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FAITH IN STRASBOURG AND LUXEMBOURG? THE FRESH RISE OF RELIGIOUS FREEDOM LITIGATION IN THE PAN-EUROPEAN COURTS

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ABSTRACT

The religious landscape of Europe has changed dramatically in the past two generations. Traditional Christian establishments have been challenged by the growth of religious pluralism and strong new movements of laïcité *and secularism. Once powerful religious cultures have been shattered by exposures of clerical abuses and financial self-dealing, leading to emptier pews and waning political influence. Once quiet, homogenous European communities are now home to large groups of new Muslim emigrants, making new demands and sparking strong anti-immigrant movements. Once strictly controlled national borders have opened across Eastern and Western Europe, leading to massive migration and tense local intermixtures of Orthodox, Catholics, Protestants, Jews, Muslims, Buddhists, Confucians, Hindus, Atheists, and Secularists never seen on this scale before. Old constitutions, concordats, and customs that privileged local forms and forums of Christian identity and morality have come under increasing attack. A single mention of God in the proposed new European Constitution triggered continent-wide debate. Old Christian Europe is dying; a new religious and political order is beginning to form.*

These new religious movements have reshaped the religious freedom law not only of individual European states but also of the European Court of Human Rights sitting in Strasbourg and the Court of Justice of the European Union sitting in Luxembourg. These two pan-European Courts have become new hotspots for religious freedom claimants from all over Europe. The rapidly

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This Article represents ongoing work by both authors on religious freedom questions in Europe. It echoes and elaborates some of the themes in Andrea Pin & John Witte, Jr., *Meet the New Boss of Religious Freedom: The New Cases of the Court of Justice of the European Union*, 55 TEX. J. INT'L L. 223 (2020), as well as JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 255–66 (4th ed. 2016).

expanding case law of these two Courts reflects the transition and tenuousness of European law and religion. Both Courts do often repeat and apply firmly the core religious freedom mandates of the 1950 European Convention of Human Rights and the 2010 European Charter of Fundamental Rights and Liberties and their statutory echoes—freedom of thought, conscience, and belief for all; freedom from direct and indirect discrimination by state and private actors; freedom to manifest one's beliefs in public, alone, and in religious groups that deserve legal personality and religious autonomy. Both Courts have emphasized the need for State neutrality toward religion, for strong protections of religious pluralism, and for ample deference to local political traditions. Both Courts have also stepped in to remove blatant religious discrimination by some state officials.

But both these pan-European Courts have also been notably churlish of late in their treatment of both Muslim and conservative Christian claimants, even while generously accommodating self-professed Atheists, Agnostics, and Secularists. Both Courts have repeatedly rejected requests by religious claimants to protect their religious dress, jewelry, dietary rules, holiday observance, and traditional beliefs about sex, marriage, and family, in each instance privileging the rights of others and the interests of democratic society over the claims of religious freedom. Both Courts have repeatedly held against Eastern European Orthodox state policies on religion, even while granting wide margins of appreciation to French, Belgian, Swiss, and other States' policies that blatantly targeted religious minorities, especially Muslims. And particularly the Luxembourg Court has begun to second-guess internal church employment decisions long protected by religious autonomy norms, and to question longstanding constitutional forms of church-state relations, even though the European Treaty formally protects them.

This Article offers a detailed comparative analysis of the religious freedom jurisprudence of these two pan-European Courts. It outlines their approaches to the variety of religious traditions and church-state models within the Old Continent and the principles and precepts of religious freedom that they have developed to date. This Article analyzes how the two Courts operate and highlights the reality that the Strasbourg Court issues only soft law that depends on individual state compliance, while the Luxembourg Court issues hard law that is binding throughout the European Union. This reality is rapidly making the Luxembourg Court an attractive forum for transnational litigation, including on religious freedom. This is a worrisome trend for the future of religious freedom, however, for the Luxembourg Court has been notably less accommodating than the Strasbourg Court of religious freedom claims, more

insistent on state neutrality on religion even at the cost of religious exemptions, and more willing to unsettle longstanding church-state models and cooperative arrangements.

INTRODUCTION

Religious freedom litigation in Europe is on the rise, with likely ramifications spilling well beyond the Old Continent. While religious freedom has always been part of the constitutional and regulatory laws of each European country,[1] two pan-European Courts are now hard at work on these issues as well. They have gained prominence in religious freedom litigation, functioning as hotspots for religious freedom claims that affect countries across Europe and well beyond.

The first pan-European Court to take up religious freedom cases is the European Court of Human Rights sitting in Strasbourg (the "ECtHR" or "Strasbourg Court"). The ECtHR has jurisdiction over religious freedom under Article 9 of the European Convention on Human Rights (1950).[2] This provision guarantees to each person "freedom of thought, conscience and religion," the right to "change" religion or belief, and "freedom, either alone or in community with others and in public or private, to manifest his [or her] religion or belief, in worship, teaching, practice and observance."[3] From 1950, when the Convention was ratified, until 1993 when it issued its first Article 9 case of *Kokkinakis v. Greece*,[4] the Court remained largely silent on religious freedom.[5] But since then, the ECtHR has delivered more than 150 judgments on the merits on this topic.[6] The Court has generally interpreted Article 9 and related articles broadly to protect the religious freedom of most individuals and groups. These claimants have won some two-thirds of their cases, although the Court of late has been notoriously hard on Muslim minorities and conservative Christian claimants alike. These Article 9 and related cases have fed European scholarship and the global human rights agenda and provided Member States with an uninterrupted flow of judgments that progressively unfold the scope and meaning of religious freedom and other fundamental rights.

The ECtHR's rulings, however, are only soft law in the forty-seven Member States of the Council of Europe. A State found in violation of Article 9 or any other article of the Convention is formally obliged to comply with the Court's

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[1] NORMAN DOE, LAW AND RELIGION IN EUROPE: A COMPARATIVE INTRODUCTION 40 (2011).

[2] Convention for the Protection of Human Rights and Fundamental Freedoms, art. 9, ¶ 1–2, Nov. 4, 1950, 213 U.N.T.S. 230 [hereinafter Convention].

[3] *Id.* See *infra* note 54 for full text and related provisions.

[4] Kokkinakis v. Greece, App. No. 14307/88, 1993 Eur. Ct. H.R. ¶ 28 (May 25, 1993).

[5] Carolyn Evans, *Pre*-Kokkinakis *Case Law of the European Court of Human Rights: Foreshadowing the Future*, *in* THE EUROPEAN COURT OF HUMAN RIGHTS AND THE FREEDOM OF RELIGION OR BELIEF 13 (Jeroen Temperman, T. Jeremy Gunn & Malcolm Evans eds., 2019).

[6] *See infra* note 64.

rulings and to remove the reasons for the injustice so far as it is possible. But this compliance is basically left to each Member State's good will and cooperation and is dependent on how concerned they are about their religious freedom and broader human rights record. Many Member States have ignored the Court's rulings against them largely with legal impunity, even if at some diplomatic cost.[7] Moreover, the ECtHR's judgment against one State in a case is not binding on any other States.[8] While some States have revised their domestic legislation or reformed their case law in light of the Court's judgments, they have no legal obligation to do so, and many States in fact have made no such changes. Moreover, Russia's and Turkey's failures to contribute to the expenses of the Council of Europe have posed further obstacles to the Court's work.[9]

The Court of Justice of the European Union, sitting in Luxembourg (the "CJEU" or "Luxembourg Court")[10] has become a pivotal new player in religious freedom cases and is rapidly emerging as "the new boss of religious freedom"[11] in Europe—at least in the twenty-seven Member States left in the European Union (EU) after Brexit.[12] Before the 2010 Charter of Fundamental Rights of the European Union,[13] EU laws made only indirect references to religious freedom and produced little case law. Even when Article 10 of the Charter gave specific religious freedom protection for citizens of EU countries (tracking the language of Article 9 of the Convention),[14] the CJEU remained largely silent on the subject until 2017.[15] Since then, however, the CJEU has delivered a dozen landmark rulings on religious freedom, and many other cases are pending.

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[7] Janneke Gerards, *The European Court of Human Rights and the National Courts: Giving Shape to the Notion of 'Shared Responsibility'*, *in* IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND OF THE JUDGMENTS OF THE ECTHR IN NATIONAL CASE-LAW 27 (Jenneke Gerards & Joseph Fleuren eds., 2014).

[8] T. Jeremy Gunn, Jeroen Temperman & Malcolm Evans, *Introduction* to THE EUROPEAN COURT OF HUMAN RIGHTS AND THE FREEDOM OF RELIGION OR BELIEF, *supra* note 5, at 2.

[9] Mikhail Bushuev & Markian Ostapchuk, *Russian Withholds Payments to the Council of Europe*, DEUTSCHE WELLE (Mar. 1, 2018), https://p.dw.com/p/2tYKP.

[10] It was only in late 2009 that the CJEU took this name; before then, it was called European Court of Justice. *Court of Justice of European Union (CJEU)*, EUR. COMM'N, https://ec.europa.eu/home-affairs/content/court-justice-european-union-cjeu_en (last visited Dec. 22, 2020). For the sake of simplicity and clarity, this Article will make no temporal distinction and will use the name of CJEU.

[11] Andrea Pin & John Witte, Jr., *Meet the New Boss of Religious Freedom: The New Cases of the Court of Justice of the European Union*, 55 TEX. J. INT'L L. 223, 226 (2020).

[12] *Id.* at 225.

[13] Charter of Fundamental Rights of the European Union, Mar. 30, 2010, 2010 O.J. (C 83) 389 [hereinafter Charter].

[14] *Id.* art. 10.

[15] Pin & Witte, *supra* note 11, at 225.

Unlike the ECtHR's rulings, the CJEU's rulings are hard law for all Member States of the European Union, immediately binding on every State and preemptive of local laws to the contrary.[16] The CJEU thus has much more legal power than the ECtHR, and its religious freedom docket is likely to grow rapidly. Since the CJEU's rulings are good law throughout the EU, override all domestic legislation, and guide future local cases, religious freedom litigants have used the CJEU to shape domestic law.[17] Whoever wins in Luxembourg wins in her hometown, and the new judgment will affect the entire EU. This has incentivized local religious freedom litigants, particularly those with broader European interests or constituents, to appeal to EU law and the EU Charter, with the goal of using the Luxembourg Court as leverage to produce both local and regional reforms on religious freedom. So far, the Strasbourg and Luxembourg Courts have produced comparable religious freedom jurisprudence, but the latter Court has already shown less sympathy for religious freedom claims of minorities and less deference to religious autonomy and traditional religion-state arrangements.

This Article offers a comparative analysis of the religious freedom jurisprudence of these two pan-European Courts. It explains how and why this supranational litigation has emerged, how it takes shape in each Court, and what differences are emerging in the religious freedom jurisprudence of the ECtHR and CJEU. Part I briefly sketches the social, political, and religious context of the Council of Europe and the European Union, and how both Courts have acknowledged the importance of religion for private and public life. Part II describes how the two Courts operate, the status of their case law at the domestic level, and the reasons that the CJEU is rising in importance. Part III synthesizes the two Courts' case law in the field of religious freedom from three different angles: (1) freedom of thought, conscience, and belief; (2) the regulation of public manifestations of religion; and (3) freedom of religious groups. The Conclusion not only evaluates the many notable advances in religious freedom jurisprudence offered by both Courts, but also signals the dangers to religious freedom suggested by some of the most recent cases.

