues. But one important factor of the emerging of political entities or nation States is the demand for independence from papal interference within the Protestant countries. This demand, taken together with Protestant theology and changes in the ecclesiastical order, was the offspring of the State Churches, or national churches, still prevailing in most of Northern Europe today.

The Reformation, however, took different forms in different places. Whereas the Nordic Countries were greatly affected by the teachings of Martin Luther, Reformers Ulrich Zwingli and Jean Calvin attracted the Swiss, the Dutch, the Scots, some Germans, Hungarians and Czechs, and a small, but important, minority, of the French. The latter Reformers advocated a more rigorous version of Protestantism, with stringent moral codes and a new kind of theology based on predestination and redemption. The South of Europe, Spain, Portugal, Italy and France, remained Catholic, as well as Belgium and Ireland. The Reformation affected some of these countries, whereas some countries, such as Spain and Portugal, were almost untouched by the events.[25] Most of middle Europe, the Netherlands, Germany, Hungary and the Czech Republic, are more mixed countries, often with one majority and a significant minority of the other. Among the Eastern European countries, Lithuania, Poland, Slovakia and Slovenia are firmly Catholic, whereas Estonia and Latvia are Lutheran and more closely related the their Scandinavian neighbors. Greece is as of today, the only Orthodox country in the European Union, and in modern Greece Orthodoxy is almost identical with national identity.[26]

This confessional map of Europe, which emerged in the early modern period and has remained quite stable since then, is nevertheless not an automatic factor for the development of State-Church relation in these countries. Due to different historical events and circumstances, a variety of arrangements have developed. There are few areas of law, in which historical events and experience, tradition, basic convictions and cultural heritage have such a direct influence as in the law of State and Church. There is a great diversity between the approaches taken by the Member States. Some Constitutions

[24] Christoffersen, Lisbet; *Religion as a Factor in Multi-Layered European Union Legislation*, in Mehdi, R; Petersen, H; Sand, E.R. and Woodman, G.R. (eds.); *Law and Religion in Multicultural Societies*, Copenhagen, DJØF Publishing, 2008, p. 112.
[25] Robbers, Gerhard (ed.), in conjunction with the European Consortium for State and Church Research; *State and Church in the European Union*, Baden-Baden, Nomos Verlagsgesellschaft, 1996, p. 324.
[26] Davie, pp. 15-17, 20.

start with an *Invocatio Dei* while others proclaim a complete separation of church and State. The traditional way of classifying State-Church relationships in Europe is based on a tripartition: separation systems, concordatarian systems and national Church systems.

Roughly speaking, France, Ireland, Belgium and the Netherlands are so called separatist countries. This is a very heterogeneous group. France, with its strict *laicité* principle, has little in common with Ireland, which Constitution contains an invocation to the Holy Trinity. Even though the Enlightment has shaped all European countries, France has to a larger extent identified itself with it, giving the principle of secularism constitutional value.[27] Perhaps it is more correct to describe this group as a residual group; containing countries which neither have a concordatian system, nor a State Church system. The State Church system is a typical Protestant, or Lutheran, phenomenon. In the United Kingdom and in Denmark, and until the year 2000, Sweden, the State Church, or the national Church, enjoy preferential treatment in several ways. This includes religious education in schools, chaplaincies in the armed forces, in prisons, in universities, and in hospitals. On the other hand, the State also performs a greater control over the Church, such as appointing leaders, and the head of the State being the head of the Church, as in England. Concordatarian countries, for example Italy, Germany and Spain, follow another approach. The prevailing feature is that the State's relationship with different religious groups is based on contracts, namely concordats with the Roman Catholic Church and agreements with other denominations. The idea behind these agreements is that the relationship between the State and different religious communities is better organized through bilateral agreements, than through State enforced legislation. The State does not, however, enter into agreement with all denominations or religious groups. Often the agreements are restricted to groups, which are large in number, or have been active in the country for a long time.[28] In concordatian countries, the Roman Catholic Church is seen as a State, therefore, another State can enter into agreements with the Holy See. The concordats are, accordingly, international agreements, between two sovereign States. Protestant countries, on the other hand, view the Catholic Church as a religious organization, not a State entity that you can enter into international agreements with. Thus, there are no concordats between Protestant countries and the Catholic Church.

But is this tripartition of the systems still relevant today? It is dangerous to over-emphasize the formal aspects of State-church relationships. The tripartition is a leftover from when Europe was divided between Protestant and Catholic countries, and secular countries. If one instead looks at the content of the relationships, a different picture emerges. In Ireland and Belgium, the Catholic Church enjoys a better legal position than in some countries with a concordatian relationship, even though there is a strict

[27] Robbers, p. 324.
[28] Ferrari, Silvio; *Islam and the Western European Model of Church and State Relations*, in Shadid, W.A.R. and van Koningsveld, P.S. (eds.); *Religious Freedom and the Neutrality of the State: The Position of Islam in the European Union*, Leuven, Peeters, 2002, p. 6.

formal division between Church and State in both countries. The mere existence of an agreement is not necessary a qualifying element of the State's attitude towards a religious organization. In the same way, a State Church system does not *per se* grant a strong financial support for the Church. The financial support granted by Germany to the Roman Catholic Church and the Protestant Churches, through the agreements, is far greater than the support provided for the Church of England, even though the latter is a national Church.[29]

Countries in the Central and Eastern parts of Europe are trickier to deal with and map out. This is largely due to the relatively new-won independence, and the continuing work of building a new constitutional framework. It is significant to point out the importance of State-Church relationship in this process of building new democracies. Although freedom of belief and conscience are universal aspirations, the practical aspects of these rights are by no means self-evident and straightforward. Especially the role and rights of religious minorities are problematic, especially for less recognized denominations. Religious organizations undoubtedly formed a political force, and played an important role, in the democratization process post-1989. The fact that the majority religious groups have gained increasing rights, and State-Church relationships form an important part in writing the new constitutions, has not lead religious minority groups to require the same status or rights, as the majority Church. In the Baltic States, the situation is relatively stabile. In Estonia and Latvia, the Lutheran Church is affirmed, while at the same time recognizing freedom of religion for everyone. Latvia has a regionally based Catholic minority in the south, and both countries have a significant Russian minority adhering to the Orthodox Church. Lithuania, on the other hand, is predominantly Catholic and the Catholic Church serves as a conservative force. The Catholic Church also plays an important role in Polish politics. The Polish Catholic Church, being very privileged, has pushed trough a Concordat in 1998, and has intervened in Constitutional debates and defended an advantageous financial situation. These privileges are increasingly seen as disproportionate by a number of Poles. In addition, minority groups have problems getting their issues recognized, despite legal tolerance, since Polishness often equals Catholicism. The interplay between ethnicity and religion also plays an important role in more secular countries, such as Hungary and the Czech Republic, and not least in the former Yugoslavian countries.[30] Not all the mentioned countries are in fact members of the European Union. Even so, they are in various states of becoming members, some have entered into pre-accession agreements, while others have important roles to play in the neighborhood polices of the Union.

If one moves beyond the traditional tripartition system of State-Church relationships in Europe, can one still see a pattern, a pattern that might run deeper than the mere formal and substantive aspects elaborated on above? Is it possible to distinguish a deeper structure that makes it feasible to speak of

[29] *Ibid*.
[30] Davie, pp. 17, 20f.

a European way of viewing religion? Furthermore, can we construct a way to deal with religious pluralism in the European Union? These are question I will reflect on throughout the rest of my thesis, but especially in chapter five.

Religion is an image of social reality. It is not simply restricted to the private sphere, but corresponds with society, and inevitable, with law. The various systems of the State-Church dichotomy cause a myriad of outcomes, with impacts for European Union law and European integration. Whether the Churches are seen as public legal personalities, or if they are governed by private law, is one major difference. The handling of New Religious Movements, 'sects', and 'cults' is another. State facilitated and financed chaplaincy services in public institutions, financial relief in the form of direct support and/or tax relief, participation and/or representation in mass media or school system, and support for religious organizations in the cultural and social realm, such as in cases of ancient church monuments and social care, are all subjects which Community law touches upon.[31] I will come back to this discussion in chapter four.

2.3 European Religiosity – Sociological Overview

The sociological overview will follow a thematic, rather than geographical, path. The questions and problems elaborated on are circumstances, which can be found throughout the European Union, but necessarily some features are more prevailing in some countries rather than in others. When studying religion in Europe from a sociological point of view, two underlining questions can be distinguished. The first theme is the substance of contemporary values, and to what extent they are homogeneous. The second theme is a more dynamic approach, asking to what extent these values are changing. These two major questions naturally give rise to a series of further questions; what is the origin of a common value system, if one can be shown? What role does religion carry in the making of said value system? Should primacy still be given to religion, or has the process of secularization undermined its role? Is the influence of religion merely peripheral in contemporary Europe?

The most common meaning of 'secularism' is that religion has less impact on social progress, and the development of society, today, than before modernity. Sometimes it is used to talk about the religiosity of individuals, but more often it concerns social frameworks, and social values.[32] Many statements have been made on the secularization process in Europe; in the recent discussion, the impression is that the decline in religious attendance is not followed by a parallel decline in religious belief. Davie states: "[i]n short, many Europeans have ceased to belong to their religious institutions

[31] Bloss, p. 14.
[32] Furseth, Inger and Repstad, Pål; *Religionssociologi – en introduktion*, translated from Norwegian by Harald Nordli, Malmö, Liber, 2005, p. 110f.

in any meaningful sense, but so far they have not abandoned many of their deep-seated religious aspirations."[33] How then can a European religiosity be described, if there as indeed been a shift away from institutional religiosity? Below, I will describe one major feature of importance, the idea of 'vicarious belief'. Furthermore, I will elaborate on religious pluralism and the law – in three alternative forms of memory, that of established minorities such as Muslims, Jews and Hindus, that of the New Religious Movements (NRM) and last, that of New Age.

The idea of vicarious belief is one way of understanding patters of religion and religiosity, especially in Northern Europe. A population has ceased to be religiously active, at least to a great extent, but has delegated that activity to the professional ministries of the Churches. The clergy beliefs, figuratively speaking, *on behalf* of the rest of the population. This has consequences for a number of different areas. Often the expected level of moral is higher for so called professional religious people, and if they fail to live up to set standards, the fall is higher than for the average person. The professional clergy is supposed to be there in times of need, such as a national catastrophe, or in times of celebration. Furthermore, the clergy is asked to articulate the sacred moments in the life circle, such as birth, marriage and funerals, this even if the person benefitting from such an event would rarely attend a Sunday morning Church service. A refusal to carry out such tasks would violate the expectations, both individuals, and the collective, have on the clergy. In other words, a significant number of Europeans acknowledge, and expect, that the churches perform, vicariously, a number of tasks on behalf of the population. This has been the development since the post-war period, but it remains to be seen for how long it is possible to continue such a situation. One problem is the decreasing number of professional religious individuals; another is the growing gap between those professionals and the rest of the population.[34]

The post-war period has also brought forward questions of pluralism, both in sense of legal, and of religious pluralism. The economic change, an additional demand of labor in some European countries, and other migrant patterns, has increased the numbers of religious minorities. In particular the Islamic presence has grown, one example being the large Turkish minority in Germany. In addition, former colonial connections play an important role, both for a Muslim minority in France, coming from North Africa, but also a considerable number of Pakistani Muslims, and Indian Sikhs and Hindus in Britain. Due to problems with statistics and definitions it is hard to estimate an exact number of Muslims in Europe today, but a conservative number suggests a figure of 6 million. That would make Islam the largest non-Christian religion in Europe.[35] The Jewish population on the other hand, has been present in Europe for centuries. A presence that is inseparable from the recent history and its tragedies prior and during the Second World War.

[33] Davie, pp. 6ff, (8).
[34] *Ibid*, p. 59.
[35] *Ibid*, p. 13. In addition to problems of statistics and definition, a large, hidden, number of illegal migrants also makes the estimations preliminary.

Moreover, anti-Semitism did not start in the Interwar Years; it has a long-standing tradition in Europe. Nor is it, unfortunately, a thing of the past. Again, estimations of numbers are very difficult, but roughly there are about 1 million Jews in Europe, and the largest communities are present in France (500-600 000) and in Britain (300 000).[36]

If one regards Muslims and Jews as established *religious* minorities, established in the sense that they are widely acknowledged to be religious and belong to the so called world religions, the same cannot be said about the New Religious Movements. The presence of such movements is certain, but the significance of it is a matter of debate. Indeed, many NRM draw a lot of media attention, often of the negative kind, but the number of people involved is tiny. Despite the few numbers, NRM have acquired a large attention from sociologists of religion, since they are seen as indicators of change in contemporary society. As explained "[n]ew religious movements represent an extreme situation which, precisely because it is extreme, throws into sharp relief many of the assumptions hidden behind legal, cultural and social structures".[37] The NRM, and the attitude towards them, are a great barometer of the status of religious freedom and tolerance in Europe, since by examining them, the underlying attitudes in society are often revealed.

Europe has been inseparable from its Christian tradition, and the Church Institutions that follows, for the last two millennia. Societal change, in which I include legal change, has often happened either because of Christianity and the Churches, or in opposition and polemic to it. Europe is now faced with a challenge to accommodate a diversity of faith communities, some of whose aspirations clash with the historical framework of Christianity. The literature and studies done on NRM, from the 1960's and onwards, are vast, boarding to disproportionate, if one regards the small numbers involved. NRM disturb the European secular mind, in that they challenge assumptions of rationality, and the Christian religious mind in that they throw up disturbing alternatives to Christianity. Since the NRM differ widely in adherence and content, they face different problems in different Member States, a fact also linked to the different religious traditions present in each State.[38]

One of the major controversies, and the cause of much litigation in European Courts, is the Church of Scientology. In the United States, where the organization was founded, it is considered a 'Church' in the legal sense, and, hence, it is granted different kinds of exemptions and differential treatment on the basis of such a status. In Europe, the response has been quite different. Being viewed as a threat to society, and to individuals, the organization has faced severe restriction, and even bans in some Member States. In some it is not banned as such, but seen as a commercial organization, treated as such, and not granted status as religious organization. Lastly, in some States it is indeed viewed by legislators and

[36] *Ibid.*
[37] *Ibid*, p 14.
[38] *Ibid*, pp. 14, 116-21.

Courts as a religious organization, which requires special status. The Church of Scientology is a good example of the diversity among European States when faced with religious pluralism and NRM. Ranging from an outright prohibition in some Member States, seen as a threat to the public order in some, and considered a religion in some; the diversity is evident. This can also be seen in the case law of the European Court of Justice, in the classic case of *Van Duyn*[39], and more recently, in *Èglise de Scientologie*[40].[41]

Religious diversity takes a number of forms, and religious innovation happens both from within and from outside traditional religious institutions. Through new teachings and changed socio-economic patterns, Churches and other religious organizations split, renew and disappear. This also challenges the notion of majority versus minority. This is particularly true in cases of split, due to disagreement, in established denominations and, thus, the forming of new Christian organizations. At the end of the day, belongers to and believers in traditional forms of Christianity, might very well find themselves belonging to a religious minority, among a vast secular majority.

In addition, there are innovative forms of the sacred outside religious organizations altogether, such as the widespread notion of 'New Age'. New Age is a loose concept, but not an empty one. Two concepts seem to be the gathering factors, self-spirituality and holism. Self-spirituality reflects the language used in most publications, the monistic assumption that the self is a sacred object, and a need to return to our authentic nature. Holism is a continuation of self-spirituality, resisting the split in Western tradition between mind, spirit and body, and instead it stresses the 'whole'. There are indeed a multiple of activities connected to these ideas, some that object to a modern lifestyle, some which embrace it. In a way New Age is indeed an effect of modernization itself, since it is very much a global phenomenon, with a focus on the individual. The enormous number of material which is published by the different organizations themselves show a great variety, but is also an indicator that people do care for religious and spiritual issues. It is an indicator that Europeans are only partially secular, if one defines secular as "an increasing approximation of average thinking to the norms of natural and social science".[42]

[39] Case 41/74 *Van Duyn*, [1974] ECR p. 1337
[40] Case C-54/99 *Èglise de Scientologie*, [2000] ECR I-1335
[41] It is beyond the scope of this paper to go in the detailed case law, and political policy, concerning the treatment of the Church of Scientology, throughout Europe. A good overview can be found in; Kent, Stephen A.; *The Globalization of Scientology: Influence, Control and Opposition in Transnational Markets*, Idea Library, Religion (1999) 29, pp. 147-169. For the specific case of Germany, where Scientologists have faced the hardest resistance among the European Countries, see; Taylor, Greg; *Scientology in the German Courts*, Journal in Law and Religion, Vol. 19, No 1 (2003-2004), pp. 153-198. As for Britain, see Rivers, Julian; *Religious Liberty as a Collective Right*, in O'Dair and Lewis (eds.), p 237.
[42] Davie, p. 142.

3 Freedom of Religion Serving as a Minimum Criterion

3.1 Establishing the Basic Framework

Freedom of religion is one of the most crucial and basic of the fundamental rights.[43] The Charter of United Nations proclaims, in Article 1, that the main purpose of the UN includes

> "promoting and encouraging respect for human rights and for fundamental rights for all without distinction as to race, sex, language, or religion."

Furthermore, the United Nations obliges all its member States to promote the same respect.[44] In the aftermath of the Second World War, one can hardly underestimate the importance of the freedom of religion, and the right to protection from discrimination on the basis of religious adherence, which is strongly linked to it. It can even be said the experience of the War and the Holocaust, and not the least the asylum seeking procedures after the War, modified the *cuius regio eius religio* principle that had dominated since 1648.[45] It was recognised that religion is indeed not solely an internal matter for a State, instead some basic safe-guards must be guaranteed by the International society. The specific content of this fundamental right has been codified and explained in a number of human rights documents since 1945, when the United Nations was established. The Universal Declaration of Human Rights (UDHR), provides in Article 2, after having declared in Article 1, that all human beings are 'born free and equal in dignity and rights', for the core principle of equal treatment stating that all rights set forth in the Declaration shall be enjoyed without any distinction of any kind. The right to freedom of thought, conscience and religion is addressed in Article 18 UDHR.

International law forms a background tapestry to which the present discussion within the European Union must be understood. Freedom of religion and right to equal treatment is addressed in several international treaties, with a varying degree of binding legal effect and different modes of applicability in national law and Community law. The International

[43] See Arcot Krishnaswami, Special Rapporteur of the Sub-Commission on Prevention of Discimination and Protection of Minorities in Study of Discrimination in the Matter or Religious Rights and Practices, E/CN.4/Sub.2/200/Rev. 1 (1960) (the so called 'Krishnaswami Report'), which states "the right to freedom of though, conscience and religion is probably the most precious of all human rights, and the imperative need today is to make it a reality for every single individual regardless of his condition in life. The desire to enjoy this right has already proved itself to be one of the most potent and contagious political forces that the world has ever known".
[44] Articles 55 and 56, Charter of the United Nations.
[45] Christoffersen, in Mehdi *et al*, p. 112.

Covenant on Civil and Political Rights (ICCPR), containing the so-called first generation of human rights, was adopted by the General Assembly of the UN in 1966. It contains, in Article 18, a specific protection of freedom of religion and conscience, including a right to change one's religion. In addition, the other civil and political rights enshrined in ICCPR shall be enjoyed without distinction to religious belonging, according to Article 2(1). The counterpart to ICCPR is the International Covenant on Economic, Social and Cultural Rights (ICESCR), also enacted in 1966, and entered into force 1976. The latter Covenant protects economic, social and cultural rights, the so-called second generation of human rights. These rights include a right to work, right to social security, right to an adequate standard of living, and a right to education. In respect to the enjoyment of such rights, the Covenant requires State parties to guarantee a minimum of protection from discrimination on the basis of religion, in Article 2(2).[46] In the European sphere similar social and economic rights are protected through the European Social Charter, dating from 1961. The European Charter does not contain a specific non-discrimination clause but states in the preamble that social rights shall be enjoyed without discrimination on ground of, *inter alia*, religion.[47]

Regarding first generation human rights in Europe, the European Convention on Human Rights (ECHR) is the main carrier of a State's duty to comply with a minimum human rights standard. The Convention has been praised for its effectiveness, mostly due to a strong enforcement mechanism, and focuses on civil and political rights. The freedom of thought, conscience and religion is enshrined in Article 9.[48]

Article 9 ECHR:

> 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 belief 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 for the protection of the rights and freedoms of others.

The European Court of Human Rights merely creates a minimum standard of protection, something which is specifically true regarding religious

[46] Monaghan, Karon; du Plessis, Max; Malhi, Tajinder and Cooper, Jonathan (ed.); *Race, Religion and Ethnicity Discrimination – Using International Human Rights Law*, London, Justice, 2003, pp. 22-33.
[47] *Ibid*, p. 60.
[48] In addition to Article 9, the ECHR contains Article 14, which enshrines the principle of equality and prohibits unequal treatment on the grounds of religion. Article 14 is, however, not a self-standing article, but must be seen in conjunction with another rights under the Convention. Article 2 of the First Protocol (1952) also forms a part of the ECHR legal body, and endorses the right of parents to choose the religious or ideological orientation of their children's education.

freedom. The common standard is kept at a very minimum, and a wide margin of appreciation is left upon the member States.[49] This is particularly evident in *Leyla Sahin* v. *Turkey*[50] where the ECtHR stated

> ”where questions concerning the relationship between State and religion are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance […] Rules in this sphere will consequently vary from one country to another according to national traditions.”[51]

It serves as an illustration of the sensitivity of religious issues, that it was first as late as in 1993 that the Court of Human Rights actually found a State to be in breach of Article 9. This was the landmark judgment *Kokkinakis*[52], in which the Greek prohibition of proselytism was considered a violation of the right to freedom of religion.[53]

The ECtHR has held that the so-called State-Church systems are compatible with the Convention. Moreover, a State does not have to collaborate with all religious groups on an equal basis. However, collaboration with a certain creed cannot, as a side effect, cause unjustified harm to the freedom other groups and individuals enjoy. Furthermore, the ECtHR has not used its jurisprudence to create any sort of ‘model-relationship’ between Church and State in Europe, nor to impose a compulsory secularism. The reason for this approach is said to be “that the State’s attitude towards religion is primarily a political issue and is the result, to a large extent, of the historical tradition and the social circumstances of each country.”[54] Instead, Article 9 ECHR, and the ECtHR’s jurisprudence, focus primarily on the rights of private individuals, setting aside the broader aspects of law and religion. In other words, it emphasizes the guarantee of non-interference of the State, and protects the individual, but does not have a bearing on the structure of exactly how this is organized. Nevertheless, it does provide a safeguard, a minimum standard of protection a State has to fulfill. In that sense, Article 9 can modify said arrangement between State and Church.[55] Article 9 has also been interpreted as an outer boundary of democracy, and of the law-religion relationship. In *Refah Partisi*[56] the ECtHR stated that democracy, and public elections, cannot be used to introduce a theocratic State, *in casu Shari a* law in Turkey. Doing so, the Court held the Turkish Highest Court’s decision to

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[49] Augenstein, Daniel; *The Constested Polity: Europe’s Constitutional Identity between Religious and Secular Values*, University of Edinburgh, School of Law, Working Papers Series, 2009/13, p 6.
[50] Case of *Leyla Sahin* v. *Turkey*, No 44774/98, (10.11.05)
[51] *Ibid*, para. 109.
[52] *Kokkinakis* v. *Greece*, No 14307/88, (25.5.93)
[53] Janis, Mark W.; Kay, Richard S. and Bradley, Anthony W.; *European Human Rights Law – Text and Materials*, third edition, Oxford, Oxford University Press, 2008, p. 323.
[54] Martínez-Torrón, Javier; *European Court of Human Rights and Religion*, in O’Dair and Lewis (eds.), pp. 189f.
[55] Van Bijsterveld, Sophie C.; *Religion, International Law and Policy in Wider European Arena: New Dimensions and Developments*, in Ahdar (ed.), pp. 165, 167.
[56] *Refah Partisi* v. *Turkey*, Nos 41340/98; 41342/98; 41343/98; 41244/98, (13.2.03)

dissolve the Refah Party, a quite drastic measure, as compatible with the Convention.

As for minority groups, the ECtHR has increasingly paid attention to the rights they carry. They carry the right to act upon their beliefs, not merely to be tolerated in a specific setting. Under Article 14 ECHR all discrimination is prohibited, when enjoying a Convention right. In *Hoffman*[57] the ECtHR held that differential treatment on the basis of religious conviction, when deciding a custody case, was unacceptable.[58] In addition, the equality principle has also been interpreted as protecting individuals from States treating persons differently in analogous situations, without providing an objective and reasonable justification for the different treatment. The latter was the case in *Thlimmenos*[59], and the ECtHR held it to be a violation of Article 14, in conjunction with Article 9 ECHR.[60]

There are a few important aspects of the freedom of religion, such as the ECtHR has interpreted it, which need to be highlighted. First of all, the ECtHR diffrentiates strictly between the internal and the external aspects of the freedom. The internal aspect, *forum internum*, is held to be absolute and may not be restricted in any way, whereas the external aspect, *forum externum*, is by its very nature relative and may be restricted under the specification provided in paragraph 2 of Article 9 ECHR. It is evident that a State should not compel citizens to believe, or refrain to believe, in a certain way. The ECtHR confirmed this in 1976; in case *Kjeldsen, Busk Madsen and Pedersen*[61], and stated that a State is not allowed to organize its educational system (*in casu*, sexual education) in such a way as to amount to indoctrination of pupils with a certain religious or moral view, which is contrary to the view of the parents.[62]

The second aspect, which needs to be highlighted, is the differentiation the ECtHR makes between 'manifestation' and 'motivation'. The Convention does not contain an unrestricted right to behave according to one's religion. The right is, strictly, limited to manifestations of belief, not to acts motivated or influenced by religion. This approach has a large influence on the way Article 9 functions. The ECtHR has held that actions simply *permitted* by ones conscience is not protected by Article 9, something that seems plausible since permitted behavior is different from *obliged* behavior. Nevertheless, the ECtHR has gone one step further and stated that Article 9 does not even protect behavior, which is *required* by one's religion, belief or consciousness. This seems like a strict approach, which gives no protection for religious freedom from 'neutral law', law that has a secular aim in mind. Article 9 protects from State interference strictly aimed at a religious group, but does not protect when moral obligations of an

[57] *Hoffman* v. *Austria*, 23 June 1993.
[58] Martínez-Torrón in O'Dair and Lewis (eds.), p 191.
[59] *Thlimmenos* v. *Greece*, 6 April 2000, n. 44.
[60] Martinéz-Torrón in O'Dair and Lewis (eds.), p.194.
[61] *Kjeldsen, Busk Madsen and Pedersen* v. *Denmark*, 7 December, 1976.
[62] Martínez-Torrón in O'Dair and Lewis (eds.), p. 198.

individual, or group, clashes with laws that pursue a secular goal. Inevitably, the individuals concerned see their right to freedom of religion as being "*indirectly* and nonetheless unavoidably restricted".[63]

This strict approach on 'neutral law', adopted by the ECtHR, has been criticized, since the burden has been placed upon the individuals. Either they are required to disobey a law, leading to a secular sanction, or to disobey their own consciousness, something leading to a spiritual sanction. In addition, concern has been raised that the ECtHR has substituted the individual's conscience for its own judgment, and determines what beliefs are reasonable. It does not lie upon a Court to decide which thoughts and worldviews are 'true', and, hence, which are false. It is alleged that the duty to protect a right to religion is not determined by the reasonableness of said religion or worldview. In other words "[w]hat freedom of religion and belief protects is the right to choose the truths in which one is willing to believe in".[64] State control of different worldviews must then be limited to restrictions, which are "necessary in a democratic society", to use the wording of Article 9(2) ECHR. What are considered 'neutral law' are often the views prevailing among the majority of the population. The strict and narrow interpretation of the 'private sphere' performed by the Court of Human Rights, may then have a more severe impact on those minority groups which hold ideas that are further from the ethical consideration of the majority, than those who are more in line with mainstream thinking.[65]

Freedom of religion carries, maybe to a larger extent than many of the other rights, a great corporate, institutional, and collective content. As for minorities, the right to equal treatment, including prohibition of so called indirect discrimination, often assumes an assimilationist model or approach. It is often assumed that minority groups wish to achieve the same standard of rights protection, as the majority group, or simply the absence of the disadvantage it means to belong to that minority group. The assimilationist model does little to promote the existence of the minority group itself, and the protection of the specific characteristic traits they carry. In that sense, the right to freedom of religion is often linked to non-discrimination on the basis of race or ethnicity, or gender. Discrimination is rarely a single-handed phenomenon, it is important to keep in mind the intersectionality of different grounds of discrimination.[66] The problems a Muslim woman, from an Arabic country, living in Europe, may face, is different from what a white British man, belonging to a New Religious Movement, such as the Hare Krishna, faces. In addition, one must not forget, the discrimination one may face from within a minority group, for instance a homosexual Pakistani man in a Muslim congregation.

When discussing freedom of religion, it is common to focus on the status of minority religions. However, due to the strong principle of secularism in

[63] I*bid*. p. 199. (Cursive in original.)
[64] *Ibid*. p. 202.
[65] *Ibid.*
[66] Monaghan *et al*, pp. 13f.

most European countries, and the separation of private and public, the right to be religious and what it entails, is often neglected in the discussion. This can be seen when discussing the alleged right to be exempted from apparently neutral law, and the right to consentious objection to State duties and obligations. These alleged rights might very well come to the forefront with the European Charter of Fundamental Rights, that I will develop on in chapter six. National 'neutral' law often stems from Community measures, which bring to the fore possible exemptions and derogations in the implementation.

3.2 Collective Aspects of Freedom of Religion

The collective aspects of freedom of religion are not as evident in the case law of ECtHR. There are a few cases dealing with these aspects, all from the last 15 years. Prior to that, the ECtHR was reluctant to even grant standing for religious organizations. Even in the present day, the scope of collective religious freedom is not clear-cut. However, although the exact scope of legal standing is not fully explored, in cases *Holy Monasteries* v. *Greece*[67] and *Serbo-Greek Orthodox Church in Vienna* v. *Austria*[68] there was no question that the monasteries and the Church, respectively, were the applicants, not the individual members. Thus, there is no doubt that the collective aspect of freedom of religion includes some form of legal standing. Not only cases regarding legal standing suffer from the individualist bias, but also matters of substance. The most striking example of this is perhaps case *Serif* v. *Greece*[69] where a chief mufti was elected by the Muslim congregation, in opposition to the chief mufti appointed by the Greek government. The ECtHR did not view this as a case of a religious body's right to choose its own leader, instead the Court stated that it was the individual's right to 'appear' as a religious leader, without actually being one.

The question arises, what is exactly collective religious freedom? And what implications does it have for Community law and for free movement rights? The classic argument for collective religious liberty is presented by Julian Rivers. There are four basic elements in the protection of collective religious liberty; religious communities as ordinary legal associations, exemptions from the general law, the privileges of religious associations, and, lastly, religious communities and public functions.[70] All of the mentioned aspects might, to a lesser or greater extent, influence how the European Court of Justice and the Community Institutions evaluate and assess its judgments and measures in relation to religious freedom.

[67] *Holy Monasteries* v. *Greece* A 310 (9.12.94).
[68] *Serbo-Greek Orthodox Church in Vienna* v. *Austria*, No. 13712/88 (2.4.90)
[69] *Serif* v. *Greece*, No. 38178/97 (14.12.99)
[70] Rivers in O'Dair and Lewis (eds.) pp. 227, 231ff.