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[16] *Id.* at 223.

[17] *See* ELINA PAUNIO, LEGAL CERTAINTY IN MULTILINGUAL EU LAW: LANGUAGE, DISCOURSE AND REASONING AT THE EUROPEAN COURT OF JUSTICE 59 (2013); Morten Rasmussen, *The Origins of a Legal Revolution – The Early History of the European Court of Justice*, 14 J. EUR. INTEGRATION HIST. 77, 77 (2008).

I. RELIGION IN EUROPE

The place of religion in Europe has been one of the most intractable controversies in recent decades,[18] and it has shaped the religious freedom narrative and jurisprudence of both the pan-European courts. These Courts now regularly face religious freedom issues concerning the place of religious symbols, dress, and ornamentation in public life; charges of religious discrimination in public and in the workplace; issues of religion in schools and charities; challenges to local forms and forums of both religious establishment and secularization (called *laïcité* in France and Belgium); legal limitations to religious worship, organization, proselytization, diet, dress, and other forms of religious expression; asylum claims by religious refugees; conscientious objections to oaths, military participation, and various public policies; clashes between religious liberty and other fundamental rights, particularly concerning sexual liberty and identity; claims of freedom and autonomy by religious groups to govern their polity, property, leadership, and membership; and much more. In addressing these and other cases, these two pan-European Courts have sought to apply general European religious freedom norms to Member States with ample constitutional, cultural, and religious diversity, and with new and rapid changes and challenges concerning the place of religion.[19]

A. Religion in the Council of Europe and European Union

The ECtHR has jurisdiction over all forty-seven Member States within the Council of Europe. This territory includes Western European lands, some with strong and longstanding Roman Catholic and Protestant populations, others with strong movements of secularism and laïcité.[20] The Council of Europe also includes Eastern European lands, the Russian Federation, and former Soviet bloc countries like Armenia, Azerbaijan, Georgia, and Ukraine, each with strong Orthodox Christian populations along with smaller communities of Catholic, Protestant, Islamic, Jewish, and other religious minorities.[21] And it includes

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[18] Julie Ringelheim, *State Religious Neutrality as a Common European Standard? Reappraising the European Court of Human Rights Approach*, 6 OXFORD J.L. & RELIGION 24, 25 (2017).

[19] *See, e.g.*, Andrea Pin, *Does Europe Need Neutrality? The Old Continent in Search of Identity*, 2014 BYU L. REV. 605, 605–06 (2014) (discussing legal variations of neutrality and religious freedom across Member States).

[20] LORENZO ZUCCA, A SECULAR EUROPE: LAW AND RELIGION IN THE EUROPEAN CONSTITUTIONAL LANDSCAPE 4 (2012).

[21] *47 Member States*, COUNCIL OF EUR., https://www.coe.int/en/web/portal/47-members-states (last visited Dec. 22, 2020); *Many Countries Favor Specific Religions, Officially or Unofficially*, PEW F. (Oct. 3, 2017), https://www.pewforum.org/2017/10/03/many-countries-favor-specific-religions-officially-or-unofficially/.

Greece with its strong Orthodox populations and Turkey with its Islamic majority.[22]

The ECtHR has struggled to develop a universal religious freedom jurisprudence that applies consistently across this diverse religious and cultural field. The European Convention is silent on the status of local religion-state relations and the roles and rights of religious expression, practices, officials, and institutions in the political and public sphere,[23] leaving the ECtHR to work out these questions through its case law. The Court now frequently uses such words as "neutrality," "living together," "religious choice," and even "secularism" to address these questions.[24] But these terms do not appear in the Convention,[25] and the Court has not developed a universal or consistent definition or application of them in its case law.[26] Moreover, the ECtHR often—though not always of late[27]—uses these terms to justify state limitations on public expressions of religion, particularly by Islamic or Christian religious minorities when they are out of step with local secular fashions or with local religious establishments.[28]

Religion has been a hot topic for the CJEU as well, even though the twenty-seven countries of the European Union have less religious and legal diversity, given the absence of Turkey, Russia, and most former Soviet bloc countries, and now, since Brexit, the United Kingdom as well. While the EU Charter has comparable provisions on religious freedom to those in the European Convention, EU law goes further and explicitly requires "respect [for] . . . the status under national law of churches and religious associations or communities in the Member States."[29] The CJEU thus accommodates a variety of local

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[22] W. Cole Durham Jr. & David M. Kirkham, *Introduction* to ISLAM, EUROPE, AND EMERGING LEGAL ISSUES 1, 7 (W. Cole Durham Jr., Rik Torfs, David M. Kirkham & Christine Scott eds., 2012).

[23] Andrea Pin, *(European) Stars or (American) Stripes: Are the European Court of Human Rights' Neutrality and the Supreme Court's Wall of Separation One and the Same?*, 85 ST. JOHN'S L. REV. 627, 646 (2011).

[24] S.A.S. v. France, App. No. 43835/11, 2014-III Eur. Ct. H.R. 341, 359 ¶ 82, 366 ¶ 103, 372 ¶ 127; Metro. Church of Bessarabia v. Moldova, App. No. 45701/99, 2001-XII Eur. Ct. H.R 81, 108 ¶ 98; *see* Şahin v. Turkey, App. No. 44774/98, 2005-XI Eur. Ct. H.R. 173, 222–23 ¶ 4–7 (Tulken, J., dissenting).

[25] T. Jeremy Gunn, *The "Principle of Secularism" and the European Court of Human Rights: A Shell Game*, *in* THE EUROPEAN COURT OF HUMAN RIGHTS AND THE FREEDOM OF RELIGION OR BELIEF, *supra* note 5, at 473, 572.

[26] Ronan McCrea, *Secularism Before the Strasbourg Court: Abstract Constitutional Principles as a Basis for Limiting Rights*, 79 MOD. L. REV. 691, 703 (2016) (stating "on how best to arrange the relationship between religion and state in Europe, . . . the Court has consistently adopted a 'hands-off' approach").

[27] *See infra* case *Gldani* at note 431 and *Dimitrova* at note 442.

[28] Gunn, *supra* note 25, at 573.

[29] Consolidated Version of the Treaty on the Functioning of the European Union art. 17, ¶ 1, June 7, 2016, 2016 O.J. (C 202) 42 [hereinafter TFEU].

constitutional arrangements on religion and state—aggressive policies of *laïcité* in France and Belgium; formal religious establishments of Orthodoxy in Greece and Lutheranism in Scandinavia; and cultural and legal favoritism of various forms of Catholicism or Protestantism in other States and local regions.[30] Another EU provision guarantees that EU laws will not affect a Member State's rights or obligations "arising from agreements" that a Member State concluded with another country before joining the EU.[31] This provision covers various State agreements with the Holy See, which are a constitutional staple in predominantly Catholic states of Italy, Spain, Portugal, Poland, and Hungary—although EU law now recommends that its Member States "take all the appropriate steps to eliminate the incompatibilities" between these older agreements and current EU law.[32]

This formal legal deference to local church-state relationships, however, coexists with heated debates over the public visibility and role of religion within the European Union and beyond. The EU has struggled to define its constitutional identity, including whether and how to take account of its religious heritage and diversity.[33] That struggle culminated in the early 2000s, when the Member States intensely debated a proposed EU Constitution. The first draft referenced Europe's religious tradition in the Preamble, and this raised ample controversy.[34] Some advocates wanted explicit recognition of Europe's long Christian heritage and the sundry contributions of churches to the development of European culture; others wanted no mention of religion at all both to avoid partisanship and to underscore the EU's neutrality toward religion.[35] The drafters sought a *via media* that recognized the variety of religious heritages and constitutional arrangements on religion within the Member States, while establishing a common framework for EU government.[36] That move, too, raised controversy. In the end, the final proposed Constitution dropped all references to Christianity and any other religions.[37] This led to inevitable charges that the

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[30] *See generally* BRENT F. NELSEN & JAMES L. GUTH, RELIGION AND THE STRUGGLE FOR EUROPEAN UNION (2015).

[31] TFEU, *supra* note 29, art. 351.

[32] *Id.*

[33] NELSEN & GUTH, *supra* note 30, at 66–110; PATRICK PASTURE, IMAGINING EUROPEAN UNITY SINCE 1000 AD, at 204 (2015).

[34] Joseph H.H. Weiler, *A Christian Europe? Europe and Christianity: Rules of Commitment*, 6 EUR. VIEW 143, 143 (2007).

[35] Pin, *supra* note 19, at 605.

[36] Memorandum from Praesidium on Draft Constitution, Volume 1 to The European Convention (May 28, 2003), http://register.consilium.europa.eu/doc/srv?l=EN&f=CV%20724%202003%20REV%201.

[37] Preamble of the Treaty Establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C 310) 3 ("DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy,

EU now preferred secularism over religious pluralism, and political expediency over historical authenticity.[38] The EU Constitution was not ratified when put to a vote in 2005, and the Union has since tabled debates about the EU Constitution, including its religious foundations and dimensions. But any new talk of EU constitutional ratification will no doubt raise this issue sharply anew.

B. New Religious Changes and Challenges

Three other new factors have helped to bring religion back into public prominence and debate, complicating the religious freedom jurisprudence of both Courts: (1) shifts in European religious demography, (2) the rise of Islam, and (3) various scandals within European churches.

First, European politics and culture have experienced a rapid new awakening of religion. "With the disappearance of the East-West divide, which had pushed all other conflicts into the background" for decades after World War II, Dieter Grimm writes, "religion and religious communities reappeared on the public scene and began to insist more vigorously on respect for their beliefs and on living according to the commandments of their creed."[39] This has given birth to "a process of re-politicization of religion"[40] throughout Europe, with many new religious players participating. The freedom of movement guaranteed by EU treaties has mobilized people of different cultures and faiths to move to other EU Countries, seeking new homes, new work, better schools, more generous welfare systems, and more.[41] Moreover, the geographical expansion of the Council of Europe into the former Soviet bloc and Turkey, and the porousness of its borders has accordingly transformed the religious makeup of its State Members. Orthodox Christians living in Eastern Europe, for example, have relocated to the West to fill the new jobs that have opened in countries with aging and waning local populations.[42] Secularized Scandinavians have moved

equality and the rule of law.").

[38] *See generally* GOD AND THE EU: FAITH IN THE EUROPEAN PROJECT (Jonathan Chaplin & Gary Wilson eds., 2017).

[39] Dieter Grimm, *Conflicts Between General Laws and Religious Norms*, *in* CONSTITUTIONAL SECULARISM IN AN AGE OF RELIGIOUS REVIVAL 3 (Susanna Mancini & Michel Rosenfeld eds., 2014).

[40] *Id.* at 3.