Collective religious freedom is more than the sum of it member's freedom of religion. The organization must be able to act on behalf of its members, and obtain legal personality in its own name. The fundamental right of freedom of religion is a typical right which is seen as an essential part of the inner world of an individual, but which cannot wholly function if not the collective aspects are considered. Churches and other religious organizations often carry out important social functions, such as marrying, burying, resolving disputes, running retirement homes and hospitals, supporting charities and arranging social meetings for children, homeless people and elders. To be able to carry out above-mentioned tasks, and in order to be able to act as an organization, a religious organization must be able to obtain the most basic features of legal personality. The ways this is organized is a question for each Member State to decide. But owning property, to trade for the purposes of the organizations, act as an employer, and suing and being sued is some of these basic rights, according to the ECtHR in *Canea Catholic Church* v. *Greece*[71]. To what extent this coincides with the idea of mutual recognition is hard to say, but drawing from the case law of the Court of Human Rights just presented, some minimum components of the rights to freedom of establishment and to provide services, should be applied when a religious organization wishes to establish itself in another Member State.

A common feature among the Member States is to exempt religious organizations from some parts of its legislation. General law is sometimes clashing with the ethics of the religious organizations; hence the general law is experienced as oppressive. The constitutional and human right of religious freedom then requires a State to accommodate religious belief and practice. Religious freedom cannot, however, automatically render a minority practice lawful, or that exceptions always must be provided. There will be times where a State is allowed to insist on certain standards, regardless of their impact on minority groups.[72] A middle path must be found, a way the balances between assimilation and accommodation. One example of this balancing, which concerns planning and building permissions is performed in *ISCON* v. *the United Kingdom*[73]. In this case the Court of Human Rights exempted from general law, unless the State measures were 'necessary in a democratic society'. Another evident example within Community law is anti-discrimination law, and especially the Framework Directive on equal treatment, Article 4(1) and (2). This provision will be examined in chapter four.

The different approaches of State-Religion relations in the Member States have significant impact on certain privileges the State grant religious organizations; to the extent they do so at all. The most important aspects of these privileges, concerning Community law, is probably the financial advantages and tax exemptions. Several Member States give tax reductions or exemption for organization that holds so called 'charitable status'. A

[71] *Canea Catholic Church* v. *Greece*, No. 25528/94, RJD 1997-VIII 2843 (16.12.97)
[72] Rivers in O'Dair and Lewis, p 133.
[73] *ISKCON* v. *the United Kindom*, No. 20490/92, 76 DR 90 (8.3.94).

recent case, *Persche*[74], on free movement of capital regarding charitable gifts, was decided upon by the Court of Justice in 2009. The case will be further developed on in chapter four. Naturally, a question arises of what this charitable status entail, not to mention what religion means in this given context.[75]

As presented above, in many national legal systems, religious organizations carry out important public functions. These functions raises questions of what constitutes 'religious' and 'secular' activities, questions that are differently solved in the Member States.[76] It also raises the very important question of State interference with religious matters. The ECtHR acknowledges, to a large extent, the right to self-determination of a religious organization. In *Rommelfanger* v. *Germany*[77], Dr. Rommelfanger was employed by a Catholic hospital in Germany. He publically voiced opinions on abortion that were contrary to the teachings of the Roman Catholic Church, and explicitly presented himself as a doctor of the Catholic hospital in question. His employer gave him a notice, and the German Constitutional Court declared the dismissal lawful, since the Church, acting as an employer, had used its right to self-determination in a permissible fashion. Accordingly, the employer is free to determine the obligations of loyalty of the employees, and can request the employee to not seriously injure the religious interest of the employer. The Commission for Human Rights upheld the judgment by the German Constitutional Court, and declared the action acceptable under the ECHR.

If the Union continues to develop in the direction of a 'citizenship model' of integration, rather than just an economic integration, more questions of self-determination of Churches and religious organizations will appear. In several Member States, as we have seen, Churches, and religious communities, carry out state functions, and perform important social work. How far can this integration go, still respecting national diversity, and fulfilling the non-interference obligation, which serves as the foundation of modern state-religion affairs? Are European policies merging, or converging, or will this serve as a limit of how far European integration can go? These questions will be further addressed in the following chapters.

[74] Case C-318/07 *Persche*, [2009] ECR n.y.r.
[75] Rivers in O´Dair and Lewis (eds.), p. 236f.
[76] *Ibid*, p 240. See following pages for a discussion on how this is solved in England.
[77] *Rommelfanger* v. *Germany*, No 12242/86, (6.9.1989 B)

4 A Substantive Look at Religion within the European Union

The connection between the European Union and religion can, at a first glance, be seen as somewhat remote. But, with the increasing number of areas of Union and Community policy, the interaction of religion and law will be of expanding practical importance. In addition, the greater emphasize put on fundamental rights protection within the Union plays a great role. Even though the ECHR is not a formally binding document for the European Union, it is nevertheless a direct part of the Community's legal order. All Member States are bound by it, and the ECJ views the Convention as a source of the unwritten principles of fundamental rights within the Union. Article 6(2) TEU explicitly provides for this position.[78] However, the actions taken by the Community itself, or its Institutions, are not under scrutiny by the ECtHR. Since the European Communities are not contracting parties to the Convention, Europeans have no possibility to bring complaints before the ECtHR regarding actions of the Communities. But since fundamental rights form an integral part of the general principles of law of the European Community, it lies upon the European Court of Justice to ensure respect for human rights as one condition for the lawfulness of all Community acts.[79] Thus, there is no doubt that Article 9 ECHR, containing the duty to protect freedom of religion, is a part of Community law. Another question is, whether the protection granted by Article 9, in the sphere of European Union law, is enough? In other words, does it safe-guard protection-worthy phenomena to a large enough extent? And, furthermore, how does Community law affect the religious organizations and issues that are specifically 'religious'?

In the late 1980's President Delors established a so-called 'Dialogue with religions, churches and communities of conviction', which is still running at present time. It was motivated by the fall of the Berlin wall, as a way to include civil society in the future of the European Union – especially keeping in mind future, possible, enlargement of the Union. President Delors wanted to establish a political Union, based on a sense of common identity and sense of belonging. In order to fulfill this prospect, the President felt it was necessary to invite organizations active in the field of religion, science and culture. President Delors successors, Jacques Santor, Romani Prodi, as well as the current president, José Manuel Barroso, have

[78] Krüger, Hans Christian; *The European Union Charter of Fundamental Rights*, in Peers, Steve and Ward, Angela (eds.); *The European Union Charter of Fundamental Rights*, Oxford and Portland, Oregon, Hart Publishing, 2004, p. xxi.
[79] Opinion 2/94 on Accession by the Community to the ECHR (1996) ECR I-1759.

upheld this idea.[80] A dialogue is not a legal instrument as such. Neither is the idea of creating 'a Soul of Europe' a bureaucratic task, it is simply not static and enforceable enough to fit in that category. A soul, or, to put it differently, an identity, does not emerge from a desk at the Commission. A dialogue requires a "vibrant social mix".[81] But it does show that matters of religious importance are not only a matters of strict legal interpretation, when dealing with religious freedom, but is a revealing example of a growing consciousness of the positive role of religion within the EU.[82] Perhaps is the discussion of a European Soul also an indication of that integration cannot simply come out of a mere economic union, something more spiritual is needed.[83]

The Bureau of European Policy Advisors (BEPA) is an organ working directly under the President of the Commission, and is in charge of the meetings with different representatives of major religious organizations. The key words for the Dialogue are open, transparent and regular. These concepts have been interpreted by BEPA, as meaning that anyone is allowed to take part in the Dialogue, since it does not fall within the power of the Commission to define either the relationship between State and Church in the different Member States, or how other religious communities, philosophical or non-confessional organizations are defined or organized. If the Member State in question recognizes an organization as a Church, religious community or a community of conviction, according to national law or practice, then BEPA accepts that definition. In order to fulfill the second criterion, transparent, the Commission provides information on its webpage on the Dialogue's partners, and the objectives and results of a specific dialogue. The aim is that everyone, at any time, should have the right to know the involved partners, the topic of discussion, and the outcome. Lastly, the meetings are held regularly and at various levels, in the form of bilateral meetings or specific events.[84]

A further indication of the enhanced importance of religion in the European public sphere, can be seen in the Commission's White Paper on Governance of 25 July 2001[85], which contains another reference to established religion and religious organizations. The White Paper came about since the Commission held it to be important to revitalize the Community method, and to give the Commission a more leading role within policy making. The Council and the Parliament, representing the Member States and the nationals respectively, should lay out the main guidelines, and then leave it to the Commission to execute those guidelines.[86] In a chapter on Civil

[80] Internet site; Bureau of European Policy Advisors, http://ec.europa.eu/dgs/policy_advisers/activities/dialogues_religions/index_en.htm read 2009-07-20, at 16:50.
[81] Van Bijsterveld in Ahdar (ed.), p 175.
[82] *Ibid*, p 175.
[83] Christoffersen in Mehdi *et al*, p. 114.
[84] See note 80.
[85] Commission's White Paper on European Governance of 25 July 2001 (COM (2001) 428 final)
[86] Craig, Paul; *EU Administrative Law*, Oxford, Oxford University Press, 2006, p. 112f.

Society the White Paper States that "[c]ivil society plays an important role in giving voice to the concerns of citizens and delivering services that meet people's needs. Churches and religious communities have a particular contribution to make."[87]

4.1 Does Religious Pluralism Fall within the Scope of Community Law?

The very core of the State-Religion relation is freedom of religion. It is as stated, the most fundamental right of an individual – the right to choose a worldview. This fundamental right also forms the basis of how Community law deals with religious pluralism. In 1976 the ECJ had before it a staff case, concerning recruitment tests for linguistic experts, to the Council of the European Communities. Said case, *Prais* v. *Council*[88], seems at first glance to be quite simple and self-evident. A British woman, being of Jewish religion, seeks annulment of the decision of the Council to refuse her complaint regarding the specific date for a recruitment test. She could not undergo the test that specific set day, Friday 16 May 1975, since it was the first day of the Jewish Feast of *Shavuot*. *Shavuot* is a holiday linked to the Passover, and celebrates when God gave the *Torah*, the law, to His people. Ms. Prais asked for a new possible date for the test, since you are not allowed to travel or write on this particular day. The defendant, the Council, rejected her application, and based its rejection on the principle of equal treatment, stressing that it was essential that all candidates were tested on the same day.

The applicant based her argument on Article 27, paragraph 2, of the Staff regulations, which provides that officials shall be selected without reference to race, creed or sex. In addition, she claimed that prohibition of religious discrimination forms a part of the protection of fundamental rights, which the ECJ is bound to ensure. She also based her argument on Article 9 of the ECHR, and the freedom to manifest one's religion, enshrined in paragraph 2 thereof. She claimed that both the Staff regulation and the fundamental rights in Community law, as well as Article 9 ECHR, should be interpreted in a way, which enables a person to take part in test, no matter what religious circumstances he or she is in.

The Council objected to this interpretation of the Staff regulation, as well as the alleged interpretation of the fundamental rights and Article 9 ECHR. It claimed that, if the Court would interpret said provisions in that manner, it would oblige the Council to "set up an elaborate administrative machinery […] and it would be necessary to ascertain the details of all religions practiced in any member State in order to avoid fixing for a test a date or a time which might offend against the tenets of any such religion".[89] The

[87] Van Bijsterveld in Ahdar (ed.), p 175.
[88] Case 130-75 *Prais* v. *Council*, [1976] ECR p. 1589.
[89] *Ibid*, para. 11.

Court of Justice agreed with the Council on this matter. It stressed that the principle of equal treatment makes it necessary for a fixed date to be set, a date that is the same for all participants of the test. Any requirement for changing the date, due to religious reasons, must be balanced against this necessity. The Court stated that a Community Institution does not have a duty to keep itself informed of all details of religious holidays present in the Community. However, if the participant of a test, in due time, informs the Institution that a date is unfitting, there is an obligation to try to avoid such dates. Even though is it desirable to, generally, try to avoid certain dates, there is no obligation, under Community law, to avoid conflicts with religious requirement of which said Institution has not been informed.[90]

One might argue, is this not a completely reasonable judgment? Is it not self-evident? There are indeed a multitude of different religions present in the Member States, as well as local traditions and branches of religious traditions. Must there not be some kind of limit to the duty to respect different cultures and religions? Maybe that is indeed the case, but one must ask – what is behind the assessment the Court makes? Discrimination is often not a willful act, and is even less often a hateful act or planned act directed towards a specific individual or group of individuals. More often, it is an individual belonging to a minority group, who is faced with phenomena, which the majority considers a common understanding, a tradition or even a normative order. There is, according to me, no doubt that the Council never would have held the test on the 25th of December or on Easter day. There is no formal prohibition within Christianity to write or travel on Christmas, so why would it not be held then? Simply, because for most people in Europe, its a cultural holiday. You may celebrate in what ever way you choose, or refuse to celebrate altogether, but no one would require you to inform you employer or school that you do not wish to work or write a test on that specific date. The Court takes for granted that there is a Christian, cultural, background to the acts by the Council, and accepts this policy. I say cultural Christian, since I believe that its more question of a religious tradition so embedded in (European) culture, that is has lost most of its touch with an actual Christian creed. The outcome of the case is that the Community Institutions do not have to reorganize their administration, and they do not have to accommodate the religious minority traditions. Only if they are informed of the problems arising do they need to act.

The Court of Justice performs a balancing act, between the necessity of equal treatment and the duty to respect freedom of religion. But, when doing so, the Court overlooks the structural and cultural background a member of a religious minority group is faced with. Might it not seem fair to impose an obligation to the Institution to keep itself informed of some major features of the minority religions in Europe? If the case were to be assessed today, would the outcome be different? Does a larger obligation exist today, for States and Institutions, not only to refrain from interfering with religious matters, but also to accommodate minority beliefs? Despite these concerns

[90] *Ibid*, paras. 13-18.

and questions, *Prais* serves as an important statement that there indeed exist at least a limited duty for the Community Institutions to respect freedom of religion, and religious pluralism. However, the question still remains to what extent this duty stretches.

4.2 Free Movement of Religious Pecularities

How Community law deals with religious pluralism, and affects religious peculiarities, stretches further than the *Prais* formula of protecting a basic fundamental right. The Court of Justice has on a few occasions dealt with religious phenomena in relation to the free movement rights, and has assessed with the various State-Religion policies of the Member States, in relation to Community law.

The question of free movement of workers, and social security for workers, arises when the worker is not employed, or paid, by a religious organization, but instead paid by a third party or *in natura*. The latter was the case in *Steymann*[91]. Mr. Steymann was of German nationality and moved to the Netherlands, in order to take up work as a plumber. He only worked as a plumber for a short amount of time, and then joined a religious community in the Netherlands, called 'the Bhagwan Community'. The community supplies its material need through commercial activities, such as running a music club, a bar and a launderette. Mr. Steymann applied for a Dutch residence permit, in order to pursue an activity as an employed person. His tasks included plumbing on the Bhagwan premises and taking part in the commercial activities performed by the organization. No salary was paid; instead the community took care of all material needs of its members.

The Dutch authorities refused Mr. Steymann's application for a residence permit, on the grounds that he was not pursuing an economic activity as an employed person. Hence, he was not a favored EEC national according to Dutch legislation on aliens. He appealed the decision and the appellate court referred the question to the ECJ under Article 234 EC. The ECJ held that participation in a religious community, or another community based on a certain philosophy, can only fall within Community law if the participation can be regarded as an economic activity. The Court assessed the degree of economic activity within the organization, stressing that it cannot be merely ancillary or marginal, but must be genuine and effective. The work was seen as an important aspect of the Bhagwan community, and aimed at ensuring a certain degree of self-sufficiency for the community. Furthermore, the members could not avoid taking part in the work, unless special circumstances occurred, hence, the service provided by the community for its members must be seen as an indirect *quid pro quo* for their work. In the light of the foregoing, the ECJ held that activities performed by members of a religious community, as part of that organization's commercial activity,

[91] Case 196/87 *Steymann*, [1988] ECR p. 6159.