[41] *See, e.g.*, *The Impact of Demographic Change in Europe*, EUR. COMM'N, https://ec.europa.eu/info/strategy/priorities-2019-2024/new-push-european-democracy/impact-demographic-change-europe_en (last visited Dec. 22, 2020); EUR. UNION COMM. REGIONS, THE IMPACT OF DEMOGRAPHIC CHANGE ON EUROPEAN REGIONS (2016), https://cor.europa.eu/en/engage/studies/Documents/The%20impact%20of%20demographic%20change%20on%20European%20regions/Impact_demographic_change_european_regions.pdf; EUR. PARLIAMENTARY RSCH. SERV., DEMOGRAPHIC TRENDS IN EU REGIONS (2019), https://ec.europa.eu/futurium/en/system/files/ged/eprs-briefing-633160-demographic-trends-eu-regions-final.pdf.

[42] *See supra* note 41 and accompanying text.

to more traditional southern European Christian countries and have rebelled against the religious cultures and customs of their new homes.[43] Evangelical missionary churches have moved into long-closed Eastern European and former Soviet lands, and they have been met with strong local opposition as they have sought to establish churches, schools, and publishing houses, and to proselytize door-to-door and on the public streets and parks.[44] Anti-Semitism is again on the rise throughout Europe, with xenophobic attacks on synagogues and on Jewish interests both in Europe and in the Middle East.[45] New émigrés from the Indian subcontinent and the Pacific Rim have brought strong new forms of Hinduism, Buddhism, Confucianism, and other Asian religions to European cities and neighbourhoods.[46] While Brexit and COVID-19 have put a temporary halt to some of this religious movement, it has already produced vast new religious pluralism in European lands and attendant conflicts that have clogged local courts and regulators. Supranational courts, with more detached views on religious freedom, have become more attractive to these new or newly arrived faiths, particularly religious and cultural minorities seeking accommodations for themselves or removals of the religious establishments around them.

Second, and related, the recent rise of Islam in Western European lands has raised serious religious and cultural controversy in Old Europe. For more than a decade, the EU has demurred on Turkey's accession to the EU, in no small part because of deep worries over the compatibility of Turkey's majority "Islamic values" with the "European values" of existing Member States.[47] These worries about Islam have been exacerbated by bloody terrorist attacks by Islamists in France, Spain, Germany, England, and many other places beyond Europe; by ongoing struggles with ISIS, the Taliban, and other extremist Islamist groups in the Middle East and their agents abroad; and by repeated controversies over blasphemy, polygamy, civil unrest, labor disputes, and neighborhood segregation involving Muslim émigrés in Member States.[48] And since 2015, the

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[43] The famous case of the crucifix in Italian public schools started when Ms. Lautsi, a Finnish mother with secular views living in Italy, challenged the Italian practice of having the crucifix displayed in classrooms. Lautsi v. Italy, 2011-III Eur. Ct. H.R. 61.

[44] *See* John Witte, Jr., *A Primer on the Rights and Wrongs of Proselytism*, 31 CUMB. L. REV. 619, 620–21 (2001).

[45] Bojan Pancevski, *One in Four Europeans Holds Anti-Semitic Views, Survey Shows*, WALL ST. J. (Nov. 21, 2019), https://www.wsj.com/articles/one-in-four-europeans-holds-anti-semitic-views-survey-shows-11574339097.

[46] *How Religious Commitment Varies by Country Among People of all Ages*, PEW F. (June 13, 2018), https://www.pewforum.org/2018/06/13/how-religious-commitment-varies-by-country-among-people-of-all-ages/.

[47] *See* Pin, *supra* note 19, at 618.

[48] *See* GILES MERRIT, SLIPPERY SLOPE: EUROPE'S TROUBLED FUTURE 199 (2016); Susanna Mancini, *The Tempting of Europe, The Political Seduction of the Cross: A Schmittian Reading of Christianity and Islam in*

massive wave of new Islamic refugees and immigrants from war-torn nations of the Middle East and Northern Africa to European Member States has fueled strong new anti-immigration policies and harsh anti-Islamic rhetoric and political movements.[49]

Finally, several grave scandals in various churches have put Christianity back on its heels and back into the glaring media spotlight. Catholic churches in Ireland, Germany, the Netherlands, Austria, Spain, Poland, and beyond have all been rocked by recent media exposures, state reports, criminal indictments, and lawsuits about decades of widespread pedophilia of delinquent priests and cover-ups by complicit bishops—all committed under the thick veil of corporate religious freedom.[50] Protestant and Evangelicals in various lands also now face charges of sexual and physical abuses by their clergy and other church leaders against wives, children, parishioners, clients, and students.[51] And various churches have been called out for financial abuses and luxurious living on their vast tax-exempt properties.[52] This exposure of the underside of Christianity has led a number of academics and politicians to question seriously the wisdom and safety of maintaining the time-honored human rights principle of recognizing the autonomy of religious groups, and some now call for the abolition of religious freedom altogether.[53]

Together, the new debates over the ongoing roles and rights of traditional Christian religions, the new challenges posed by the rise of Islam and new emigrants, and the exposure of church abuses have put religion at the heart of

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European Constitutionalism, *in* CONSTITUTIONAL SECULARISM IN AN AGE OF RELIGIOUS REVIVAL 111–13 (Susanna Mancini & Michel Rosenfeld eds., 2015); Alessandro dal Lago, *Esistono davvero I conflitti tra culture? Una riflessione storico-metodologica*, in MULTICULTURALISMO: IDEOLOGIE E SFIDE 78 (Carlo Galli ed., 2006).

[49] Cathrytn Costello, *Overcoming Refugee Containment and Crisis*, 21 GERMAN L.J. 17, 19–20 (2020).

[50] *See, e.g.*, Nik Martin, *German Catholic Church 'Needs Urgent Reform'*, DEUTSCHE WELLE (Feb. 3, 2019), https://p.dw.com/p/3Ce6m; *Poland's Catholic Church Admits Clergy Sexually Abused Hundreds of Children*, DEUTSCHE WELLE (Mar. 14, 2019), https://p.dw.com/p/3F5dV; Ralf Sotscheck, *Pope Francis in Ireland Draws Large Crowd, Protests*, DEUTSCHE WELLE (Aug. 25, 2018), https://p.dw.com/p/33jbq; *Vatican Set to Issue Guidelines on Pedophile Priests*, NEWS.COM (Apr. 10, 2010), https://www.news.com.au/world/vatican-set-to-issue-guidelines-on-pedophile-priests/news-story/25c18a9da3fdb2d2024da1b11ae2f890.

[51] Michael Martin, *Protestant Churches Grapple With Growing Sexual Abuse Crisis*, NPR (May 23, 2014, 11:33 AM), https://www.npr.org/2014/05/23/315129859/sex-abuse-allegations-getting-protestant-churches-to-come-clean?t=1579600456400.

[52] Von Anna Catherin Loll & Peter Wensierski, *The Hidden Wealth of the Catholic Church*, SPIEGEL INT'L (June 14, 2010), https://www.spiegel.de/international/germany/financial-scandals-the-hidden-wealth-of-the-catholic-church-a-700513.html.

[53] *See* Brian Morris, *It's Time for the Churches to Start Paying Tax*, DAILY TEL. (May 9, 2016, 3:08 PM), https://www.dailytelegraph.com.au/rendezview/its-time-for-the-churches-to-start-paying-tx/news-story/2a96bc23043ffbbbb0327b64f8350802.

Europe's political narratives and legal controversies. And it has accelerated the pace of religious freedom litigation in both the ECtHR and the CJEU.[54]

II. RELIGIOUS FREEDOM IN THE TWO COURTS

A train will take you from Strasbourg to Luxembourg in two and a half hours. But the real distance between the Strasbourg Court and Luxembourg Court is much wider in legal, institutional, and cultural terms. The European Court of Human Rights in Strasbourg has focused on rights from the beginning, using the 1950 European Convention on Human Rights. While its jurisdiction covers the whole of Europe and well beyond, the impact of its rulings depends on voluntary compliance by Member States. By comparison, the Court of Justice of the European Union in Luxembourg is territorially much smaller, but its rulings are much more powerful. Initially, this Court focused on economic matters. But, in the past decade with the promulgation of the 2010 Charter of Fundamental Rights of the European Union, the CJEU has also taken up religious freedom and other fundamental rights claims, particularly when they include labor, property, and other economic factors. Its religious freedom cases so far have been narrow in scope, but its rulings are binding throughout the EU, and are thus more legally consequential than the rulings of the ECtHR. Part II summarizes these main differences.

A. The European Court of Human Rights

The ECtHR, sitting in Strasbourg, has jurisdiction over the forty-seven European countries of the Council of Europe (not just the twenty-seven countries of the European Union), which include nearly 900 million people.[55] Parties within any of these Member States can file complaints that their State has violated their rights as enshrined in the 1950 European Convention on Human Rights ("ECHR" or "Convention"), including their religious freedom rights.

The most important religious freedom guarantee enforced by the ECtHR is Article 9 of the European Convention:

> 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

[54] OLIVIER ROY, L'EUROPA È ANCORA CRISTIANA? 11 (Michele Zurlo trans., 2019).

[55] *The European Convention on Human Rights – How Does it Work?*, COUNCIL OF EUR., https://www.coe.int/en/web/impact-convention-human-rights/how-it-works (last visited Dec. 22, 2020).

> or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.[56]

An important Protocol on Article 9 adds that "the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."[57] Complementing these protections, the Convention also protects other rights and freedoms with religious dimensions. Included are the right to one's own private religious practices (Article 8);[58] freedom of religious and antireligious expression (Article 10);[59] and freedoms of religious assembly and association (Article 11).[60] The Convention also prohibits religious and other forms of discrimination (Article 14).[61]

As with other international human rights instruments, the European Convention has no formal prohibition on the establishment of religion that is equivalent to the First Amendment's "No Establishment Clause" in the United States Constitution.[62] The European Convention also lacks a separate, explicit provision governing the relations of religious communities and the state.[63]

While the Convention's religious freedom guarantees have always held ample potential, they were largely dead letter for the first forty years, generating little sturdy case law on the merits before the *Kokkinakis* case of 1993.[64] But

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[56] Convention, *supra* note 2, art. 9, ¶¶ 1–2.

[57] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, *opened for signature* Mar. 20, 1952, 213 U.N.T.S. 262 (entered into force May 18, 1954) [hereinafter Convention Protocol No. 1].

[58] Convention, *supra* note 2, art. 8.

[59] *Id.* art. 10.

[60] *Id.* art. 11.

[61] *Id.* art. 14.

[62] *See generally* NO ESTABLISHMENT OF RELIGION: AMERICA'S ORIGINAL CONTRIBUTION TO RELIGIOUS LIBERTY (T. Jeremy Gunn & John Witte, Jr. eds., 2012). *But see* JEROEN TEMPERMAN, STATE-RELIGION RELATIONSHIPS AND HUMAN RIGHTS LAW: TOWARDS A RIGHT TO RELIGIOUSLY NEUTRAL GOVERNANCE 2–4 (2010) (arguing that contemporary human rights norms imply limits on state-religion identification).