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.[92]

Steymann shows that there was, at the present stage of Community integration and legal development, no right to residency in another Member State for the sole purpose of joining a religious community. For Community law to apply, there had to be an economic activity, and that activity had to be genuine and effective. This is the same reasoning as in *Grogan*[93], where the ECJ held that the freedom of expression is in it self not enough to constitute a Community element, that there has to be an economic activity pursued. What if the Bhagwan Community would have been banned in Mr. Steymann's home country, Germany? Would there been a Community element in the sense that the Netherlands maybe was the only place he could have practiced his religion? Does the duty to protect religious freedom stretch that far? Or does the obligation, which lies upon the Community to protect freedom of religion, only stretch as far as there is a common consensus, between the Member States, of what actually constitutes a religion? Again, the question might seem remote, but if one considers the various ways different Member States treat the Church of Scientology, the question might not be that far from a real scenario.

A couple of years prior to *Steymann*, the ECJ ruled on another situation with Church-connotations, in *van Roosmalen*[94]. The ruling shows the difficulties that arise when Community law meets the special characteristics of Church and religious life. The case concerned the expression 'self-employed person' in Article 1(a)(IV) of Regulation No 1408/71, as amended by Regulation No 1390/81. Question was whether Mr. van Roosmalen, a Roman Catholic Priest, belonging to a Premonstratensian order and working as a missionary in Zaire, could be regarded as a self-employed person. Mr. van Roosmalen was not paid by the Roman Catholic order he belonged to, but relied on third parties to sustain him. He had been, for some decades, maintained by his missionary community rather than by his order, and there were no contractual relations. The ECJ, after having stated that the term 'self-employed person' must be interpreted broadly, held that the term applies to persons who are pursuing, or have pursued, an occupation in respect of which they receive income to meet all, or most of, their needs, even if that income is supplied by third parties benefitting from the services of a missionary priest.[95] Although not as evident as in *Steymann*, it is clear that the Court does not treat a common feature among people working with religious organizations, namely, to be paid by third parties, differently from other (non-religious) situations. As long as a person is paid by *someone* for the services performed, he or she is considered a self-employed person, hence, worthy of protection by Community law. The consequence of both cases is that the specific peculiarities of religious life do fall within the

[92] *Ibid*, paras. 9-14.
[93] Case C-159/90 *Grogan*, [1991] ECR I-4685.
[94] Case 300/84 *Roosmalen*, [1986] ECR p. 3097.
[95] *Ibid*, para. 23.

scope of Community law, if the necessary ties are established. The freedom of movement, free distribution of services, freedom of establishment, and prohibition of discrimination, do in fact cover Churches and religious matters.

Regarding matters, which lay closer to the heart of the State-Church relations of the Member States, the Court of Justice, assessed the impact of Community law in some more recent cases. In *Persche*, which was decided in January 2009, the Court had to assess the question whether the free movement of capital includes deduction of income tax on the basis of a gift in kind given to bodies recognized as charitable, and furthermore, if such a deduction can be restricted to national organizations only. Mr. Persche had applied for a tax reduction in Germany, since he had given a gift in kind to an organization in Portugal, which the Portuguese authorities viewed as charitable. He was refused such a reduction, but claimed that this refusal was contrary to the free movement of capital, since he would have been granted the reduction should the charitable organization be placed in Germany. The Court held that tax deductions, based on gifts given to charitable organizations, do fall within the scope of Community law, and the free movement of capital. Whether the transfer of assets is in money, or in movable or immovable property, is in that aspect irrelevant. The Court compares tax treatment of gifts to that of tax levied on inheritances, and affirms that both fall within the scope of Community law, unless the constituent elements of the transaction are confined to one particular Member State alone.[96] The Court reaffirmed the right of a Member State, under Article 58(1)(a) EC to distinguish, without prejudice to Article 56 EC, between taxpayers who are not in the same situation with regard to the place where their capital is invested. However, the unequal treatment permitted under 58(1)(a) EC must be separated from the arbitrary discrimination, or the disguised restrictions, prohibited under Article 58(3) EC. In order for national legislation, concerning deductible charitable gifts, which distinguish between national bodies and those established in other Member States, to be compatible with the Treaty, they must fulfill one of two criteria. First, the difference in treatment must concern situations which are not objectively comparable, or second, must be justified by an overriding reason in the public interest, such as the need to safeguard effective fiscal supervision. In order to be fully justified, the unequal treatment in national legislation must not go beyond what is necessary to obtain the objective of said legislation.[97]

It is interesting to see the evaluation made by the Court, concerning the comparability of national bodies recognized as charitable. It points out that, at the outset, it is appropriate for each Member State to decide which activities should be recognized as charitable, and, hence, worthy of tax advantages. Whilst it is lawful for the State to restrict such tax advantages to bodies carrying out certain charitable purposes, it is not permitted to restrict those advantages only to bodies operating in said Member State, on the

[96] *Persche,* paras. 25-27.
[97] *Ibid*, para. 41.

basis that said charitable organization carries out some State-responsibilities. The German provisions aim at encouraging private bodies to substitute themselves for the public bodies, in assuming certain responsibilities. However, it is established case law that such a budgetary compensation, or in other words, the need to prevent a reduction of tax revenues, is neither among the objectives stated in Article 58 EC, nor an overriding reason in the public interest, capable of justifying a restriction on a freedom provided by the Treaty. Furthermore, the Court holds that it is permissible for a State to apply a difference in treatment between national and non-national bodies, if the latter bodies pursue objectives different from those in national legislation. The obligation to respect the status of 'charitable' under the legislation of another Member State is not automatic. There is a certain discretion of the 'home' Member State, *in casu* Germany, which it must exercise in accordance with Community law. A Member State is free to define the interests the general public, which serves as the background for its policy, and which it wishes to promote. However, if the requirements for being recognized as 'charitable' in the other Member State serve to promote the very same interests of the general public, as in the home State, and would have likely to be viewed as such by the latter's national authorities if it would have been established there, the home State cannot refuse equal treatment on the sole basis that it is not established in that State.[98]

Once settled that religious community life do fall within Community law, if the necessary ties are established, one might wonder if there are any possibilities left for the Member States to keep their national policies. In the case of the Church of Scientology, the Member States have very different policies, which has been assessed by the Court of Justice, in *Van Duyn*[99] and *Église de Scientolgie*[100]. In both cases the Member States relied on public policy, in their attempt to treat the Church of Scientology less favorable than other organizations, considering the organization socially harmful. In *Van Duyn*, the question of free movement in order to take up employment with an (religious) organization arose.[101] Ms. Van Duyn, a Dutch national, wanted to work in the United Kingdom, as a secretary in the Church of Scientology. She was refused entry in Britain, since the activities of the Church of Scientology were considered socially harmful, albeit, not illegal, in the United Kingdom. British citizens were not precluded from taking up employment with the organization. The ECJ held that a Member State is entitled to take into account, as a matter of personal conduct, the involvement with an organization the State considers socially harmful. This situation would fall under the scope of a possible derogation of a directly applicable provision, on the basis of 'public policy'.[102] *Van Duyn* shows that the ECJ leaves a certain amount of discretion on the Member State,

[98] *Ibid*, paras. 42-49.
[99] Case 41-74 *van Duyn*, [1974] ECR p. 1337.
[100] Case C-54/99 *Eglise de Scientology*, [2000] ECR I-1335.
[101] Religious in parantesis, since there is no consensus whether the Church of Scientology should be considered a religious organisation or not.
[102] *Van Duyn*, paras. 23-24.

concerning national values and public policy. The justifications possible under public policy might very well vary between the Member States, but also from time to time.

Van Duyn was decided in 1974, at a time where the status of fundamental rights were not fully developed upon, within the Community legal order. In addition, and maybe more importantly, Article 13 EC and the following Directives on equal treatment, had not been enacted. Article 13 EC, and the Framework Directive, contains a right to not be less favorably treated because of yous religion, in employment situations. There is no consensus in Europe whether the Church of Scientology should be considered a religion or not. Would the ECJ, if *Van Duyn* was to be assessed today, be required to come up with a definition of religion and religious organization – in order to establish whether Ms. Van Duyn would be protected by Community law or not? And if there was consensus that the Church of Scientology is a religious organization, but the United Kingdom still held their activities to be socially harmful (but notice, not illegal), would she then be protected due to the increased status of fundamental rights within the Community? If a Muslim of Swedish nationality, belonging to a more conservative branch of Islam, wanted to take up work in an organization in Germany, but was refused since the German authorities viewed said organization as a threat to the social order. However, as in *Van Duyn*, the organization was not illegal, and German citizens were not prohibited from taking up work there. Would this be viewed as illegal discrimination, not only on the basis of nationality (which could probably be justified on the basis of *Van Duyn*), but instead on the basis of religion? That question is still left for the future, but the scenario is in my opinion not merely hypothetical, it could very well occur. The situation cannot be solved through the Framework Directive, since it only concerns employment, and Article 13 is not considered directly effective. Can a link to Community law be established by invoking the general principles of Community law, and the right of equal treatment as part thereof? Is it possible that the Union's duty of respecting freedom of religion, at the present stage of Community law, would make the outcome of my hypothetical case different, compared to *Van Duyn*?

In line with the judgment in *Van Duyn*, the public policy clause was also evaluated in *Église de Scientologie*, in 1999. The French Prime Minister had laid down in law, a system of prior authorization for certain categories of direct foreign investments. This system affected the Church of Scientology in Paris, to which the Scientology International Trust Reserve, a trust established in the United Kingdom, wanted to transfer capital. The Church of Scientology asked for a repeal of this system, submitting that it was contrary to Community law governing free movement of capital. France, on the other hand, claimed that the prohibition of all restriction on free movement of capital is without prejudice to the right of Member States to take measures, which are justified on grounds of public policy or public security. The Court of Justice stated that the system of prior authorization is indeed a restriction, and agreed that a Member State is, in principle, free to determine the requirements of public policy and public policy in the light of

their national needs. However, the State must do so in accordance with Community law. The derogations from the free movement of capital must be interpreted strictly, and cannot be decided unilaterally by the Member State, without control by the Community Institutions. Only if there is a genuine and sufficiently serious threat to a fundamental interest of society, can a Member State rely on the public policy and public security derogation clauses. In addition, the clauses must not be misapplied, to serve a purely economic interest, and the persons affected must have means of legal redress. Furthermore, the measures taken by the Member State must fulfill the proportionality criteria, and must not be able to be attained by a less restrictive measure. In the case, the Court of Justice affirmed that it might very well be the least restrictive measures, and that prior declaration is an inadequate measure, due to the difficulty of tracing and identifying capital once it has entered the State. However, in French provisions at stake, there was no definition of what constitutes a threat to public policy and security; hence, French legislation did not fulfill the principle of legal certainty.[103]

In conclusion, a basic fundament for equal treatment of, and respect for, religious minorities is long since established regarding the Community Institutions, but they are not obliged to reorganize their administration to accommodate such minorities. Religious peculiarities, such as various forms of 'employment' and *quid pro quo* salaries, fall within the scope of free movement, with the exception of when a Member State is allowed to restrict such a movement of the basis of 'public policy'. The discretion left upon the Member State is in those cases quite wide. National values, in order to establish what should be considered 'charitable' also fall within the margin of appreciation of the Member State. In the light of the foregoing, Community law does affect the 'law and religion' policies of the Member States, but a cannot be said to fundamentally alter such a polity.

4.3 Are Matters of Religion Harmonized?

Issues of religion, and of religious freedom, play a role in wide ranging areas of legal spheres. Dealing with secondary legislation, there are a number of different legal fields, which touch upon religion, especially in a structural and collective sense. Two different approaches may be discerned when examining these provisions. First of all, a distinct Union policy emerges, concerning non-discrimination and a prohibition of revealing religious affiliation. The second way secondary legislation deals with religion, is to refer the issue back to the Member State, and to national legislation. Is this two-folded approach an outcome of a respect for national diversity, or is it a result of a, new, independent, legal structure between religion and the European Union?

The principle of equal treatment, which requires persons in the same situation to be treated in the same way and persons in different situations to be treated differently, is a general principle of Community law. It finds

[103] *Église de Scientlologie*, paras. 13-23.

expression in the EC Treaty, in Article 12, a prohibition of discrimination on grounds of nationality, and in Article 141, with the aim of eliminating inequality between men and women, and is also enshrined in the Charter of Fundamental Rights. More importantly, the principle of equal treatment is the basic thought behind Article 13 EC. Article 13 serves as a legal basis for the Community to take action against discrimination on the basis of, among other grounds, religion and belief. In order to pursue this aim, the Community has enacted two Directives. Council Directive 2000/43/EC[104] implementing the principle of equal treatment between persons irrespective of racial or ethnical origin ('The Equal Treatment Directive') and Council Directive 2000/78/EC[105] establishing a general framework for equal treatment in employment and occupation ('The Framework Directive'). The latter contains the prohibition to discriminate on the basis of religion or belief, or lack thereof, in employment and occupation.

The Framework Directive concerns, at its core, a prohibition of discrimination on the grounds of religion or belief, age, disability and sexual orientation, in employment and occupation. The Directive defines 'unlawful discrimination' as direct and indirect discrimination, harassment, and an instruction to discriminate, according to Article 2. The wide range of prohibited grounds evoked strong disagreement among the Member States, and the outcome is a Directive full of omissions, exemptions, and derogations. First of all, Article 2(5) provides for an ambiguous exception, in relation to "measures, laid down in law which, in a democratic society, are necessary for public security, for maintenance of public order and the prevention of criminal offences, for health protection and for the rights and freedoms of others". The intended purposes for this clause are not clear-cut, and the provision was introduced late in the negotiations.[106] For the field of religion, inspiration might be drawn from *Van Duyn* and subsequent case law on public policy exceptions, concerning prohibitions of the Church of Scientology, as well as prohibitions of religious clothing in public employment. Ultimately, the scope of the exception will be for the Court of Justice to determine.

A more specific exception is provided by Article 4(2) of the Framework Directive, stating that employment "in churches or other public or private organizations the ethos of which is based on religion or belief" is exempted. This exception is commonly understood as aiming at sexual orientation and religion. Those two issues were heavily debated during the negotiation rounds, and the terms and the terminology shifted throughout the process. At the end, the outcome can be said to have three dimensions. The first one is access, by gays and lesbians, to employment in religious organizations. According to Article 4(2) the exception to the prohibition on discrimination on grounds of religion or belief, shall not justify discrimination on any other

[104] Council Directive 2000/43/EC[104] of June 29, 2000 implementing the principle of equal treatment between person irrespective of racial or ethnical origin, (2000) O.J. L180/22.
[105] Council Directive 2000/78/EC of November 27, 2000 establishing a general framework for equal treatment in employment and occupation, (2000) O.J. L303/16.
[106] Bell, p. 115f.

grounds. But one of the main reasons for the existence of this provision is the reluctance, of certain religious organizations, to employ homosexuals. The Directive does not allow a religious organization to automatically exclude all lesbians and gay men from employment, but might open up for more proportionate measures.[107] The second aspect is that, when national law or practice already permits it, religious organizations will continue to be able to take into account religion or belief when making recruitment decisions, but only insofar as it is necessary to maintain the ethos of the organization. In order to define the scope of an exception, especially regarding what constitutes an ethos, and whether a difference in treatment is necessary, one must regard the specific occupation in question.[108] To give an example, it is most likely in accordance with the Directive to only employ Catholic teachers in religion at a Catholic school, or only Muslims as Imams in Muslim congregations. But if the teacher was to teach math or physical education, a closer examination of the relationship to the ethos of the organization, might have to be assessed. If all teachers at the school were to participate in daily or weekly prayers, or religious counseling, the necessary link might be established. Third, and finally, a religious organization can require of existing employees to "act in good faith and with loyalty to the organization's ethos", if this is in compliance with the other provisions of the Directive. The exact meaning of such 'loyalty oaths' is hard to define, and the provision was introduced late in the negotiations so few interpretative sources exist.[109] Again, the full scope of Article 4(2) will be the difficult task of the Court of Justice to examine.