[63] The same is true of the Charter of Fundamental Rights of the European Union. Charter, *supra* note 13.

[64] The European Court of Human Rights (and its predecessors) has found at least fifty-nine violations of Article 9—the first in 1993 and most of them in the past decade. *See* COUNCIL OF EUR., OVERVIEW: 1959–2014 ECHR 1, 6–7 (2015), http://www.echr.coe.int/Documents/Overview_19592014_ENG.pdf (compiling court statistics). For the early case law, see THE CHANGING NATURE OF RELIGIOUS RIGHTS UNDER INTERNATIONAL LAW (Malcolm D. Evans, Peter Petkoff & Julian Rivers eds., 2015); CAROLYN EVANS, FREEDOM OF RELIGION

since then, the ECtHR has issued judgments on the merits in some 150 cases involving religious freedom, including almost a score of them in the form of Grand Chamber judgments that carry ample authority.[65] These cases have come from a remarkable variety of countries—from Turkey to Ireland, from Finland to Cyprus—with strikingly different legal regimes and a wide range of local religion-state relations.[66]

Through its cases, the Strasbourg Court has developed a nuanced jurisprudence of religious freedom. It emphasizes religion as "one of the most vital elements that go to make up the identity of believers and their conception of life."[67] It appreciates that religious culture and pluralism are vital for "the society as a whole."[68] Moreover, the Court has distilled the crucial aspects of religious freedom, namely freedom to believe, to manifest one's religion, and to associate for religious purposes, thereby identifying the individual and the collective components of religion.[69] Despite the initial individualist focus of the European Convention when passed in 1950, the ECtHR of late has emphasized that:

> [T]he autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. The State's duty of neutrality and impartiality, as defined in the [ECtHR's] case-law, is incompatible with any power on the State's part to assess the legitimacy of religious beliefs.[70]

The Strasbourg Court, however, has rather weak powers. Individuals usually file claims in the Court against their home State only after exhausting all their existing domestic remedies in their home State. Their claim is that the Member State failed to comply with the Convention and violated their rights.[71] A new

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UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2001); Carolyn Evans, *Religion and Freedom of Expression*, *in* RELIGION & HUMAN RIGHTS: AN INTRODUCTION 188 (John Witte, Jr. & M. Christian Green eds., 2012); T. Jeremy Gunn, *Adjudicating Rights of Conscience Under the European Convention on Human Rights*, *in* 2 RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 305 (Johan D. van der Vyver & John Witte, Jr. eds., 1996).

[65] For a complete list of cases through 2015, see EUR. CT. OF HUM. RTS., GUIDE ON ARTICLE 9 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: FREEDOM OF THOUGHT, CONSCIENCE, AND RELIGION 1, 70–80 (2015), https://www.echr.coe.int/Documents/Guide_Art_9_ENG.pdf.

[66] Pin, *supra* note 19, at 605–06.

[67] Jehovah's Witnesses of Moscow v. Russia, App. No. 302/02, ¶ 99 (June 10, 2010), http://hudoc.echr.coe.int/eng?i=001-99221.

[68] Christopher McCrudden, *Religion, Human Rights, Equality and the Public Sphere*, 13 ECCLESIASTICAL L.J. 26, 32 (2011).

[69] *Id.* at 27.

[70] *Jehovah's Witnesses of Moscow*, App. No. 302/02 at ¶ 99.

[71] Convention, *supra* note 2, art. 34.

Protocol allows the trial courts of Member States to request a preliminary opinion from the ECtHR on the correct interpretation of a Convention right that might be at issue.[72] But not many Member States have adhered to this Protocol, and it is hard to foresee what its impact will be.[73] Almost all religious freedom cases before the Court have gone through the entire and often lengthy appeal process in the domestic courts before the cases are finally filed in Strasbourg.

Even if the Court finds a rights violation, the effects of its rulings are weak. The States that are party to the European Convention have a specific obligation to comply with the ECtHR's rulings and to remove the reasons for the injustice as far as it is possible. But a State's compliance with the ECtHR's rulings is basically left to their good will, and many Member States ignore the Court's rulings with legal impunity.[74] ECtHR cases are thus only soft laws that depend upon persuasion, not command, and on a willingness of State Members to reform their laws to protect their reputations as respectful of human rights, including religious freedom rights.

Even as soft law, however, the ECtHR's jurisprudence has high respect both within and beyond the Council of Europe.[75] Some Member State legislatures and courts have reformed and applied their laws in accordance with its rulings.[76] And the Court's general principles and protections of religious freedom are often regarded as exemplary.[77] Moreover, this soft law has paved the way for the CJEU, which has drawn extensively from the ECtHR. The CJEU has started forging hard law on religious freedom out of the soft law in the ECtHR's judgments.

B. The Court of Justice of the European Union

The CJEU is the judicial organ of the European Union. Founded in the 1950s, the EU covers only some of the territory within the Council of Europe—twenty-seven countries and an estimated 446 million people after Brexit (500 million before Brexit in 2020).[78]

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[72] Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, *opened for signature* Oct. 2, 2013, C.E.T.S. No. 214 (entered into force Aug. 1, 2018).

[73] *Details on Treaty No. 214*, COUNCIL OF EUR., https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/214 (last visited Dec. 22, 2020) (showing that only ten countries have ratified the protocol).

[74] Gerards, *supra* note 7, at 22.

[75] *See* COURTNEY HILLEBRECHT, DOMESTIC POLITICS AND INTERNATIONAL HUMAN RIGHTS TRIBUNALS: THE PROBLEM OF COMPLIANCE 11 (2014) ("[T]he ECtHR has a 49 percent compliance rate, which is remarkably high for an international tribunal.").

[76] *Id.* at 14.

[77] Durham & Kirkham, *supra* note 22, at 2.

[78] *EU in Figures*, EUR. UNION, https://europa.eu/european-union/about-eu/figures/living_en (last visited

The CJEU is composed of a General Court and a Court of Justice.[79] These two tribunals have discrete competence, with the latter functioning also as court of appeal from the General Court's judgments.[80] Most religious freedom cases have been decided directly by the Court of Justice, which operates through ten Chambers and reserves for the Grand Chamber the most important cases.[81] The CJEU normally employs an Advocate General (AG), who is a member of the CJEU, although not a judge.[82] The AG typically submits a written opinion with a detailed explanation of the case and a reasoned legal reflection of the best interests of the EU in the case.[83] The AG's opinion often shapes the CJEU's judgment, whose rulings tend to be succinct and issued without dissenting or concurring opinions.[84]

While the ECtHR issues soft law that depends on voluntary compliance by individual Member States of the Council of Europe, the CJEU issues hard law that is automatically binding in all EU states. Its judgments override domestic legislation and are immediately applicable by domestic judges. The CJEU spells out EU policy and mandates, with local enforcement of EU law done by the Member States themselves.

The CJEU operates primarily through the "preliminary procedure."[85] When a domestic judge is confronted with a controversy that involves interpretation of applicable EU law, the judge requests the CJEU to issue a ruling to dispel the interpretive doubt. Once the ruling is issued, the domestic judge resumes the local proceeding and adjudicates according to the CJEU's direction.[86] When directed, the domestic judge applies EU law instead of domestic law.[87] This "preliminary procedure" thus leaves the Member States' compliance with EU law both to the CJEU and domestic judges. By enforcing EU law, even at the

Dec. 22, 2020).

[79] *Court of Justice of the European Union (CJEU)*, EUR. UNION, https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en#composition (last visited Dec. 22, 2020).

[80] *Id.*

[81] *Court of Justice: Composition of Chambers*, CT. JUST. EUR. UNION, https://curia.europa.eu/jcms/jcms/Jo2_7029/en/ (last visited Dec. 22, 2020).

[82] Statute of the Court of Justice of the European Union, art. 49 (May 1, 2019), https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/tra-doc-en-div-c-0000-2016-201606984-05_00.pdf.

[83] *Id.*

[84] *Id.*

[85] Giulio Itzcovich, *The European Court of Justice*, *in* COMPARATIVE CONSTITUTIONAL REASONING 277, 278 (András Jakab, Arthur Dyevre & Giulio Itzcovich eds., 2017); *see Preliminary Ruling Proceedings — Recommendations to National Courts*, EUR-LEX (Oct. 31, 2017), http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:l14552.

[86] PAUL P. CRAIG & GRÁINNE DE BÚRCA, EU LAW 382 (5th ed. 2011).

[87] *Id.* at 362.

expense of domestic legislation, local domestic judges act in effect as EU judges, amplifying the effect and effectiveness of the CJEU.[88]

Fundamental rights protection was initially not part of the CJEU's mission. The European Union was born out of the European Community of Carbon and Steel, the European Economic Community, and the European Agency for Atomic Energy, all vital cooperative arrangements created in the aftermath of World War II. The CJEU was accordingly focused on cultivating the cooperation of these and other European communities and fostering economic freedoms and equal opportunities in a free and unified European market.[89]

In the 1990s, however, the EU took on the language and the narrative of rights more directly. In 2000, it adopted the Charter of Fundamental Rights of the European Union, and in 2010 incorporated it into the EU Treaty and synced it with the earlier European Convention enforced by the ECtHR: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."[90] Accordingly the new EU Charter tracks many of the rights provisions of the Convention, including those on religious freedom.

Article 10 of the Charter echoes Article 9 of the Convention, while adding an express conscientious objection clause:

> 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 recognised, in accordance with the national laws governing the exercise of this right.[91]

Similarly, in Article 14, the Charter protects the freedom of education, including "the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions."[92] Article 21 issues a sweeping prohibition on discrimination,

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[88] Anthony Arnull, *Judicial Dialogue in the European Union*, *in* PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW 118–19 (J. Dickson & Pavlos Eleftheriadis eds., 2012).

[89] Consolidated Version of the Treaty on European Union, Oct 26, 2012, 2012 O.J. (C 326) 17.

[90] *Id.* at 19.

[91] Charter, *supra* note 13, art. 10.

[92] *Id.* art. 14.

including religious discrimination.[93] Finally, Article 22 proclaims that "[t]he Union shall respect cultural, religious and linguistic diversity."[94] Several important decided or pending CJEU cases are based on further EU laws that protect religious freedom. A 2000 EU Directive, for example, prohibits "direct" and "indirect" religious discrimination in the workplace.[95]

The CJEU has explicitly worked to integrate the religious freedom protections of the 1950 European Convention of Human Rights with the newer 2010 EU Charter of Fundamental Rights as well as EU legislation.[96] In so doing, the Court has often started with relevant ECtHR case law, picking up where the ECtHR left off and then casting its rulings in the hard law terms with which it operates. If this pattern continues, the CJEU will play an increasingly vital role in integrating religious freedom protections and shaping religion-state relations in Europe, at least in the areas where religion intersects with economic freedom, labor relations, and social welfare, which are the Court's primary focus.

III. THE CASES ON RELIGIOUS FREEDOM IN THE TWO COURTS

The ECtHR has touched on Article 9 in nearly 950 cases, and some 150 of these cases have involved judgments on the merits of religious freedom.[97] While this Court has weak enforcement mechanisms that depend on voluntary compliance by Member States, these cases have set out important religious freedom principles and precepts that have helped shape European legal culture as well as the constitutional laws of some Member States of the Council of Europe. By contrast, the CJEU entered the religious freedom field decisively only in 2017, but it has already issued a dozen cases on religious freedom.[98]

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[93] *Id.* art. 21.

[94] *Id.* art. 22.

[95] Council Directive 2000/78, art. 2, 2000 O.J. (L 303) 16, 16 (EC) [hereinafter Council Directive 2000/78].

[96] Philippa Watson & Peter Oliver, *Is the Court of Justice of the European Union Finding Its Religion?*, 42 FORDHAM INT'L L.J. 847, 850–51 (2019).

[97] HUDOC DATABASE, https://hudoc.echr.coe.int/eng#{"article":["9","9+P1-2","9-1","9-2"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"]} (last visited Dec. 22, 2020).

[98] Case C-157/15, Achbita v. G4S Secure Sols. NV, 2017 WL CELEX 62015CJ0157 (Mar. 14, 2017); Case C-188/15, Bougnaoui v. Micropole SA, 2017 WL CELEX 62015CJ0188 (Mar. 14, 2017); Case C-414/16, Egenberger v. Evangelisches Werk für Diakonie und Entwickiung eV, 2018 WL CELEX 62016CJ0414 (Apr. 17, 2018); Case C-68/17, IR v. JQ, 2018 WL CELEX 62017CJ0068 (Sept. 11, 2018); Case C-25/17, Tietosuojavaltuutettu, 2018 WL CELEX 62017CJ0025 (July 10, 2018); Case C-193/17, Cresco Investigation GmbH v. Achatzi, 2019 WL CELEX 62017CJ0193 (Jan. 22, 2019); Case C-74/16, Congregación de Escuelas Pías Provincia Betania v. Ayuntamiento de Getafe, 2017 WL CELEX 62016CJ0074 (June 27, 2017); Case C-497/17, Œuvre d'assistance aux bêtes d'abattoirs v. Ministre de L'Agriculture et de l'Alimentation, 2019 WL CELEX No. 62017CJ0497 (Feb. 26, 2019); Case C-426/16, Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen VZW v. Gewest, 2018 WL CELEX No. 62016CJ0426 (May 29, 2018); Case C-56/17,

While the issues addressed in these cases have been quite narrow and the decisions have been based more on EU statutes than on EU Charter rights, these CJEU cases are influential because they are automatically binding law on all Member States of the EU.

What follows is an analysis of the two Courts' case law in the field, arranged under the major principles of religious freedom set out principally in the identical language of Article 9 of the Convention and Article 10 of the Charter: "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."[99] Article 9 adds a clear limitations clause, absent from Article 10:

> Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.[100]

After working through the clusters of major cases in this Part, we distill the main principles of religious freedom on offer in both these pan-European courts, and the emerging tensions between them. Our main findings are: (1) freedom of religion, freedom from religion, and freedom to manifest one's religion are now safely within the radar of the Strasbourg Court and of the Luxembourg Court; (2) such rights inhere in all human beings, no matter their citizenship or any other legal status; and (3) religious organizations are also protected under the European Convention and EU law. On the other hand, (4) religious freedom is not necessarily privileged above any other fundamental rights—it can and must be balanced with other competing rights and interests; (5) the inner life and working of religious organizations tends to be more heavily scrutinized by the CJEU than the ECtHR; (6) religious freedom claims tend to lose when the ECtHR grants a "margin of appreciation" to Member States and the CJEU calls for religious "neutrality"; and (7) those losses have fallen disproportionately of late on newly arrived Muslims and traditional Christians.

Bahtiyar Fathi v. Predsedatel na Darzhavna agentsia za bezhantsite, 2018 WL CELEX No. 62017CJ0056 (Oct. 4, 2018).

[99] Convention, *supra* note 2, art. 9, ¶ 1; Charter, *supra* note 13, art. 10.

[100] Convention, *supra* note 2, art. 9, ¶ 2.

A. Rights of Thought, Conscience, and Belief

Article 9 of the European Convention protects not just "religion" but also "thought," "conscience," and "belief."[101] Like other national and international tribunals, the ECtHR has used this more expansive language to provide "religious freedom" protections to theists and nontheists, atheists and agnostics, free thinkers and skeptics, new religions and ancient traditions alike.[102] The ECtHR has placed a high premium on religious "pluralism" as a fundamental good for democratic societies, and insisted that conflicts between religions, or between religion and nonreligion, be resolved in a way that tolerates all peaceable forms of religion and belief in the community. As the Court put it in 2007: "[T]he role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other. This State role is conducive to public order, religious harmony and tolerance in a democratic society."[103] In a 2013 case, the ECtHR stressed further "the positive obligation on the State authorities to secure the rights under Article 9," even when they are being violated by another private party rather than by the State.[104]

Article 9 further protects a person's right both to hold religious beliefs in private and to manifest those beliefs peaceably in public. The ECtHR has treated the "internal right to believe" much like European and North American national courts have treated the liberty of conscience.[105] Several ECtHR cases have made clear that this includes each person's right to accept, reject, or change his or her thoughts, beliefs, or religious affiliation without involvement, inducement, or impediment of the state.[106] It protects a person from pressure to reveal his or her religious identity or beliefs to the state.[107] It protects military personnel from

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[101] *See also* The International Covenant on Civil and Political Rights, art. 18, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (providing similar protections); Convention, *supra* note 2, art. 9, ¶ 1.

[102] Convention, *supra* note 2, art. 9.

[103] Members of the Gldani Congregation v. Georgia, Eur. Ct. H.R. ¶ 132 (2007), http://hudoc.echr.coe.int/eng?i=001-80395 (citing Refah Partisi (the Welfare Party) v. Turkey, 2003-II Eur. Ct. H.R. 267; Serif v. Greece, 1999-IX Eur. Ct. H.R. 73); *see also* Kuznetsov v. Russia, Eur. Ct. H.R. ¶ 62 (2007), http://hudoc.echr.coe.int/eng?i=001-78982 (finding an Article 9 violation for a state's failure to prosecute officials who had illegally broken up a Jehovah's Witness Sunday worship service).

[104] Eweida v. United Kingdom, 2013-I Eur. Ct. H.R. 215, 254, ¶ 84.

[105] *See* EUR. PARLIAMENTARY RSCH. SERV., FREEDOM OF CONSCIENCE AROUND THE WORLD: BRIEFING (2019), http://www.europarl.europa.eu/RegData/etudes/BRIE/2019/642277/EPRS_BRI(2019)642277_EN.pdf.

[106] Kokkinakis v. Greece, 260-A Eur. Ct. H.R. (ser. A) at ¶¶ 56, 74 (1993).

[107] Işik v. Turkey, 2010-I Eur. Ct. H.R. 341, 356, ¶ 41. *But see* Wasmuth v. Germany, App. No. 12884/03, ¶¶ 50–51 (2011), http://hudoc.echr.coe.int/eng?i=001-103536.

being forced to discuss religion with their superior officers.[108] It protects persons from being forced to swear a religious oath in order to take political office, to testify in court, or to receive a state benefit or professional license.[109] As the ECtHR put it in 2010: "State authorities are not entitled to intervene in the sphere of an individual's freedom of conscience and to seek to discover his or her religious beliefs or oblige him or her to disclose such beliefs."[110]

1. Conscientious Objection and the Military

Many European countries now use their own constitutional guarantees of "liberty of conscience" and the "internal right to believe" as grounds for granting pacifists exemption from compulsory military service.[111] An explicit right to conscientious objection was not included in Article 9 of the 1950 Convention, nor was it included in the 1948 Universal Declaration of Human Rights, whose religious freedom guarantee was largely echoed in the Convention. Conscientious objection to military service was a vexed human rights topic in the immediate aftermath of the two world wars, and it only gradually came to be recognized by individual states.[112] The European Convention itself, while prohibiting forced labor in general in Article 4, made clear that this provision did not include "any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service."[113] It was only in 1993 that the United Nations Human Rights Committee first declared to the human rights world that "the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief."[114] The Committee urged all nation states worldwide to recognize this right "by law or practice," ensuring "there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs [and] . . . no discrimination against conscientious objectors because they have failed to perform military service."[115]

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[108] Larissis v. Greece, 1998-I Eur. Ct. H.R. 329, 362.

[109] Alexandridis v. Greece, App. No. 19516/06, ¶¶ 38, 41 (2008), http://hudoc.echr.coe.int/eng?i=001-85189; Buscarini v. San Marino, 1999-I Eur. Ct. H.R. 605, 616–18, ¶¶ 36, 39–40.

[110] *Işik*, 2010-I Eur. Ct. H.R. at 356, ¶ 41; *see also* Dimitras v. Greece, App. Nos. 42837/06, 3269/07, 35793/07 & 6099/08, ¶¶ 46, 64 (2010), http://hudoc.echr.coe.int/eng?i=001-99014.

[111] Brief for Amnesty International Supporting the Right to Conscientious Objection to Military Service as Amici Curiae, Constitutional Court [Const. Ct.], 2014Hun-Ga8, 2013Hun-Ga5, 13, 23, 27 & 2012Hun-Ga17 (S. Kor.), https://www.amnesty.org/download/Documents/8000/pol310012014en.pdf.

[112] Dorothy Estrada Tanck, *Civil Resistance in Public International Law*, 35 ANUARIO ESPANOL DE DERECHO INTERNACIONAL 373, 373–77 (2019).

[113] Convention, *supra* note 2, art. 4, ¶ 3(b).

[114] Hum. Rts. Comm., Gen. Comment Adopted by the Hum. Rts. Comm. Under Art. 40, ¶ 4, of the Int'l Covenant on Civ. & Pol. Rts. on its Forty-Eighth Session, U.N. Doc. CCPR/C/21/Rev.1/Add.4, at 4, ¶ 11 (1993).

[115] *Id.*

Accordingly, in 2010, the European Union included an explicit right to conscientious objection in Article 10 of the Charter of Fundamental Rights.[116]

It was only with *Bayatyan v. Armenia* (2011)[117] that the ECtHR read this right into Article 9 of the European Convention. In that case, the Court granted relief to a Jehovah's Witness who was imprisoned for failing to serve in the military upon his conscription; noncombat options were unavailable at the time. "Article 9 did not explicitly refer to a right to conscientious objection," the ECtHR noted, ignoring Article 4's explicit denial of this right.[118] The ECtHR, however, found that "a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or deeply and genuinely held religious or other belief constituted a conviction or belief of sufficient cogency, seriousness, cohesion, and importance to attract the guarantees of Article 9."[119] It helped the *Bayatyan* Court that "the overwhelming majority" of European state legislatures by that time had already granted conscientious objection status to pacifists, thereby generating a consensus among the Member States.[120] In the absence of a legislative accommodation by a Member State, Article 9 protects the rights of pacifism, the ECtHR ruled.[121] The Court ruled similarly in a more recent Jehovah's Witness case in *Papavasilakis v. Greece* (2016).[122] There, a man invoked his upbringing as a Jehovah's Witness as grounds for his conscientious objection to military service.[123] Even though he no longer identified as a Witness, he still believed in pacifism.[124] The ECtHR held that since Greece had not properly adjudicated this claim to conscientious objection, it had violated his Article 9 rights.[125]

In more recent cases, however, the ECtHR has made clear that Article 9 protects conscientious objectors only if their objections are rooted in religious beliefs that are in serious and insurmountable conflict with state obligations to perform military service. In *Enver Aydemir v. Turkey* (2016),[126] the Court

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116 Charter, *supra* note 13, art. 10, ¶ 2.