The intersection of religious freedom, both collectively and individually, and the right to equal treatment, both irrespective of sexual orientation and religious adherence, is a very difficult area. Both serve as important fundamental rights, and a careful case-by-case balancing act will have to be performed. The importance of self-determination of the religious organizations is crucial to keep in mind, in light of the *Rommelfanger* case law of the ECtHR, as presented in chapter three. The possible scope of the exception also raises questions of State interference in matters of religious doctrine. What a secular State, or gathering of States such as the Union, might see as employment policies, the religious organizations very often see as matters of doctrine and theology. Once more, the role of religious organization in the Member States varies. To what extent the State may enforce policies on employment, treatment, and curriculum varies accordingly, something which is particularly true when the Churches carry out State functions. As shown, the self-determination of the religious organization is an important principle, but how it is interpreted and applied is less evident. One major distinction must be made between religious organizations having public legal personality, and, as in the vast majority of Member States, were religious organizations fall within the scope of private law.

[107] *Ibid*, p. 117.
[108] *Ibid.*
[109] I*bid*, p. 118.

Article 13 EC provides a legal basis for fighting discrimination, and to take all 'appropriate action' in order to achieve this goal. This naturally stretches further than enacting two Directives. Non-discrimination clauses can be found in several aspects of Community law, which often contain, not only a prohibition to discrimination, but also an obligation for positive action in order to prevent it. The Fundamental Rights Agency (FRA) was set up to fight, *inter alia*, discrimination on the basis of religion or belief, and xenophobia, trough a close cooperation with civil society, including Churches and religious organizations.[110] This also includes giving financial assistance to organizations, confessional and non-confessional, working towards the same goal.[111] Furthermore, public administration shall be conducted in respect of 'human dignity' and without discrimination. This includes, when returning illegally staying third-country nationals[112], the Visa Information System[113], and equal treatment during border checks and surveillance[114].

Common Community measures also include Data Protection provisions, which allow religiously based organizations to circumvent specific prohibitions, in order to safeguard the religious conviction of its members[115], and harmonized aspects of media law, which forbid interrupting the broadcast of Church services by commercial advertisements[116]. Additionally, Community law that requires Member

[110]Article 10 of Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, Official Journal L 053, 22/02/2007 P. 0001-0014.

[111] Article 2 of Regulation (EC) No 1889/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a financing instrument for the promotion of democracy and human rights world wide. Official Journal L 053, 22/02/2007 P. 0001-0014.

[112] Clause (21) of the preamble of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. Official Journal L 348, 24/12/2008 P. 0098-0107.

[113] Clause (12) of the preamble of Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation) Official Journal L 218, 13/08/2008 P. 0060-0081

[114] Article 6 of Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulation the tasks and powers of guest officers. Official Journal L 199, 31/07/2007 P. 0030-0039.

[115] Article 3(2) Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, O.J. L 080, 23/03/2002, 29;
Article 10 (2) Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection for individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, O.J. L 008, 12/01/2001, 1;
Article 8 (2) lit. d) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data, O.J. L 281, 23/11/1995, 31.

[116] Article 11 (5) Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain

States to respect the welfare of animals, through detailed legislation on procedures, allows for exception regarding religious rites and festivals, such as kosher butchering.[117] The role of Churches and other religious organizations in promoting cooperation and a vivid civil society is stressed, both within the Community[118], and in its international operations in developing countries[119]. In order to promote religious organizations, Member States shall also exempt transactions from the common Value Added Tax system, if done to supply staff in religious institutions. But, only insofar as the supply has a view to enhance spiritual welfare, and, additionally, is unlikely to distort competition.[120] Harmonizing legislation concerning trademarks contain an obligation to pay due respect to religious sensibility, and to exclude religious symbols from being registered as trademarks.[121] Interestingly, in the Regulation on genetically modified food and feed, the labeling of such goods is explicitly regulated. If foodstuffs contain a genetically modified seed (GMO) they are subject to be labeled that they may "give raise to ethical or religious concern".[122] What actually stipulates 'an ethical and religious concern' is not defined, its meaning is, seemingly, presupposed.

Regarding planning on work times, the Member States have been given discretion whether to hold Sunday as the day of rest or not[123], something which can be seen as an outcome of the duty to respect national culture and tradition. Other parts of the harmonizing strategy have also taken into account the different ways the Member States organize religion. Serving as concordatian countries, special concern has been given to the concordats Italy, Spain, Portugal and Malta have signed with the Holy See. This concerns especially ecclesiastical courts and the recognition and

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provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, O.J. L 202, 30/07/1997, 60.

[117] Annex III Chapter 4, No. 7 Regulation (EC) No 853/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific hygiene rules for food of animal origin, O.J. L 139, 30/04/2004, 55;
Article 4 Council Directive 95/23/EC of 22 June 1995 amending Directive 64/433/EEC on conditions for the production and marketing of fresh meat, O.J. L 243, 11/10/1995, p.7;
Article 5(2) Council Directive 93/119/EC of 22 December on the protection of animals at the time of slaughter or killing, O.J. L 340, 31/12/1993, p. 21.

[118] Article 1 Council Regulation (EC) No 955/2002 of the European Parliament and of the Council of 13 May 2002 extending and amending Council Regulation (EC) No 1659/98 on decentralised cooperation. O.J. L 148, 06/06/2002 p. 1.

[119] Article 2 (1) lit. a) Council Regulation (EC) No 550/97 of March 1997 on HIV/Aids-related operations in developing countries O.J. L 085, 27/03/1997, 1.

[120] Article 132 (1) lit. k) and l) Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax O.J. L 347, 11/12/2006, 1.

[121] Article 3 (2) (b) Directive 2008/95/EC of the European Parliament and of the Council of 22 October to approximate the laws of the Member States relating to trade marks (Codified version) Text with EEA relevance. O.J. L 299, 08/11/2008 p. 25.

[122] Articles 5 (3) (g) and 13 (2) (b) Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed (Text with EEA relevance) O.J. L 268, 18/10/2003 p. 1.

[123] Article 17 (1) lit. c) Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organization of working time, O.J. L 299, 18/11/2003, p.9.

enforcement of judgments in matrimonial matters, and in matters of parental responsibility.[124] Churches in some Member States are established as public institutions, carrying public legal personality, instead of being governed by private law. This is especially true in countries with established Churches, and for a number of the major Churches in Germany. This may have implications for the application of Community law, something which has been accommodated in the Directive on Credit Institutions.[125]

However, not only legislation which explicitly mentions religion, or provides exception for religious organization, are of importance when one wants to thoroughly examine the relationship between EC law and religion. In addition, there are several fields, within Community law, which has the potential effect of causing legal problems. Equal treatment in the social sector, such as working rhythms and religious holidays, religious schooling for migrant children, applicability of Directives concerning public construction commissions to churches, applicability of competition law to charitable religious organs, and banking law, are just a few examples of relevant areas.

In *Chacon Navas*[126] the ECJ held that concepts mentioned in Article 13 EC, and in the Framework Directive, *in casu* disability, would be independently interpreted in the Community legal order. This definition of the protected grounds might differ from how it is used in national legislation. Will this eventually lead to an autonomous Community interpretation of religion? And if so, will such an interpretation have implications for how religion is organized in the different member States? Or, will a mere minimum definition or standard be assessed, since this is a greatly debated area and something which comes very close to very core of the national identity of a Member State, the latter which the ECJ has a duty to protect? These are questions, which remain to be answered by the Court of Justice. The Framework Directive serves two, somewhat contradictory, purposes in relation to State-Religion relationships. It can be seen as a factor in an evolving framework for State-religion relationships within the European Union itself, in that it harmonizes equal treatment irrespective of religion or belief, and, at the same time, it keeps such a relationship as a matter for the Member States, in that the derogations are plentiful, and relate to the specific measures taken by the Member States, prior to the Directive. But it is inevitably so, that religion and the aspects of religious life concerning employment, do fall within the scope of Community law. The provisions, in other fields of law, just mentioned, indeed show the erratic character of Community provisions dealing with religious issues. In some ways, there is

[124] Article 1 Council Regulation (EC) No 2116/2004 of 2 December 2004 amending Regulation (EC) No 2201/2003 concerning jurisdiction and the enforcement of judgments in matrimonial matters and the matters of parental responsibilities, repealing Regulation (EC) No 1347/2000, as regards treaties with the Holy See, O.J. L 367, 14/12/2004, p. 1.
[125] Article 46 (2) Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of business of credit institutions, O.J. L 126, 26/05/2000 p. 1.
[126] Case C-13/05 *Chacón Navas*, [2006] ECR I-6467.

an indication that Community law has harmonized matters of religion, but still, in many fields, the exact scope is left to the Member States.

Perhaps will the inclusion of both Civil Society in legislation making and the adoption of Declaration No 11 of the Amsterdam Treaty[127], contribute to a more coherent legal framework when dealing with issues of religious importance. Can we begin to distinguish a role for religious organizations in the European Union policy making, in the churches' own right, starting in the 1980's with the Dialogue, an moving on to the Declaration inserted through the Amsterdam Treaty in 1999, and lastly the White Paper on Governance in 2001? As previously shown, the Church(es) has always played an important role in relation to State policy at the national level. Historically, change has often happened under the influence of, or in opposition to, established forms of Christianity. The consequences are evident in the Member States today, in their different way of organizing religion. But are we beginning to see an awareness of the role religious organizations play, also in the European Union? So far, I would argue only to some degree. Religious organizations only have a voice in the European public sphere as far as they are recognized by the Member States. The Commission in its Dialogue does not decide who can take part, or not. That is a matter for the single Member State, and it is the prerogative of that State to decide what actually constitutes a religious organization. That approach is reinforced by the Declaration on Churches, but the Declaration adds to the equation by stating the importance, in the Union itself, of religious associations, as well as non-confessional organizations. A sign of the increasing importance of religion in the European Public sphere can also be seen in the White Paper, which explicitly stresses the role of Churches in the creation of civil society. Arguably, a White Paper is not hard law; it does not provide any binding legal rules. Nevertheless, it does use an inclusive language, which points at an emerging discussion on a 'European Civil Society', one that naturally includes religious organizations as one sphere of human societal life.

In the European Union, as in the Member States, threats to religious liberty and to religious organizations are not put willfully into legal restrictions. Instead, they are often side effects of general measures. This means, that both by acting, and by not acting, Community Institutions might influence the status of Churches and religion. Hence, it is necessary to reflect upon the degree of religious protection, and to what extent is it necessary to develop a strategy specifically aimed at the European Union setting. To be able to do so, a careful balancing act, between the will of the Member States and the need for such a policy, must be performed. Likely, Community law is not fully there yet, but in order to solve a problem, an awareness that it is actually is a problem is necessary first. The general principle of equal treatment must then serve as the guiding star for such a future development.

[127] I will further elaborate on Declaration 11 in chapter five.

5 A Constitutional Look at Religion within the European Union

5.1 A Complex System of Competences, Constitutional Principles and a Declaration

The European legal order has established itself as a self-standing legal order, claiming supremacy over the national legal systems of the Member States. The Treaties function as an independent legal source, which, in function, works as a Constitution of the European Union. Furthermore, they constitute autonomous forms of law making and they are supreme above all other layers of Union law. They include a limited public power, an organized political policy-making process, establishing a supreme legal level, and creating a set of 'highest principles', an order of values.[128] It has been claimed that the Treaties only form one part of the system in reality. In addition, the Constitution of each Member State (or law or tradition functioning as a Constitution) must not be neglected, since they can only together, in tandem, establish the fundamental order of society.[129]

The Member States closely cooperate with the Union, the latter's competence to act cannot be viewed separately from the Member States. This is due to the fact that the model of separation between the Union and the Member States is based on "interconnections, interdependence and co-operation […] [g]enerally speaking, the Member States and the Union closely co-operate, a fact which is usually affirmatively interpreted as a co-operative system of separation of powers".[130] The term 'multileveled constitutionalism' was introduced in the late 1990's.[131] The concept describes the relationship between the Member States and the European Union, not as an over-arching system of hierarchy, but instead, one of a 'dynamic multileveled system'. In other words:

> "no level in the overarching system is per se assigned hierarchal precedence. The classic means to resolve conflicts between decision-

[128] Möllers, Christoph; *Pouvoir Constituant – Constitution – Constitutionalism*, in Bogdandy, Armin von and Bast, Jürgen (eds.) and Max Planck Institute for Comparative Public Law and International Law; *Principles of European Constitutional Law*, Oxford and Portland, Oregon, Hart Publishing, 2006, p. 208.
[129] Heinig, Hans Michael; *Law on Churches and Religion in the European Legal Area – Through German Glasses*, German Law Journal, Vol. 08, No. 6, 2007, p. 567.
[130] Bogdandy, Armin von and Bast, Jürgen; *The Vertical Orders of Competences*, in Bogdandy and Bast (eds.), p. 345.
[131] Pernice, Ingolf; *Multileveled Constitutionalism and the Treaty of Amsterdam*, 36 Common Market Law Review 703 (1999).

> making levels, namely, via super- and subordination, gives way to the reciprocal reliance, reference, and restriction. Distinctions between the various decision-making levels give way to reciprocal checks, coordination and cooperation."[132]

In this described system of policy and law, religion plays a part on many different levels. At first glance, the European Union does not have competence in religious matters. However, as shown in chapter four, Union policies range over various fields and indeed have several indirect implications for religious matters, as shown in the previous chapter.

The direct competence, in the field of State-Church relations, lies solely on the Member States. No legal basis is provided in Article 2 and 3 EC for matters of State-Church policies. According to Article 5 EC, "[t]he Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein". The principle has to be respected, both in the internal action of the Community, as well as in the international.[133] To put it simple, where the Community is not empowered to act, such action necessarily falls within the residuary competence of the Member States. The principle of subsidiarity further strengthens this dividing line. Where the principle of conferral powers strengthens the penetrating force of European law, the principle of subsidiarity serves as the safeguard of the former. The Treaty permits the Community to take action, outside its exclusive competence, only in so far as the objectives "cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or the effects of the proposed action, be better achieved by the Community", according to Article 5(2) EC.

Does the principles of subsidiarity and conferral of powers, hinder the Community from taking any measures, regarding the legal position of Churches in a Member State, what so ever? This question will have to be answered in the negative. Article 5(2) does not hinder measures in areas where the Community has either exclusive or shared competence, to have an effect, to a greater or lesser extent, on matters of religious importance. As presented above, there are several exception clauses for religious organizations and traditions, in secondary legislation. Perhaps they should be seen as joint outcome of the principles of subsidiarity and conferred powers, and of the duty to respect individual, and collective, religious freedom, within the European legal order.

Article 6 of the Treaty on the European Union states that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. The importance of the European Convention on Human Rights, as well as the constitutional principles of the Member States, as general principles of community law, are laid down in the second

[132] Heinig, p. 568.
[133] Lenaerts, Koen and Van Nuffel, Piet; Bray, Robert (ed.); *Constitutional Law of The European Union*, second edition, London, Sweet & Maxwell, 2005, pp. 86f.

paragraph. General principles of Community law are deducted from the constitutional principles of the Member States. When establishing what constitutes a general principle, the Court of Justice use an evaluative approach and tries to discern general trends in the Member States.[134] The purpose of the third paragraph of Article 6 TEU, which states, "[t]he Union shall respect the national identities of its Member States", is, however, not completely clear. When trying to concretize it, substantive problems arise. It is argued that there is no need for such a principle to be of other than political importance, since; it only works as a counterweight to principles of unity and homogeneity. But such principles, it is argued, cannot be used in order to achieve advanced legal unity; hence, the balancing counterweight is not necessary. It is claimed that

> "[w]hile the primary law clearly demands respect for diversity, it does not go as far as to support a legal principle, above and beyond various legal norms. Diversity is thus a political and ethical postulate but not a legal principle that has an operative function in the legal order."[135]

Yet, in case law, protection of national identities of the Member States is seen as a legitimate aim for derogations of Community law. This will be further developed on below.

In Declaration No 11[136], included by the Amsterdam Treaty, the status of Churches and non-confessional organizations, in relation to the European Union, is established. The Declaration provides that

> "[t]he 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 organizations."[137]

The Declaration relates closely to Article 6(3) TEU. Does the Declaration mean that the structure of how a Member State organizes its relationship between law and religion, or State and church, can be categorized under 'national identity'? Taken together, Article 6(3) TEU and Declaration No 11 constitutes a mandate to consider the diversity of nationally organized bodies of religion. It does not, however, mean that all aspects of how a Member State organizes religion fall within the exclusive competence of the Member State, and hence, outside the scope of Community law. The level of protection relates to the specific form given for such laws. It becomes

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[134] Groussot, Xavier; *General Principles of Community Law*, Groningen, Europa Law Publishing, 2006, pp. 43-58.
[135] Bogdandy, *Constitutional Principles*, in Bogdandy and Bast (eds), p 46.
[136] Declaration No 11 to the last act of the Treaty of Amsterdam, 02-10-1997. Declarations adopted by the Conference. Official Journal C 340, 10.11.1997, p. 0133.
[137] In addition to Declaration No 11, Greece added the following; "(w)ith reference to the Declaration on the status of churches and non-confessional organizations, Greece recalls the Joint Declaration on Mount Athos annexed to the Final Act of the Treaty of Accession of Greece to the European Communities".Declaration No 8 to the last act of the Treaty of Amsterdam, 02-10-1997. Declarations of which the Conference took note. Official Jounral C 340, 10.11.1997, p. 0144.

greater if the chosen norm relates closely to the fundation of a Consitutional tradition, than if it merely thouches upon the softer layers of legal rules.[138] To give an example, giving tax reductions to a particular religious organization may not fall outside the scope of Community law, since it not necessarily is as closely related to the 'national identity' of that particular Member State, whereas the basic fundament of how that Member State relates to religion, a strong laical principle or a State-Church, most likely, does. This line of thinking can be seen in recent case law on free movement of capital.[139]

The failed Constitutional Treaty would have made Declaration No 11 a Treaty Article. However, it is doubtful whether this would have changed the actual importance of the content, since it did not intend to change any of the regulatory content. Nevertheless, scholars have argued that the mere existence of having Declaration No 11, whether in a Treaty Article or not, strengthens the effect of the obligation to respect diversity among the Member States. It is important to notice that neither Article 6(3) TEU, nor, Declaration No 11, aim at protecting religion *per se*. Instead, their main goal is to protect the division of power, within this field of law. The Union can then equally respect the laical tradition of France, and the State-Church systems, and Article 6(3) TEU instead serves the purpose of maintaining national diversity in unity.[140] But as the Declaration contains an obligation to respect the religious diversity in the Member States, it inevitably rejects "a strictly laical orientation of the EU itself, since only [by respecting religious diversity] can European law sufficiently take non-laical traditions into consideration".[141]

What importance does the Declaration have for the relationship between the European Union, the Member States, and Churches and other religious organizations? A declaration is not a Treaty Article; it is merely there to provide interpretative clarity when dealing with both primary and secondary law. The main legal function is to provide interpretative aid. Even so, the political function may prove more important. It shows that Churches, and other religious, as well as non-religious, organization, do play a role in the policy making in Brussels. The Declaration establishes, in that sense, a connection to the ongoing 'Dialogue with churches and other religious organizations', the latter which is developed upon in chapter four. It is argued,

> "the Declaration opens doors. It acknowledges that that religious tradition can, and do, offer ethical approaches and insights on values-oriented policy matters and play an active role in discussions on the future of Europe and its legal development. Religion provides a natural integrative framework."[142]

[138] Heinig, p. 571.
[139] Case of *Persche*, discussed in chapter four.
[140] Heinig, p. 571.
[141] *Ibid*, p. 575.
[142] Van Bijsterveld in Ahdar (ed.), p. 175.

Another Treaty Article, which may play a role when regarding the Union's role concerning churches and religion in general, is Article 151 EC. It lays down an obligation for the Community to respect cultural diversity, and confers upon the Community a responsibility for protection of cultural variety. According to the Article, the Community itself contributes to the development of the cultures of the Member States. It aims at bringing the common cultural heritage of Europe to the forefront, while at the same time respecting the regional and national diversity. 'Culture', in the sense of this Article, is a legal term, not a term of cultural theory, hence; it is to be narrowly interpreted.[143] Religious roots and traditions most likely form a part of this cultural heritage, both on the national and the European level. Cultural competence refers to research, education, artistic and literary creation, protection of historic monuments and buildings, and the mass media. This would include Church educational facilities, private schools and theological faculties at universities, religious press, and, not the least, historical buildings, such as churches and cathedrals. In this sense, the Community has an obligation to promote, support and supplement the activities of the Member States, as far as necessary.[144]

5.2 Religious Traditions as National Values

It is evident, from case law, that the European Court of Justice already has drawn several conclusions from the duty to protect national identity in the Member States. Even though national identity is a wider concept, the constitutional framework is, inevitably, a part of said national identity. A Member State may, in certain cases and subjects, under the scrutiny of the ECJ, claim protection of national identity to justify derogation from the fundamental freedom of movement. In *Commission* v. *Luxembourg*[145] the Court explicitly held that preservation of national identity is a legitimate aim, protected by the Community legal order. In the case, Luxembourg wanted to keep nationals of other Member States out of access to posts in the public education system. Even though the aim, preserving national identity, was valid and legitimate, the means of achieving that aim was disproportionate. Within certain limits, a Member State is allowed to define the concept of legitimate interest, in order to justify derogation from the freedom of movement.

In *Omega*[146], the Court viewed the German constitutional principle of 'human dignity' as a general principle of Community law, but said that the scope of that principle could be defined in detail by the Member State in question. Germany relied on its own Constitutional principle in order to justify a restriction on the freedom to provide services, which the ECJ

[143] Heinig, p. 572.
[144] Robbers (ed.), p. 331f.
[145] Case C-473/93 *Commission* v. *Luxembourg* (1996) ECR I-3207, in particular para. 35.
[146] Case C-36/02 *Omega* (2004) ECR I-9609

accepted, due to the broad discretion granted to the Member State for the purpose of specifying the content and scope of human dignity. As a result, it does not matter that another Member State would define the general principle of 'human dignity' differently; Germany still had a possibility to justify a restriction in the chosen manner. The large margin of discretion given to the Member State can be viewed as an outcome of the obligation to protect national identity, *in casu* in form of a fundamental right. It seems like the Court of Justice is increasingly willing to accept national restrictions of Community fundamental freedoms, on the basis of 'cardinal constitutional principles' inherent in a particular national constitutional identity.[147]

Advocate General Maduro argued in his opinion in *Michaniki*[148], that even if respect for the constitutional identity of a Member State is a legitimate interest, and can constitute a possible justification of a derogation, it is not an absolute obligation to defer all of Community law to national constitutional provisions. If that were the case, national constitutions could function as an instrument for a Member State to derogate from all kinds of Community law. In addition, it would lead to discrimination between the Member States on the basis of the content of their respective constitutions. AG Maduro argued that the respect for constitutional values has to go two-ways, national constitutional law must be adapted to Community law, as well as the other way around.[149] In the present case, the Greek Constitution provided a provision aimed at preventing corruption in the media sector, thus prohibiting contracts between immediate families. The provision added an extra ground for exclusion from participation in procedures for the award of public works, compared to Article 24 of Directive 93/37/EEC[150]. The Greek provision was viewed, by AG Maduro, as an expression of the principle of equal treatment, considered a general principle of Community law. He, however, added, that even if a national Constitutional principle must be respected, and can be used as interpreting a Community principle in the national context, it must still adhere to the principle of proportionality. Any incompability must be proportionate to the objective of ensuring equal treatment, and effective competition.[151]

Concerning national values, and arguments based on a religious tradition of a Member State, an interesting case is *Commission* v. *Poland*[152], decided in July 2009. The Commission started a 226 EC procedure against Poland, since the latter refused to remove a prohibition on free circulation of genetically modified seed (GMO) varieties, hence, not fulfilling its

[147] Augenstein, p. 27
[148] Opinion of Advocate General Poiares Maduro in Case C-213/07 *Michaniki*, [2008] ECR n.y.r.
[149] *Ibid*, paras. 33-34.
[150] Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public contracts.
[151] Opinion of AG Poiares Maduro in *Michaniki*, para 35.
[152] Case C-165/08 *Commission* v. *Poland*, [2009] ECR n.y.r.

obligations under Directive 2001/18/EC[153]. Poland argued that "the adoption of the contested national provisions was inspired by the Christian and Humanist ethical principles adhered to by the majority of the Polish population", and continued by putting forward a clearly religiously inspired argument:

> "a Christian conception of life which is opposed to the manipulation and transformation of living organisms created by God into material objects which are the subject of intellectual property rights; a Christian and Humanist conception of progress and development which urges respect for creation and a quest for harmony between Man and Nature; and, lastly, Christian and Humanist Social principles, the reduction of living organisms to the level of products for purely commercial ends being likely, inter alia, to undermine the foundations of society."[154]

The Commission contested that Poland had not shown any proof that religious and ethical considerations were the real arguments behind the prohibition, and, moreover, that these arguments had not been relied upon during the pre-litigation procedure. Instead, Poland had relied on considerations concerning environment and public health. In response to the former of the arguments of the Commission, Poland held that it was well known that, during the time of vote of the contested national provisions, most members of the Polish Parliament were in fact members of political parties for which the Roman Catholic faith serves as a fundamental value. Hence, Poland argued, it is self-evident that it was Christian values, and not scientific concerns, that were the prevailing inspiration for the prohibition on GMO.[155]

In the Court's assessment of the substance, it is interesting to see the reluctance to focus on the religious and ethical concerns put forward by Poland. First of all, the Court does not rule out that religious and ethical concerns may in fact serve as a possible justification under Article 30 EC. In normal circumstances, if an area is wholly harmonized, it is established case law that there are no possibilities for justifying a breach of Article 28 EC under Article 30 EC. In the present case, the Court held that if national provisions aim at objectives not touched upon by the Directive in question, it might be able to justify a breach. However, since the Court states that Poland has not fulfilled its burden of proof, and has not actually shown that religious concerns are the real reason behind the prohibition of GMO, it does not assess the arguments. The argument that most members of the Polish Parliament are Roman Catholics, and hence, more inspired by religious convictions than scientific arguments, is seen as insufficient. This is especially the case since Poland only relied upon concerns for the environment, and the precautionary principle, in the pre-litigation phase of the process. The Court leaves it for future evaluation to show whether, and

[153] Directive 2001/18/EC of the European Parliament and of the Council of March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EC, OJ 2001 L 106, p.1.
[154] *Commission* v. *Poland*, paras. 30-31.
[155] *Ibid*, para. 41.

if so, to what extent, and under which possible circumstances, a Member State may rely on religious and ethical principles.[156]

Earlier case law has opened up for this possibility. In the 'Sunday trading case', *Tofaen Borough Council*[157], the ECJ explicitly held that a prohibition of Sunday trading in certain goods, is compatible with Community law, if it is not designed to govern trading patters between the Member States, and, is applied in a non-discriminatory manner. In practically all Member States, the protection of holidays is mainly based on traditions of religious nature. Such rules, according to the Court, only reflect national or regional socio-cultural patterns, and, are, in the present stage of Community law, a matter for the Member States.[158] In other words, "States are free to exercise regulatory autonomy, and to protect, preserve and promote values they cherish, without any need to justify those choices under the demands of EC trade law provided that this threshold articulated by the Court under *Keck* is not crossed."[159] According to the *Keck*[160] formula some rules are solely 'selling arrangements' and hence, fall outside the scope of Article 28 EC. Tendencies to rely on national values, in order to escape Community law, have also been seen in the sector of social welfare. In *Sodemare*[161], the ECJ dealt with whether the Treaty provisions on freedom of establishment precluded national rules, which only allowed non-profit making organizations from concluding contracts in the sphere of social security. The Court held that Community law does not detract the right for a Member State to organize its social welfare in a manner, which exclude some profit making organizations a slice of the market in question.

I would argue that there is at least one major difference between the 'Sunday Trading case' and *Sodemare*, compared to *Commission* v. *Poland*. In the two former cases, the national rules at stake are religious values, and ideas, *embedded* in national culture. They are no longer simply 'religious', but form an integral part of national culture, in patterns of trade and social welfare, respectively. Similarly, national culture is the issue in several cases. In the French case *Conforama*[162], the Court reaffirmed its reasoning in the 'Sunday Trading case', and held that French rules were necessary for the protection of workers. In the case, the plaintiff actually introduced the religious background of the legislation, claiming that those reasons for keeping shops closed on Sundays should be seen as outdated. The Court dismissed this argument completely, and instead stated that the rules only reflected national socio-cultural characteristics; hence, still were within the discretion of the Member State. Also in the several cases on gambling that has been before the Court, national rules are based on religious ideas, but only as a part of national cultural tradition, not as the actual reason behind

[156] *Ibid*, paras. 57-59.
[157] Case C-145/88 *Torfaen Borough Council*, [1989] ECR p. 3851.
[158] *Ibid*, para. 14.
[159] Weatherill, Stephen; *The Internal Market*, in Peers and Ward (eds.), p. 187.
[160] Joined Cases C-267 and C-268/91 *Keck and Mithouard*, [1993] ECR I-6635.
[161] Case C-70/95 *Sodemare*, [1997] ECR I-3395.
[162] Case C-312/89, *Conforama*, [1991] ECR I-997.

national legislation.[163] Case *Commission* v. *Poland* is different. It is the first case, as far as I know, that the Court of Justice has had *directly* religious arguments to assess, on top of that presented by a Member State. Poland relies forthrightly on the doctrine of the Roman Catholic Church. In the case, however, the Court steers away from the substance of that argument, and dismisses it due to procedural issues. It will be interesting to see whether Poland, or another Member State, will continue to bring forth religious arguments. The Court of Justice, namely, does not seem to preclude the use of religious arguments before the Court, altogether.

5.3 An Organic Constitutional Approach: Towards a Common Way to Deal with Religion in Europe?

In the latter years, scholars have argued for a constitutional pluralism, both as a descriptive and as a normative way to analyze the relationship between the Member States and the European Union. In *Arcelor*[164], the question of how to solve a clash between a French Constitutional principle and a Community Directive, arose. How can you protect the national Constitution without breaching the primordial requirement of primacy of Community law? Advocate General Maduro analyzed the problem as a manifestation of the legal pluralism, which makes the process of European integration so unique. Article 6 EU expresses the duty to respect the national constitutional values of a Member State, but the provision also anchors the constitutional principles, common to the Member States, in the Community legal order, establishing the constitutional values of the latter. In the words of AG Maduro:

> "The European Union and the national legal order are founded on the same fundamental legal values. While it is the duty of the national court to guarantee the observance of those values within the scope of their constitutions, it is the responsibility of the Court to do likewise within the Community legal order."[165]

The referring Court in the case, *Conseil d´État*, was then right to assume that the fundamental values of the French Constitutional, and those of the Community legal order, were identical.

The question of how to safeguard these principles still remains. AG Maduro points out that the structural congruence only can be guaranteed organically,

[163] See e.g. Case C-42/07 *Liga Potuguesa de Futebol*, [2009] ECR n.y.r. Especially para. 57, in which the Court reaffirms its earlier position. It states that the organization of games of chance vary between the Member States, due to significant moral, religious, and cultural differences. Thus, Member States are allowed, in areas that lack Community harmonization, to decide derogations from the freedom of movement, in accordance with their own scale of values.

[164] Opinion of Advocate General Poiares Maduro in Case C-127/07 *Arcelor*, ECR 2008, n.y.r.