117 Bayatyan v. Armenia, 2011-IV Eur. Ct. H.R. 1.

118 *Id.* at 4.

119 *Id.*

120 *See* Compilation of Gen. Comments and Gen. Recommendations Adopted by Hum. Rts. Treaty Bodies, Int'l Hum. Rts. Instruments, U.N. Doc. HRI/GEN/1/Rev.1, at 1, 38, ¶ 11 (1994).

121 *Bayatyan*, 2011-IV Eur. Ct. H.R. at 5.

122 Papavasilakis v. Greece, App. No. 66899/14 (Sept. 15, 2016), http://hudoc.echr.coe.int/eng?i=001-166850.

123 *Id.* ¶ 8–9.

124 *Id.* ¶ 11.

125 *Id.* ¶ 50.

126 Aydemir v. Turkey, App. No. 26012/11 (July 9, 2016), http://hudoc.echr.coe.int/eng?i=001-163940. The ECtHR recently reaffirmed the necessity that the objector substantiate her claim in *Dyagilev v. Russia*, App.

rejected the claim of a man who declared himself a conscientious objector and refused to perform his military service for the Turkish secularist government, though he said he would be willing to serve in the military if the Turkish government was Islamic.[127] The ECtHR judged the man's objection to be political, not religious, in inspiration and thus not deserving of Article 9 protection.[128]

2. Conscientious Objection in the Workplace

The ECtHR dealt with conscientious objection in the field of non-compulsory work with the signature case of *Eweida and Others v. The United Kingdom* (2013).[129] This ruling involved claims by four different employees who sought accommodation for their religious beliefs and their manifestation in practice.[130] Two of these employees raised freedom of conscience claims against private and state employers who insisted they work with same-sex parties.[131] In one case, Gary McFarlane worked as a consultant for a national private organization that provided sex therapy.[132] "Directly motivated by his orthodox Christian beliefs about marriage and sexual relationships," he believed that same-sex relations were sinful, and he therefore refused to provide his therapy services to same-sex couples.[133] The organization dismissed him, alleging that he had failed to comply with its code of nondiscrimination on the basis of sexual orientation.[134] McFarlane lost his domestic claim that he had been discriminated against on religious grounds,[135] and he thus sued in the Strasbourg Court under Article 9 and 14 of the Convention. The ECtHR ruled against McFarlane.[136] The Court did not deny that he suffered infringement of his Article 9 religious freedom, but found that, given his employer's explicit policy of nondiscrimination "in securing the rights" of same-sex parties and all others, the State had an ample margin of appreciation to strike a balance in favor of his employer.[137]

No. 49972/16 (Mar. 10, 2020). An appeal before the Grand Chamber is pending at the moment.

127 *Aydemir*, App. No. 26012/11 ¶ 79–80.

128 *Id.* ¶ 83.

129 Eweida v. United Kingdom, 2013-I Eur. Ct. H.R. 215, 223 ¶ 3.

130 *Id.*

131 *Id.* at 229–36.

132 *Id.* at 232.

133 *Id.* at 261.

134 *Id.* at 232–36.

135 *Id.* at 235–36.

136 *Id.* at 262.

137 *Id.* at 261–62.

The better-known claimant in the *Eweida* case was Lilian Ladele. She was an employee in a London borough's registrar office.[138] She also held the "orthodox Christian view that marriage is the union of one man and one woman for life. She believed that same-sex unions are contrary to God's will and that it would be wrong for her to participate in the creation of an institution equivalent to marriage between a same-sex couple."[139] Part of her job consisted in registering partnerships for the state. When the State introduced a same-sex domestic partnership option, she found that her Christian faith prevented her from participating in the establishment of such partnerships.[140] For a time, she sought and found a practical accommodation with her co-workers, who allowed her to avoid registering same-sex partnerships and to focus on other activities.[141] After her colleagues stopped covering for her, Ladele requested a formal accommodation from her employer, who refused.[142] She sued and lost in English courts for religious discrimination and violation of her conscience and beliefs.[143] After exhausting her domestic appeals, she took her case to Strasbourg, arguing that her employer's failure to accord her a conscientious objection constituted religious discrimination under Articles 9 and 14 of the Convention.[144]

The ECtHR now rejected as untenable its earlier position that there was no Article 9 violation if the applicant had a way to "circumvent a limitation placed on his or her freedom to manifest religion or belief."[145] Such an approach had been criticized for allowing employers to refuse accommodations to their employees' religious needs.[146] Rather than "holding that the possibility of changing jobs would negate any interference with the right," the Court reasoned, "the better approach" was "to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate."[147] On Ms. Ladele's side of the balance, the Court recognized that this new policy of registering same-sex partnerships had "a particularly detrimental impact on her because of her religious beliefs."[148] She was fired from a job that she had taken

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138 *Id.* at 230.
139 *Id.* at 259.
140 *Id.* at 230–31.
141 *Id.*
142 *Id.*
143 *Id.* at 232.
144 *Id.* at 230–31.
145 *Id.* at 253.
146 John Finnis, *Equality and Religious Liberty: Oppressing Conscientious Diversity*, *in* RELIGIOUS FREEDOM AND GAY RIGHTS: EMERGING CONFLICTS IN THE UNITED STATES AND EUROPE 33 (Timothy Samuel Shah, Thomas F. Farr & Jack Friedman eds., 2016).
147 *Eweida*, 2013-I Eur. Ct. H.R. at 254.
148 *Id.* at 259–60.

when there was no conflict between those beliefs and her job responsibilities.[149] On the other hand, the Court noted that "the local authority's policy aimed to secure the rights of others,"[150] including same-sex parties. In balancing these conflicting rights, the Court concluded that the State deserved an ample margin of appreciation and could fire Ms. Ladele with impunity.[151] The upshot of these twin *Eweida* cases is that religious conscience or belief can be protected, but only if its expression or manifestation threatened or caused no harm to others.

Squaring religious freedom claims with same-sex rights and liberties has been a difficult exercise for European states and other countries, and it is likely to remain so. The Old Continent itself is split between liberal Western and more traditional Central and Eastern European perspectives on same-sex matters. The Netherlands was the first country in the world to legalize same-sex marriage in 2001.[152] Northern Ireland was the latest to do so in mid-2019.[153] The main holdout in Western Europe is Italy, which introduced only a civil partnership option for same-sex couples in 2016.[154] Most Central and Eastern European countries, by contrast, make no legal provision for same-sex marriage, and a number of them are actively opposed to same-sex unions of any sort.[155] Accommodating the wide array of opinions on same-sex relations and their compatibility with countervailing religious freedom and liberty of conscience claims will be a formidable challenge for the Strasbourg and Luxembourg Courts in the years ahead.

3. Religion and Education, Students and Parents

The ECtHR has also repeatedly addressed claims by students and parents seeking freedom from religious coercion in schools in violation of their "thought, conscience, and belief." These cases have decidedly mixed results. In an early case of *Valsamis v. Greece* (1996), the ECtHR provided no relief to a Jehovah's Witness student who was punished for not participating in a school parade celebrating a national holiday in commemoration of Greece's war with Italy.[156] The student had claimed conscientious objection to participation in this

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149 *Id.* at 260.

150 *Id.*

151 *Id.* at 254, 260.

152 Michael Lipka & David Masci, *Where Europe Stands on Gay Marriage and Civil Unions*, PEW RSCH. CTR. (Oct. 28, 2019), https://www.pewresearch.org/fact-tank/2019/10/28/where-europe-stands-on-gay-marriage-and-civil-unions/.

153 *Id.*

154 *Id.*

155 *Id.*

156 Valsamis v. Greece, 1996-VI Eur. Ct. H.R. 2312, 2315.

celebration of warfare.[157] The school had already accommodated his conscientious objections to religious-education classes and to participation in the school's Orthodox mass, but the school did not think he warranted an exemption from the parade.[158] The ECtHR agreed. Participation in a one-time parade, far removed from the field of military battle, the Court concluded, did not "offend the applicants' pacifist convictions" enough to warrant an exemption.[159]

In *Konrad and Others v. Germany* (2006), the ECtHR rejected the rights claim of parents to homeschool their primary-school-aged children.[160] The Romeikes were conservative Christians who opposed the German public school's liberal sex education courses, its use of fairy tales with magic and witchcraft, and its tolerance of physical and psychological violence among students.[161] In the absence of available private schools, they wanted to teach their young children at home at their own expense, using the same curriculum as state-approved private schools, but with supplemental religious instruction.[162] Germany denied their request, citing its constitutionally based system of mandatory school attendance.[163] The parents appealed, on behalf of themselves and their children. They claimed violations of their rights to privacy, equality, and religious freedom under the Convention.[164] They also pointed to the Protocol to Article 9 that explicitly identifies "the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."[165]

The ECtHR ruled for Germany.[166] The Protocol to Article 9, the Court pointed out, begins by saying that "[n]o person shall be denied the right of education."[167] "It is on to this fundamental right that is grafted the right of parents to respect for their religious and philosophical convictions."[168] The child's right to education came first, and the Romeike children were too young

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157 *Id.*

158 *Id.* at 2323.

159 *Id.* at 2324–26; *see also* Efstratiou v. Greece, 1996-VI Eur. Ct. H.R. 2347 (finding no violation of Article 9 when a Greek Orthodox school punished a Jehovah's Witness student for her refusal to participate in a parade honoring the military).

160 Konrad v. Germany, 2006-XIII Eur. Ct. H.R. 355, 360.

161 *Id.* at 359.

162 *Id.* at 359–60.

163 *Id.* at 359.

164 *Id.* at 363.

165 Convention Protocol No. 1, *supra* note 57, art. 2.

166 *Konrad*, 2006-XIII Eur. Ct. H.R. at 366, ¶ 2.