[165] *Ibid*, para. 15.

and on a Community level, through the mechanisms of the Treaty. National constitutions can no longer be used as sources for the purpose of reviewing the lawfulness of Community acts, since that, in the Advocate General's opinion, would lead to derogations in one Member State, but not in another, insofar as the constitutional principles differ. This would be contrary to the organic identity of Article 6 EU, and to the rule of law. AG Maduro stresses that compability between an act of the Community, and a national constitutional value, can only be assessed within, and by, Community law itself. This since the Community already has incorporated the constitutional values of the Member States, within its legal order. The outcome being that the national constitutions should leave their claim for supremacy over Community law, and adjust to the primacy of Community law. What role does that leave the Constitutional Courts of the Member States? None at all? AG Maduro's answer is in the negative. National Constitutional Courts do play an important role in interpreting their respective constitutional provisions, and hence, creating a dialogue of interpretation of fundamental values with the European Court of Justice.[166]

At the end of the day, how can the Court of Justice unite the various constitutional principles of the Member State, when it comes to the role of religion in the various national constitutions? Separation of Church and State, an outcome of secularism, might be the common denominator, but as we have seen, this principle has as various expressions as there are Member States. 'Secularism' as a constitutional value, may at first glance seem obvious and necessary. However, there is no clear consensus of what the notion of 'secularism' actually entails. The different constitutional traditions of the Member States vary tremendously. All can be said to practice some kind of separation between Church and State, but there are various degrees of such a separation. Additionally, the 'constitutional' status of such a separation is, as presented in chapter two, highly divergent. In order to answer what role religion can have in the European Union public sphere another approach is necessary. Perhaps should a negative re-interpretation of the constitutional traditions serve the purpose better, taking into consideration the pluralism of traditions? It is then argued: "[r]ather, a European constitutional tradition is the aggregate of a plurality of national constitutional traditions. [---] For the purpose of a European Constitutional identity, national constitutional traditions cannot serve as justifications for curtailing religious claims for recognition in the European public sphere."[167]

As seen in the debate of whether or not to include an *Invocatio Dei* in the Constitutional Treaty, the Member States do not have a common understanding of what it means to be a 'secular European'. The ideas of both secular and Christian values are deeply embedded in national culture in all Member States, due to historical and religious development. But the deep-rooted constellations of these values are done in such different ways that there is little prevalent understanding of a common denominator today. So when the issue actually is at stake, such as in the Constitutional Treaty,

[166] *Ibid*, paras. 15-18.
[167] Augenstein, p. 26.

the deep disagreement comes to the forefront of the debate. What is then left? A pessimistic answer would be:

> ”put cynically, the greatest common denominator the European nation-states could consent to be to discriminate against non-Christian denominations. Europe’s national constitutional traditions appear irreconcilable *inter se*, not because the adhere to a ’Christian’ or a ’secular’ model, but because their different interpretations of the *co-relation* of secular and Christian values are deeply embedded in their *national* cultures.”[168]

It is argued that both primarily ‘Christian’, and primarily ‘secular’ national constitutional traditions are in truth depending on each other. Even in France, with the strongest secular tradition, has national culture been permeated by Christianity. The separation between private and public functions only in a predominantly Christian country, since the obligation to keep religion in the private sphere does not affect a secular Christian participant in the liberal public arena, to the same extent as a Muslim woman, for example. The Christian man does not have to change his dress, appearance or behavior in order to keep his religious convictions in the private. His appearance is, to a very large extent, similar to that of his secular collegues. Whereas for the Muslim woman, her dresscode and behavior are parts of her religious conviction. Also in Germany, which was a country that advocated the mentioning of God in the Constitutional Treaty, does the principle of secularism serve a similar function. Christian and secular values work together, and both constitutional traditions come from the same sources; namely a Christian heritage *and* the Enlightment idea of separating private and public. The latter having it roots even earlier, in the Reformation, as well as in Roman Catholic doctrine. In that sense, “European Christians will find it much easier to accept the public-private divide simply because they contributed to its creation in the first place”.[169]

Is it then possible to find a unique, non-biased, common way of dealing with religion? In the recent, and heavily discussed, joined cases *Kadi*[170] and *Yusuf and Al Barakaat*[171], the Court of Justice assessed Article 307 EC, and the relationship between the Community legal order and international law. When doing so, the Court introduced the phrase “the very foundations of the Community legal order”.[172] It stated that Article 307 EC may in no circumstances be used to permit any challenge to the very foundations of the Community legal order, one which is the protection of fundamental rights. Is this a new supra-constitutional law level, and if so, what does this very foundation consist of? The Court, in *Kadi*, does not comprehensively define the concept, but some features can be distinguished. A non-exhaustive list could contain the following elements; the allocation of powers fixed by the EC Treaties, the autonomy of the Community legal system; the exclusive

[168] *Ibid*, p, 23. (Cursive in original.)
[169] *Ibid*, p. 20.
[170] Case C-402/05 P *Kadi* (2008) ECR II-3649
[171] Case C-415/05 P *Yusuf and Al Barakaat* (2008) ECR II-3533
[172] *Kadi*, para 304.

jurisdiction of the ECJ conferred on it by Articles 220 and 292 EC; judicial review of EC acts in the light of fundamental freedoms, and the protection of fundamental rights. In addition, the ECJ referred to Article 6 TEU, and principles common to the Member States, such as liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law.

The mentioned principles and concepts are not by any means 'new' in the sense that the ECJ has not developed on the importance of them previously. To the contrary, it has indeed done so several times. What might be new is the mentioning of some alleged 'core values', some principles that are untouchable, and, thus, not possible to derogate from. In cases such as *Omega* and *Schmidberger*[173], a balancing act was performed, between fundamental rights and fundamental freedoms. Does it follow from the introduction of the 'very foundations of the Community legal order' that some core values are taken out of the scope of the balancing act, simply because they are indeed untouchable? And if the answer were in the affirmative, what exactly would these core values contain?

Despite the shown disparity in religious and secular traditions, can one still see a 'core' solution of one constitutional principle, governing how to deal with religion in the European Union? Perhaps do the solution lie not in either finding a secular core, *or* Christian heritage, but instead in an attitude that welcomes an open and pluralistic polity. This alleged polity must consist of a few shared principles, which can be seen as inherent in the European constitutions, regardless of specific 'traits' of national constitutional peculiarities. In the interplay between religion and the State, a certain separation must be in place. At an institutional level, one must recognize the non-identity of State and religion. That is to say, the State is not founded in religion. Furthermore, at a societal level, a distinction must be made between religion and politics, including a basic understanding that politics concern something else than religion.[174]

In the presented *Refah Partisi* case, the ECtHR established the outer demarcation of a democratic society. Public, free elections cannot be used in order to so severely limit the rights of others, as to introduce a theocratic State. The judgment must be seen in light of the very specific Turkish setting, and a similar situation is at present day highly unlikely to occur in a Member State. Yet, it nevertheless shows that there are indeed limits to democracy, at least according to the Convention on Human Rights. The prohibition of creating a theocratic state is, I believe, beyond doubt a 'core value' of the Union. But the *Refah Partisi* case also opens up for a more nuanced discussion. The issue at stake was not only whether the Refah Party wanted to introduce compulsory *Shari a* in Turkey. It also included the question of group rights, and if freedom of religion includes being able to choose the law of ones religion, rather then the law of the land. It was discussed, in the case, if one aspect of religious freedom, traditionally, contain a right to the family law of ones choice. This system is in force in

[173] Case C-112/00 *Schmidberger*, [2003] ECR I-5659
[174] Augenstein, p. 29.

present day in Israel and Lebanon, and, in former days, in the Ottoman empire. Said system is called the Millet system, and makes it possible to have separate legal systems, for example in personal law, for different religious groups. The outcome is that there is one legal system for all citizens of a country regarding most legal spheres, but in family matters Jews follow Jewish laws, and have their own Rabbinic courts, and Muslims follow Islamic law. The European Court of Human Rights strongly voted against this interpretation of freedom of religion. With votes 17-0, the Grand Chamber held that the European legal system is a unitary one, and there is no space for parallell systems.[175] This idea also coincides with principle of *equal liberty*, on which, according to the accession criteria, the European Union is established upon.

Besides this fundamental prohibition of the State being founded in religion, it must be recognized that Europe of today is multi-cultural, as well as multi-religious. Decisions in a given case must see beyond the peculiarities of the constitutional traditions, and find governing principles that can be applied in a changing society. 'Human dignity' and 'the right to equal treatment', serving as general principles of Community law, are two other ideas deeply founded in European culture, but it remains to see the exact scope of these concepts. They serve the common purpose of including the marginalized and mediate tensions between different worldviews present in contemporary Europe. The advocates of constitutional pluralism put forward that the constitutional principles of the Member States are the same as the general principles of Community law, since the latter is based on the former, and the former influences the latter.[176] The assumption is that the cores of the principles are the same. Principles that remove "structural discrimination and normative bias"[177], lie, inevitably, at the core of the constitutional principles of the European Union.

[175] Christoffersen in Mehdi *et al*, p. 127.
[176] See for this argumentation Walker, Neil; *the Idea of Consitutional Pluralism*, p. 336ff. and the discussion by Advocate General Poiares Maduro in *Interpreting European Law – Judicial Adjucation in a Context of Constitutional Pluralism*, and his discussion on a contested normative authority of EU law, p. 1.
[177] Augenstein, p. 32.

6 Future Challenges

6.1 A New Approach to Fundamental Rights

It has been thoroughly discussed if the European Union needs a Human Rights Charter of it own, is it not enough with the European Convention on Human Rights? After several failed attempts to find consensus on one, a final successful effort was made in October 1999, in Tampere. Only months later, the work began, with observers from the Council of Europe. The Council of Europe had earlier been reluctant to show support for a new standard of fundamental rights, and rather emphasized a succession by the Communities to the ECHR. However, this time the Council agreed to be a part of the work, since "[i]t was realized that more and more acts of the European Union affected the everyday life of the citizens of Europe, not only in an economic context, but also in a civic, social and political context. [---] Finally it was also realized in Strasbourg that the process was unavoidable and that it was in the interest of the Council of Europe to see to it that the Charter would adequately take into account the European Convention on Human Rights."[178] The outcome is 'Charter of Fundamental Rights of the European Union'. The Charter is not yet legally binding, and it was initially claimed to be of non-binding character at the Nice summit, but was held to indeed influence legal practice. This is also the official standing point of the Commission.[179] The CFR has been cited by the Advocate Generals on several occasions, but has yet to be cited by the ECJ.[180] It is, however, planned to enter into force when, or if, the Lisbon Treaty is ratified.

The Charter can be seen as a factor in the context of constitutionalization of the European Union, and its important power-shaping tradition. The symbolic function cannot be underestimated, and once it enters into legal force it will "place European actions under further legal control."[181] It has been argued that even if the Charter does not automatically, and fundamentally, shift European social policy away from the market integration model, and towards the social citizenship model, it does make a statement in favor of, and a positive contribution to, the latter model. To what extent this will be fulfilled remains in the hand of the Court of Justice,

[178] Krüger in Peers and Ward (eds.), pp. xviii.
[179] As stated in the Commission's Communication on the Legal Nature of the Charter of Fundamental Rights of the Union of 11 October 2000 (COM (2000) 644 final).
[180] See e.g.; Opinion of AG Tizzano in Case C-173/99 *BECTU*, [2001] ECR I-4881, paras. 26-28 and Opinion of AG Alber in Case C-340/99 *TNT Traco SpA*, [2001] ECR I-4109, para. 94.
[181] Möllers in Bogdandy and Bast (eds.), p. 218.

but the Charter indicates at least a willingness to examine Community law trough the lens of fundamental rights.[182]

To further emphasize the close relationship between the ECHR and the CFR, Article 52(3) of the latter contains a stipulation that the meaning and the scope of the rights contained in the Charter, which correspond to rights protected by the Convention, shall be the same as what is laid down in the Convention. The two instruments also contain similar exception mechanisms. In the CFR, exceptions are provided by Article 52(1), which states that any limitation to the rights enshrined in the Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary, and genuinely meet the objectives of general interest recognized by the Union, or the need to protect the rights and freedoms of others. This is in substance similar to the ECHR.

The scope of CFR is not as wide as the ECHR. According to Article 51 of the Charter, the Charter only applies to actions of the Union Institutions and their bodies, and to actions of the Member States, when implementing Union law. Criticism has also been raised, claiming that the CFR has merely aesthetical value, since it does not provide an enhanced protection for fundamental rights, nor contain symbolic value. The ECJ has already developed a body of law relating to protection of fundamental rights within the Community legal order; hence, there is no need for the new Charter.[183] This view is challenged, and a discussion is held on the impact of substantive Community law, which the Charter actually may carry forth.

As for the right of protection for freedom of belief, religion and thought, Article 10 CFR corresponds to a great extent with Article 9 ECHR.

> Article 10 CFR
> 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 or in private, to manifest religion or belief, in worship, teaching, practice and observance.
> 2. The right to conscientious objection is recognized, in accordance with the national laws governing the exercise of this right.

However, Article 10(2) CFR includes the right to conscientious objection, in accordance with the national laws governing the exercise of this right. This is a novelty compared to the interpretation of Article 9 ECHR. The latter has been very reluctant to grant permission for exceptions of generally applicable law. On the other hand, the jurisprudence on Article 18 ICCPR has moved towards including a right to conscientious objection to the extent that "the obligation to use lethal force may seriously conflict the freedom of

[182] Bell, pp. 23-27.
[183] Haltern, Ulrich; *On Finality*, in Bogdandy and Bast (eds.), pp. 742ff.

conscience and right to manifest one's belief or religion"[184]. The Charter explicitly refers the question of conscientious objection back to the national laws governing the issue. This is a matter connected with the way religion is organized in a State, and closely attached to the rights of minorities amongst a majority culture. If you are part of a majority culture, in power and in control of the laws enacted, you do not need to object, to the same large extent, as if you were a part of a minority. But the issue of conscientious objection also relates to the right to be religious in a predominantly secular society. During the negotiations of the Charter, the scope of Article 10(2) was discussed in relation to a suggested amendment in the Slovakian concordat with the Holy See. The Commission drew a line at a wide right to conscientious objection for doctors and nurses, since the Slovakian provision would have abled them to refuse to perform abortions. In a country which is 80 % Catholic, the Commission held that this would severly infringe the rights of women.[185] Other than this example, the right to consentious objection serves mostly a function in cases of mandatory military service, when clashing with the pacifistic claims of some religions. Nevertheless, as Article 10(2) CFR refers the issue back to the Member State, it shows a reluctance to interfere with national culture on such a delicate matter. But the actions of the Commission also points at the sharp conflict between secularism and religion, and the question of how far religion can be allowed to influence Community and Union law.

Article 22 CFR provides that "[t]he Union shall respect cultural, religious and linguistic diversity". Community law concerning packaging, labeling and advertising, naturally involves linguistic diversity, but as seen with the regulation of GMO, also religious sensitivity can play a role. Does the duty to protect religious diversity grant the Member States a greater freedom to keep measures, which may in other cases disturb the free movement? As shown in chapter four, insofar as religious phenomena and peculiarities have an economic dimension, or otherwise have an established link to Community law, such as harmonization, it does fall within the scope of jurisdiction of the Court of Justice. The Charter does not seem to indicate a wider obligation to respect national religious diversity; rather it reaffirms an already existing demarcation.

Another Charter provision, which refers back to national legislation on the matter, is Article 14. Through this provision the right to found an educational establishment is confirmed, and the parental right to choose a child's education in line with their religious convictions is stressed. Yet, again, only in accordance with national laws on the matter. Policies on private schools with a religious ethos, differ widely throughout the Union States, as well as religious teaching in public schools. The obligation for a State to respect the right of parents to choose an education for their children, in accordance with their religious conviction, is also enshrined in Article 2 of the First Additional Protocol of the ECHR. Both provisions might play an

[184] McGoldrick, Dominic; *The Charter and UN Human Rights Treaties*, in Peers and Ward (eds.), p. 112.
[185] Christoffersen in Mehdi *et al*, p. 115.

important role for minorities, but as the Charter has limited application, according to Article 51, the Charter provision might prove especially important for migrant workers and their children. But, again, this right can only be invoked insofar as national legislation permits it.

6.2 Ethically Controversial Issues and the Freedom of Movement

An important question is whether the Charter could bring about a change in policy, with the outcome that the internal market integration of the Union is really only one part of European integration, social cohesion and policy being a new, just as important, one. If that is the case, will this change the economic integration approach of the Court of Justice, in assessing national measures, solely, in light of the overarching principle of market integration? It would not be unlikely that the Court will use the Charter in interpreting the law of the internal market and of the free movement. Already, the Court has used external sources of interpretation, why would it not be inclined to use an European Union Act, even though it is not yet in force?[186] If the answer is in the affirmative, would this extend the competence of the Community into question of social policy, and, hence, social values? Even if this is not the case, several matters of social policy have already been assessed by the ECJ. Social policy is in many ways linked to the morals of a given society, something which is often, at a deeper level, linked to religious values and longstanding tradition. As shown in the chapter on religion in Europe, most Europeans are still, to a large extent, guided by religion in moral issues, even if they more rarely are influenced by the religious institutions.

In this respect, it is interesting to explore the area of health care. Many areas of health care do not, at the present stage of Community integration, fall within Community competence, but are a strict matter for the Member States. However, there might be exceptions. Some areas of health care law are evidently linked to the morals of a society. A classic case, in connection with morals, is *Grogan*, in which the Irish Court asked the ECJ whether a prohibition of distributing leaflets, containing information about the possibility of abortion in the United Kingdom, was in conflict with the freedom to provide services. A very delicate question was at stake, would abortion be considered a service or not, in the light of Community law? The Court held that medical termination of pregnancy, abortion, performed in accordance with the law in the Member State in which it is carried out, constitutes a service within the meaning of the EC Treaty. However, in *Grogan*, the students who distributed the leaflets had no connection to the establishments in the UK, and therefore there was no economic activity

[186] Weatherill in Peers and Ward (eds.); p. 201. The Court has referred to rules of the World Health Organisation in Case 53/80 *Eyssen*, [1981] ECR 409, para. 13; to the Biodiversity Convention in Case C-67/97 *Bluhme*, [1998] ECR I-8033, para. 36 and the United Nations Framework Convention on Climate Change in Case C-379/98 *Preussen Elektra*, [2001] ECR I-2099, para. 74.

within Ireland. Such as the case was, it was (only) a case of freedom of expression, and, hence, fell outside the scope of Community law. Would the information have been distributed on behalf of the abortion clinics in the UK, we might very well have seen a different outcome.

As previously shown, the Charter, in several ways, reserves issues of religion, and State-Religion relations, for national legislation. If we move beyond topics such as consentious objection and religious schooling, and view religion, and religious impact on society, in a wider sense, as ethical principles, is this still a matter solely for the individual Member State? Or is it possible to argue that the Charter does state a common consensus in (some) moral matters? Again, we turn to the health care sector for some examples. In public health care, we can discern three ethically problematic areas; abortion, euthanasia, and artificial reproduction.

First of all, a few concerns need to be raised. Most importantly, the competence of the EU in matters of health care is limited, yet, not non-existing. And the Charter only applies, according to Article 51 CFR, to acts of the Institutions and their bodies, and to the Member States when implementing Union law. Article 152 EC serves as a qualified mandate for the Community in matters of health care, but is limited to co-ordination and support for the Member States, according to paragraph 2. Furthermore, paragraph 4(c) states that the Community may take incentive measures, but does not allow for harmonization. Paragraph 5 reaffirms that the primary responsibility lies upon the Member States, but according to paragraph 4(a) the Council is given some power to adopt measures to set a high standard of quality and safety of organs, and substances of human origin, such as blood and blood derivates. The whole of Article 152 should be seen in the light of Articles 2 and 3 EC, which was introduced by the Maastricht Treaty, and affirms the Union goal of an 'improvement of quality of life'. Questions of end-of-life-decisions and of use of reproductive technology in medical treatment, lies solely on the Member States. Yet, although the direct competence for the Community is limited, as soon as there is a case of free movement, a link to Community law is established. This can be seen in *Grogan*, were the Court held that arguments of the kind that abortion is 'grossly immoral', did not hinder medical termination of a pregnancy from constituting a service, since it is not for the Court to evaluate the moral of those States where abortion is, in fact, legal.

A parallel to abortion might be drawn to euthanasia, which is legal in some States, and illegal in others. Even though this is a matter for the Member State, questions might arise if free movement rights, particularly providing services, are relied upon. What happens if a person seeks to perform euthanasia in a Member State where this is performed, and then the decedent estate requires reimbursement from the home State? Article 2 CFR concerns the right to life, and closely corresponds to Article 2 of the ECHR. In *Pretty* v. *United Kingdom*[187] the ECtHR held that a distinction between

[187] *Pretty* v. *United Kingdom*, No 2346/02, (29.4.02) at para. 41.

lawful withholding of life-prolonging treatment, and the unlawful active taking of a patient's life, is compatible with the Convention. At the same time, the Court of Human Rights also, expressively, rejected the view that Article 2 imposes an obligation to allow euthanasia onto the State. It seems like the ECHR is neutral in this matter, the Convention allows for the contracting States to allow physician-assisted suicide, but does not require it.[188] Logically, the Charter would also follow this approach, and will not prefer one particular approach to end-of-life decision before another. If the judgment in *Grogan* is upheld, a State cannot rely on a moral argument, and euthanasia will be considered a service. Instead, it might be that a Member State, which do not want to reimburse the descendent estate in my example, will have progress in relying on possible derogation from freedom of movement on the basis of public policy, since *Pretty* v. *United Kingdom* does not require a State to allow or accept a certain approach to end-of-life decisions.

6.3 An Emerging Consensus in Matters of Moral?

Although the Charter remains neutral in many aspects, and simply reaffirms The European Convention in many provisions, there are a few exceptions. Particularly Article 3 CFR, on the right to the integrity of a person, advocates, in paragraph 2, for some specific ethical concepts in the field of medicine and biology. Article 3 CFR reads:

> **Right to the integrity of the person**
> 1. Everyone has the right to respect for his or her physical and mental integrity.
> 2. In the fields of medicine and biology, the following must be respected in particular:
> - the free and informed consent of the person concerned, according to the procedures laid down by law,
> - the prohibition of eugenic practices, in particular those aiming at the selection of persons,
> - the prohibition on making the human body and its parts as such a source of financial gain,
> - the prohibition of the reproductive cloning of human beings.

The Charter here takes a stand against eugenic practices, especially those that aim at the selection of persons, making the human body and its parts a source of financial gain, and reproductive cloning of human beings. All of the three prohibitions raise various problems. First of all, what are exactly eugenic practices? Historically it was referred to as activities aiming at improving the genetics of the human race, but nowadays it is used in a wider manner. Today, it is used not only when a measures aims at improving the human species in general, but also concerning individual decisions. This includes parental decisions to prevent a birth of a child with a severe illness,

[188] Michalowski, Sabine; *Health Care Law*, in Peers and Ward (eds.), p. 294.

or a specific genetic defect. Such a decision is more likely to be made out of an incapability for the parents to take care of such a child, or because they want to save the child from extreme suffering, rather than a general wish to improve the 'human species'.[189] If this should be allowed, and under what circumstances, is an extremely complicated ethical issue. In this sense, it is highly controversial to state that an over-arching principle of human dignity shall overrule the autonomy of the individual. It is even more controversial for the Charter to impose a consensus in such a matter, especially since the term 'eugenic practices' is so ill defined. At the very most, a consensus on a more narrow definition of 'eugenic practices' can be assumed, due to the historical experience of Europe, prior and during the Second World War.

The second prohibition in Article 3(2) CFR concerns commercialization of the human body, and might have relevance in the context of Community competence. It lies within Member State competence to regulate, in principle, if they want to permit trade of organs or not, since the only competence for the Community is to adopt measures which ensure a high level of quality and safety, according to Article 152 EC. If the Charter came into force, would the definitions of goods and services then be affected? Would trade with organs fall outside the scope of Community law altogether, hence, an individual is not able to rely on Community law, since the Charter has declared trade in organs prohibited? Or would the outcome rather be that a Member State could automatically rely on a public policy derogation? And would medical activities involved be treated as services? The medical treatment is necessarily the same, no matter if the donor of an organ does it because of altruistic reasons, or because of payment.

Reproductive cloning is the last prohibition in Article 3(2) CFR. Reproductive cloning means that a human being will not be created from a fertilized egg, but instead from an egg which nucleus has been replaced by genetic material from another person's cell. The outcome is that the clone contains the exact same genetic formula as another human being.[190] The common reason behind resistance of reproductive human cloning, is that it might violate the dignity, and autonomy, of the clone. He or she will be treated simply as a mean to an end, rather than an end in his or her own right. This might also, arguably, threaten the clone's individuality and uniqueness. But these arguments are highly controversial, and more and more voices are raised that such arguments are based on "misconceived genetic determinism and on a problematic application of the [Kantian] 'no one shall be treated merely as a means to an end' formula, for it is not at all clear that the clone would be reduced to serving someone else's purposes instead of being valued as a human being with his/her own worth."[191]

It is argued that the provisions in Article 3 CFR are more like policy statements in moral matters, rather than actual rights. It seems like the main aim behind the prohibitions is to establish certain fundamental moral values,

[189] *Ibid*, p. 300.
[190] *Ibid*, p. 305.
[191] *Ibid*, p. 306.

which the European Union is supposed to stand for. Because of their relatively small impact on actual Union law, they can best be explained by "a desire to declare a system of fundamental values which should be respected regardless of their practical relevance."[192] It is, however, argued that the foundations of these fundamental moral rights are ambiguous and imprecise. Furthermore, the areas presented are constantly changing, both in actual medical knowledge and in ethical thinking. To then introduce an outright prohibition might very well serve as a conservative factor, rather than a democratic, and fruitful, debate within the European sphere.

[192] *Ibid*, p. 308.

7 Which Way is Forward? – Some Concluding Remarks

It has been argued that the European level of protection of fundamental rights must be more than just the sum of national strategies.[193] Transposing this argument to the sphere of religious freedom,

> "it is of minor use to draw the reference to one or another national organizational system as a model to build thereupon an analogous framework between Churches (*in abstracto*) and the European Union so to speak at the upgraded level. Such relegation is at the utmost capable of providing inspiration, theoretical models, [and] of serving as a starting point to develop a proper co-operational regime on the European stage […] eventually something new that has not been known before."[194]

In this quest for something new, is it possible to see seeds of something that will encompass a pluralistic European tradition, already at present day?

The Lisbon Treaty[195], in its preamble, contains a reference to the religious heritage of Europe. The second recital will be as follows, if it enters into force,

> "DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable rights of the human person, freedom, democracy, equality and the rule of law."

It does not refer to the 'Christian' heritage, but uses the wider notation of 'religious'; hence, opens up for a pluralistic view of European history and identity. Whereas the preamble is important as a symbol, and as interpretative aid, it is not in itself binding. Article 17 in the Treaty on the Functioning of the European Union on the other hand, explicitly refers to a Dialogue between the European Institutions and religions, churches and communities of convictions, and, additionally, makes Declaration No 11 a Treaty Article.

> Article 17
> (1) The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.

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[193] Weiler, Joseph H.H; *Fundamental Rights and Fundamental Boundaries: On the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space,* in: *"Do the New Clothes Have an Emperor?" and other essays on European Integration*, Cambridge, Cambridge University Press, 1999, pp. 102-129.
[194] Bloss, p. 10. (Cursive in original)
[195] Treaty of Lisbon amending the Treaty on the European Union and the Treaty establishing the European Community. 13 December 2007. Official Journal C 306, 17.12.2007, p. I-271.

> (2) The Union equally respects the status under national law of philosophical and non-confessional organizations.
> (3) Recognizing their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organizations.

Would this change the regulatory content of the already existing provisions? Perhaps not, but making them Treaty provisions further stresses the their importance, and the wish of the Member States that the Dialogue continues. Making Declaration No 11 a Treaty Article brings it to the forefront of the minds of legislators, policy makers, and of the Court of Justice. It serves as a guideline for future judgments on problems relating to division of powers and competence within this field of law. What use the Court of Justice makes of this Article, at the end of the day, remains to be seen.

The Lisbon Treaty brings to the front questions of 'European identity', and what the religious heritage of Europe actually is. These questions are, however, not new, but have provoked a fierce debate concerning the issue of Turkey's accession to the Union. Modern Turkey holds 'secularism' as a primary constitutional value, but the population is predominantly Muslim. A possible incorporation of a country with a population of seventy millions, and a strong inner conflict between secular and Islamic groups, has proved to be a great challenge, and source of conflict, between the Member States. It raises questions of the limits of Europe, both geographically and culturally. Does the 'European identity', mentioned in the preamble of the Treaty on the European Union, presuppose a Christian heritage? Commentators on the European Union-Turkey situation argue that the issue of religion, and the Islamic background of Turkey, still serves as the main, hidden, obstacle for accession.[196]

Can we then find one way to deal with religion, an approach that moves beyond the formal tripartition system presented in chapter two, and serves as a common way to deal with religious issues? As presented in chapter four, a self-standing 'law and religion' policy has emerged in the European Union, with its most striking feature being the right to equal treatment and non-discrimination. This right expresses itself in Article 13 EC, and in the Framework Directive on equal treatment, but necessarily moves beyond those provisions. It serves as a general principle of Community law, and serves as an important part of public administration, and in domestic and international operations. I would argue, that a discussion on the actual content of 'equal treatment' is needed. It has been interpreted as not obliging State and Institutions to reorganize their administration, but I believe that a shift, from a mere tolerance, towards accommodation, is necessary.

[196] Hughes, Edel; *The Secularism Debate and Turkey's Quest for European Union Membership*, Religion and Human Rights (2008), Martinus Nijhoff Publishers, pp. 15-32 (p. 17)

A deeper understanding of the relationship between the State and the Churches, and religious organizations, can be said to contain three components. The right to religious liberty serves as the first one, religious incompetence of the State and autonomy of religious groups as the second. The third one has to do with selective co-operation of States and religious groups. The first aspect has been examined previously, as well as the second. The third one can be seen in Declaration No 11, but especially in the Commission's Dialogue with religious organizations. All European States cooperate with religious organizations, at least to a minimum extent. It might be formal and open, as in concordatian countries, or more hidden, as for instance using different associations as reference groups in the legislative process. The model of cooperation has been described as a triangle, where the established Churches are closer to the top, and closely cooperate with the State in the schools, in the Armed Forces, and in prisons. Examples are the Catholic Church in concordatian countries, the Lutheran Church in Denmark and Sweden, and the Orthodox Church in Greece. They gain financial support, sometimes directly from the State, but sometimes indirectly through tax exemptions. At the bottom of the triangle we find the organizations that scarcely come in contact with the State, they gain no financial support, have no position in mass media, and have very little access to schools and higher education. The middle position is occupied by those religious organizations that are recognized by the State and receive financial support, commonly through tax exemptions, but also direct help to build places of worship. The State recognizes them and sometimes uses a system of registration, but also perform various degree of control over them.[197]

Within the Community legal order, the issue of *which* organizations to cooperate with, is decided by the Member States. The Commission welcomes all organizations, which are recognized as religious in the Member States, but does not perform an evaluation of its own. The end result might be one small indication of merging systems, incorporating all elements of religious expressions in the Union. It is a delicate task to try and merge the systems, and to find a common way to deal with religion in Europe. In order for a system of selective co-operation to survive, and be thriving, the constellation must be open to historical and sociological change. It cannot ignore social reality and shut out new phenomena in the religious map of Europe. Large minority groups, such as Muslims from wide-ranging field of traditions, should be included in that process, but also smaller denominations, such as the New Religious Movements and less dominant branches of Christian Churches.[198]

Article 2 of the Lisbon Treaty adds multiculturalism and pluralism to the 'Values of the European Union', when stating the rights of persons belonging to minorities.

[197] Ferrari in Shadid and van Koningsveld (eds.), pp. 7-11.
[198] *Ibid*, p. 11.

> "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member State in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between woman and men prevail."

It remains to be seen what the Court of Justice makes of these grand statements, as the Article does not give an indication of whether group rights are included in 'the rights of persons belonging to minorities', or not. Hopefully the 'prevailing' nature of these basic values will be stressed by the Court, and, above all, effectuated. I would argue that it is important for the Union to accommodate minorities, in order to create a real freedom of religion, not just one which lacks substantive value. The idea of the Icelandic Vikings, that " [a] country needs one religion as foundation for its law" is, since long, obsolete. Instead, the way forward must be to try to live together, constantly communicating needs, wants and desires.

The future of the European Union will bring the 'common cultural heritage' to the forefront, which will at the same time raise questions of how to protect regional, and national, diversity. Are we moving towards a normative policy making of the Union? And, if that is the case, what should the ultimate source of European law be? We need a Union in which the rule of law is respected, but the question remains, to what extent religious values shall influence the law.

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