167 Convention Protocol No. 1, *supra* note 57, art. 2.

168 *Konrad*, 2006-XIII Eur. Ct. H.R. at 364.

to waive that right or to understand the implications of that waiver for their later democratic capacities.[169] Germany's interest and duty was in protecting each child's right to education and "safeguarding pluralism in education, which is essential for the preservation of the 'democratic society' . . . . In view of the power of the modern State, it is above all through State teaching that this aim must be realized."[170] Germany has determined that in a democratic society "not only the acquisition of knowledge but also integration into and first experiences of society are important goals in primary-school education. . . . [T]hose objectives could not be met to the same extent by home education, even if it allowed children to acquire the same standard of knowledge."[171] Moreover, the parents could provide their children with the religious instruction they desire outside of school time.[172] With no European consensus on homeschooling options, the ECtHR concluded, Germany must enjoy a "margin of appreciation" in how best to educate its citizens.[173]

The German police thereafter forcibly transported the Romeike children to the public school, and their parents faced fines and potential loss of custody. In response, the family moved to the United States, which has long allowed homeschooling in many of its states.[174] The U.S. immigration court granted them asylum, holding that the German policy against homeschooling was "utterly repellant to everything we believe in as Americans."[175] The United States Court of Appeals for the Sixth Circuit, however, reversed, and the United States Supreme Court rejected the Romeike appeal.[176] The family thus faced deportation, but the Department of Homeland Security decided to give their case "indefinite deferred action status."[177] Congress now has under consideration the Asylum Reform and Border Protection Act to provide relief in such cases.[178]

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169 *Id.*

170 *Id.*

171 *Id.* at 365.

172 *Id.* at 362.

173 *Id.* at 365.

174 Billy Gage Raley, *Safe at Home: Establishing a Fundamental Right to Homeschooling*, 2017 BYU EDUC. & L.J. 59, 59, 64 (2017).

175 Uwe Andreas Josef Romeike, A 087 368 600, IJ Oral Decision at 16 (Jan. 26, 2010), http://www.becketfund.org/wp-content/uploads/2013/06/Oral-Decision-of-Immigration-Judge-in-Romeike-case.pdf.

176 Romeike v. Holder, 718 F.3d 528 (6th Cir. 2013), *cert. denied*, 571 U.S. 1244 (2014). In addition, the Board of Immigration Appeals sustained the Department of Homeland Security's appeal of the U.S. Immigration Court's decision, ordering the removal of the Romeike's to Germany. Uwe Andreas Josef Romeike, A 087 368 600, Board of Immigration Appeals Decision (May 4, 2012), https://s3.amazonaws.com/becketpdf/BIA-Ruling-on-Asylum.pdf.

177 Yujin Chun, *Courts Shall Not Rule on Homeschool Alone:* Romeike v. Holder *and the Intersection of Fundamental Rights and Asylum*, 2 CORNELL INT'L L.J. ONLINE 60, 61 (2014).

178 Asylum Reform and Border Protection Act, H.R. 3360, 116th Cong. § 21(a).

The ECtHR was more sympathetic to the claims of atheist and agnostic students and their parents who claimed religious coercion in the cases of *Folgerø and Others v. Norway* (2007) and *Grzelak v. Poland* (2010). *Folgerø* addressed a new Norwegian law requiring all public grade school and middle school students to take a course in "Christianity, Religion and Philosophy" ("KRL").[179] The law made no exceptions for non-Christian students.[180] Four students, whose families were professed humanists, objected that this policy forced them into religious instruction they could not abide.[181] The ECtHR agreed. It found that the State had not tailored its new law carefully enough to deal with students with different religious and nonreligious backgrounds.[182] "[N]otwithstanding the many laudable legislative purposes" in introducing this course, the ECtHR held, the material was not "conveyed in an objective, critical and pluralistic manner."[183] Moreover, the school's "refusal to grant the applicant parents full exemption from the KRL subject for their children gave rise to a violation" of the parents' rights to raise their child in their own faith, in this case atheism.[184]

Three years later, in *Grzelak*, a public grade school student in Poland, with agnostic parents, was properly exempted from mandatory religion classes in public school, as the *Folgerø* ruling had demanded.[185] But his only alternative to attending the religion classes was to spend unsupervised time in the school hallway, library, or club. His parents wanted him enrolled in an alternative course in secular ethics.[186] The school refused to offer such a special course for lack of enough teachers, students, and funds.[187] The school further marked his report card with a blank for "religion/ethics," and calculated his cumulative grade point average based on fewer credit hours.[188] The ECtHR found that these state actions violated both Articles 9 and 14 (prohibiting religious discrimination) of the Convention, for "[it] brings about a situation in which individuals are obliged—directly or indirectly—to reveal that they are non-believers."[189]

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179 Folgerø v. Norway, 2007-III Eur. Ct. H.R. 51, 58.
180 *Id.* at 61.
181 *Id.* at 59.
182 *Id.* at 100.
183 *Id.*
184 *Id.* at 101.
185 Grzelak v. Poland, App. No. 7710/02, ¶ 7 (Nov. 22, 2010), http://hudoc.echr.coe.int/eng?i=001-99384.
186 *Id.*
187 *Id.*
188 *Id.*
189 *Id.* ¶ 87.

In *Lautsi v. Italy* (2011), however, the ECtHR upheld Italy's longstanding policy of displaying crucifixes in its public school classrooms despite religious freedom objections.[190] In this case, an atheist mother of two public school children challenged Italy's policy as a form of coercion of Christian beliefs.[191] She argued that the presence of these crucifixes in public schools violated her and her children's rights to religious freedom and to a secular education guaranteed by Article 9 and its Protocol, and other provisions.[192] The ECtHR's Grand Chamber held in favor of Italy.[193] It recognized that the crucifix is a religious symbol, that atheism is a protected religious belief, and that public schools must be religiously neutral and free from religious coercion.[194] But the ECtHR held that the passive display of a crucifix in a public school classroom by itself was not a form of religious coercion—particularly when students of all faiths were welcome in public schools and were free to wear their own religious symbols.[195] The ECtHR held further that Italy's policy of displaying only the crucifix and no other religious symbol was not a violation of its obligation of religious neutrality, but an acceptable reflection of its majoritarian Catholic culture and history.[196] As Judge Bonello put it in his concurrence: "A court of human rights cannot allow itself to suffer from historical Alzheimer's. It has no right to disregard the cultural continuum of a nation's flow through time, nor to ignore what, over the centuries, has served to mold and define the profile of a people."[197] With European nations widely divided on whether and where to display various religious symbols, the ECtHR concluded, Italy must be granted a "margin of appreciation" to decide for itself how and where to maintain its traditions in school.[198]

4. Coercion and Religious Worship of Prisoners

The ECtHR has further made clear that a prisoner, though more limited in rights than a soldier or student, still has a right to be free from religious coercion and a basic right to peaceable religious worship without recrimination or

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190 Lautsi v. Italy, 2011-III Eur. Ct. H.R. 61, 63–64.

191 *Id.* at 68, 110.

192 *Id.* at 63, 68.

193 *Id.* at 97.

194 *Id.* at 95–97.

195 *Id.* at 95–96.

196 *Id.* at 96–97.

197 *Id.* at 103 (Bonello, J., concurring).

198 *Id.* at 96; *see also* Andrea Pin, *Public Schools, the Italian Crucifix, and the European Court of Human Rights: The Italian Separation of Church and State*, 25 EMORY INT'L L. REV. 95, 97–98 (2011) (exploring the conflict in *Lautsi* between the ECtHR's position and the Italian court's position on the relationship between church and state).

punishment.[199] The Court reiterated this longstanding position in the Grand Chamber case of *Mozer v. the Republic of Moldova and Russia* (2016), holding that prison authorities who had, for no stated reason, refused to allow a pastor and parents to visit a prisoner violated the Article 9 rights of the prisoner to exercise his faith in "community with others."[200]

The Court held similarly in *Korostelev v. Russia* (2020),[201] in protecting Korostelev, a Muslim held in a Russian penitentiary in solitary confinement. Prison officials subjected him to repeated reprimands for getting up from his bed to pray at night during the holy month of Ramadan. That conduct, officials argued, breached prison rules that required that detainees remain in their beds at night. The Russian government later argued that detainees had not only the right, but a duty to sleep at night.[202] The Court, however, found that Russia had violated Mr. Korostelev's freedom of conscience and worship under Article 9, as the limitation and reprimands that he suffered were not "necessary in a democratic society," as the Article requires.[203]

Not all such restrictions on prisoners, however, constitute coercion. In *Süveges v. Hungary* (2016),[204] for example, the ECtHR held that the authorities' refusal to allow a person under house arrest to attend a weekly worship service outside his home was not a violation of Article 9.[205] In this case, the ECtHR concluded, the restriction was prescribed by law, pursued a stated legitimate purpose of safety and security, was proportionate to that purpose, and was necessary in a democratic society.[206] After all, this claimant could still worship in his home with co-religionists and religious leaders coming to him, as they do with others who are shut-in because of injury, infirmity, or other limits on their movement. Here, the balance between state interests and private rights tipped in favor of the State.[207]

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199 Poltoratskiy v. Ukraine, 2003-V Eur Ct. H.R. 89, 129.

200 Mozer v. Republic of Moldova and Russia, App. No. 11138/10, ¶¶ 197–99 (Feb. 23, 2016), http://hudoc.echr.coe.int/eng?i=001-161055.

201 Korostelev v. Russia, App. No. 29290/10 (May 12, 2020), http://hudoc.echr.coe.int/eng?i=001-202429.

202 *Id.* ¶ 42.

203 *Id.* ¶ 65.

204 Süveges v. Hungary, App. No. 50255/12 (May 2, 2016), http://hudoc.echr.coe.int/eng?i=001-159764.

205 *Id.* ¶¶ 147, 157.

206 *Id.* ¶¶ 151–55.

207 *Id.* ¶ 156.

5. Religious Freedom for Refugees

The ECtHR has issued most of the cases alleging violations of thought, conscience, and belief based on Article 9 of the Convention. Recently, however, the CJEU has weighed in on cases dealing with claims of religious refugees to coercion and real or threatened persecution in their home countries. These parties have sought protection both under applicable EU law and Article 10 Charter rights, and the CJEU has weighed in on these cases, drawing in part on ECtHR cases.

The 2012 CJEU case of *Y and Z*[208] turned on the interpretation of two articles of an EU Directive that set standards for the qualification and status of third country nationals or stateless persons as refugees.[209] *Y* and *Z* were the pseudonyms of two Ahmadi worshippers who had fled Pakistan seeking refuge in Germany, where they submitted asylum applications.[210] Local German officials denied their requests.[211] The Ahmadis sued under an EU Directive that defined a refugee as "a third country national who, owing to a well-founded fear of being persecuted for reasons of . . . religion is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself to the protection of that country."[212] The Advocate General's (AG) opinion for the CJEU was expansive in articulating the proper grounds and limits of such refugee claims.[213] The AG thought it essential that officials differentiate cases where a refugee applicant "migrates for personal reasons or to improve his living conditions or social status," from cases "where the individual suffers from a restriction of such severity as to deprive him of his most essential rights and he cannot avail himself of the protection of his country of origin."[214] In the AG's view, it was inadmissible to deny asylum or refugee status to applicants who could avoid persecution by renouncing their religious practices, for that violated the most essential rights of conscience.[215] Under EU law, *Y* and *Z* could not be expected to conceal their religious identities in order to avoid persecution:

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208 Joined Cases C-71 & 91/11, Bundesrepublik Deutschland v. Y, Z, CELEX No. 62011CJ0071 (Sept. 5, 2012).

209 *Id.* ¶¶ 80, 81; *see* Council Directive 2004/83 of Apr. 29, 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted, arts. 2(c), 9(1)(a), 2004 O.J. (L 304) 12, 14, 16 (EC) [hereinafter Council Directive 2004/83].

210 *Y, Z*, CELEX No. 62011CJ0071 ¶¶ 30–32.

211 *Id.* ¶ 32.

212 Council Directive 2004/83, *supra* note 209, at art. 2(c). 2004 O.J. (L 304) 12 (EC).

213 *Y, Z*, CELEX No. 62011CC0071 ¶¶ 33–69 (Apr. 19, 2012).

214 *Id.* ¶ 29.

215 *Id.* ¶ 106.

> In Pakistan, where Sunni Islam is the State religion and its followers represent the majority of the population, the Ahmadiyya community constitutes a religious minority, whose members are considered heretics. The law on blasphemy has strengthened . . . the Pakistan Penal Code by introducing the death penalty and the penalty of imprisonment for any individual who . . . insults the sacred name of the prophet Muhammad or the symbols and places associated with Islam. In addition, [the code makes] an offence punishable . . . for any individual member of the Ahmadiyya community who [among other things] professes his faith in public, or identifies it with Islam . . . or in any other way outrages Islam.[216]

The CJEU agreed. While not every "interference with the right to religious freedom guaranteed by Article 10(1) of the Charter constitutes an act of persecution requiring the competent authorities to grant refugee status,"[217] the CJEU argued, EU law protects both public and private expressions of religion.[218] Prohibitions on public worship and threats of repression and punishment for those who do not follow the state's established religion can constitute persecution under EU law so long as they pose concrete, not theoretical, threats to an individual,[219] and so long as a public religious practice is of particular salience for the individual seeking refuge.[220]

In *Bahtiyar Fathi* (2018),[221] the CJEU further clarified how EU States should assess the claims of religious persecution of refugee applicants, now interpreting a new EU Directive.[222] Fathi was an Iranian Kurd, who applied for refugee protection while living in Bulgaria.[223] He did not identify as a member of a traditional religious community, nor did he submit evidence of his religious practice.[224] He identified himself simply as a "normal Christian with Protestant leanings."[225] He said he had been questioned and detained by Iranian officials for watching and calling into a program playing on a Christian channel that

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216 *Id.* ¶ 80.

217 *Y, Z*, CELEX No. 62011CJ0071, ¶ 58 (Sept. 5, 2012).

218 *Id.* ¶¶ 62–63.

219 *Id.* ¶ 69.

220 *Id.* ¶ 70.

221 Case C-56/17, Bahtiyar Fathi v. Predsedatel na Darzhavna agentsia za bezhantsite, CELEX No. 62017CJ0056 (Oct. 4, 2018).

222 *Id.* ¶¶ 99–101; *see* Directive 2011/95 of the European Parliament and of the Council of Dec. 13, 2011 on Standards For the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, For a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Ranted, 2011 O.J. (L 337) 9, 16 (EU).

223 *Fathi*, CELEX No. 62017CJ0056 ¶ 30.

224 *Id.* ¶ 73.

225 *Id.* ¶ 2.

Iranian law prohibited.[226] During his detention, he confessed his Christian faith.[227] Bulgarian authorities found his story of persecution "implausible," and they rejected his refugee application.[228] Fathi sued in a Bulgarian court, who then requested the CJEU to issue a preliminary ruling on: (1) what type of persecution triggered the right to refugee status, (2) how broad was the protection of religious belief accorded by EU laws, and (3) how should states judge the veracity of the asylum seeker's claim.[229]

First, the CJEU stated that the penalties that a convert would face in case of return to his home country had to be "applied in practice"[230] or consist of a real threat.[231] Second, the concept of "religion" in the EU Directive protecting refugees included public and private expressions of religion, "theistic, non-theistic and atheistic beliefs,"[232] and "both 'traditional' religions and other beliefs."[233] It covered "participation in" those various forms of religion "either alone or in community with others, or the abstention from, formal worship, which implie[d] that the fact that a person [wa]s not a member of a religious community [could not], in itself, be decisive in the assessment of that concept."[234] Third, the claimant had to "duly substantiate his claims as to his alleged religious conversion," going beyond mere "statements and no more relating to his religion beliefs or membership of a religious community."[235] The claimant had also to provide "coherent and plausible" statements, without running "counter to available specific and general information relevant to [the] case."[236] Overall, the claimant himself had to be credible.[237] The *Fathi* Court urged domestic authorities not to take too a narrow approach to the evidence provided by a claimant.[238] They were expected to consider the applicant's claim *in concreto*. They had to consider a variety of aspects of the claimant's faith, including his:

> religious beliefs and how he developed such beliefs, how he understands and lives his faith or atheism, its connection with the

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226 *Id.*
227 *Id.*
228 *Id.* ¶ 3.
229 *Id.* ¶ 4.
230 *Id.* ¶ 98.
231 *Id.* ¶ 83.
232 *Id.* ¶ 77.
233 *Id.* ¶ 80.
234 *Id.*
235 *Id.* ¶ 84.
236 *Id.* ¶ 87.
237 *Id.*
238 *Id.* ¶ 88.

> doctrinal, ritual or prescriptive aspects of the religion to which he states he is affiliated or from which he intends to distance himself, his possible role in the transmission of his faith or even a combination of religious factors and factors regarding identity, ethnicity or gender.[239]

This pair of cases provides a good framework to understand what the state and the refugee applicant owe each other according to EU law. The claimant must substantiate the claim that she has been or may be persecuted in her country of origin. The state, in turn, must thoroughly consider what it is about the religious belief, practice, or personality of the claimant that has or might trigger religious persecution. Without entering religious disputes, this approach tries to give a comprehensive reading of what can be considered religious persecution, while shortening the list of discriminatory practices that amount to persecution. The close attention paid by the CJEU to the ECtHR's case law in setting its Directive shows the extent to which pan-European jurisdictions are trying to secure their borders while providing shelter to persecuted people from third countries.

B. Regulation of the Public Manifestations of Religion

Article 9 of the European Convention protects not only the internal right to believe or change belief without coercion, conditions, or control by the state, but also the external right to manifest one's beliefs in public through worship, teaching, practice, and observance.[240] The freedoms of expression in Article 10 and of association in Article 11 offer complementary protections.[241] Article 9 further makes clear that the right to "manifest one's religion [in public]" is subject to regulation "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."[242] When a party claims interference with, violation of, or a burden on Article 9 and related rights, the Court will assess (1) whether there is, in fact, interference with that right; (2) whether this interference was based on law, rather than an arbitrary judgment; and (3) whether it was necessary in a democratic society. This last point is judged by whether the law (a) corresponds to a pressing social need; (b) is proportionate to the aim pursued; and (c) is justified by relevant, sufficient, or pressing reasons.[243]

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239 *Id.*

240 Convention, *supra* note 2, art. 9 ¶ 2.

241 *Id.* art. 10, 11.

242 *Id.*

243 *See* EUR. CT. OF HUM. RTS., *supra* note 65, at 18.

Article 10 of the European Charter has an identical guarantee of the right "to manifest religion or belief" but includes no explicit statement on the limitations to this right. But in practice, the CJEU uses the three-pronged proportionality test, which is a staple of adjudication in Continental Europe,[244] to judge all such rights claims: (1) whether a policy under scrutiny is appropriate for achieving a certain goal; (2) whether it is necessary for its achievement; and (3) whether it is commensurate to its purpose.

1. Proselytism and Its Legal Limits

In its earliest Article 9 case on point, *Kokkinakis v. Greece* (1993), the ECtHR upheld a person's right to share his faith, despite a Greek criminal law that prohibited proselytism.[245] A Jehovah's Witness, peaceably discussing his faith with a local Orthodox woman, was arrested and convicted under this statute.[246] He appealed, and the ECtHR found in his favor. Article 9, the Court reasoned, explicitly protects "freedom to manifest one's religion . . . in community with others" through "words and deeds" that express one's "religious convictions."[247] It protects "the right to try to convince one's neighbour, for example through 'teaching.'"[248] If that were not the case, Article 9's "'freedom to change [one's] religion or belief' . . . would be likely to remain a dead letter."[249] The State may regulate this missionary activity for the sake of security and protection of the rights of others. It may also outlaw "activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need; [or] the use of violence or brainwashing."[250] These factors, however, were not present in *Kokkinakis*, so he prevailed.[251]

By contrast, in *Larissis v. Greece* five years later, the ECtHR found no violation of the Article 9 rights of military officers who were convicted for proselytizing their military subordinates.[252] The officers were Pentecostal Christians; their subordinates were Greek Orthodox.[253] The officers repeatedly

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244 ALEC STONE SWEET & JUD MATHEWS, PROPORTIONALITY BALANCING & CONSTITUTIONAL GOVERNANCE: A COMPARATIVE & GLOBAL APPROACH 166, 175 (2019).

245 Kokkinakis v. Greece, 260-A Eur. Ct. H.R. (ser. A) (1993).

246 *Id.* at 3.

247 *Id.* at 13.

248 *Id.*

249 *Id.*

250 *Id.* at 17, ¶ 48.

251 *Id.* at 17, ¶ 49.

252 Larissis v. Greece, App. No. 23372/94 (Feb. 24, 1998), http://hudoc.echr.coe.int/eng?i=001-58139.

253 *Id.* ¶ 7.

engaged these soldiers in theological discussions while on duty, sent and read them sundry biblical and religious texts, and invited them repeatedly to visit or join the Pentecostal church, which one of the soldiers eventually accepted to the dismay of his family.[254] The officers were convicted of the crime of proselytism, defined by Greek law as "any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion (*eterodoxos*) with the aim of undermining those beliefs."[255] The officers were given brief prison sentences, later commuted to fines so long as they desisted from such behavior in the future.[256] The officers claimed violations, *inter alia*, of their Article 9 rights.[257] The Court held for Greece.[258] It noted that the military's "hierarchical structures . . . colour every aspect of the relations between military personnel, making it difficult for a subordinate to rebuff the approaches of an individual of superior rank or to withdraw from a conversation initiated by him."[259] What might seem like "an innocuous exchange of ideas which the recipient is free to accept or reject," in civilian life, might in the military be "a form of harassment or the application of undue pressure in abuse of power."[260] The Court further noted that, in this case, the light punishments imposed on the officers were "more preventative than punitive in nature," making Greece's law a proportionate and justified burden on the religious freedom rights of the officers.[261]

Larissis was an unusual case of military officers exploiting their superiority to proselytize their minority faith among their subordinates, who belonged to the faith of the majority. But the problem of proselytism is much wider in Europe, encompassing also peer-to-peer relationships. It has remained a perennial issue particularly in Orthodox lands that prohibit evangelization of any who have been baptized as Orthodox; in Muslim communities that regard conversion out of Islam as a (capital) crime of apostasy; and in former Soviet bloc lands unaccustomed to competing with Western missionaries in an open "marketplace of religious ideas."[262] The ECtHR and European national courts have continued to allow for general time, place, and manner restrictions on all proselytizers that are necessary, proportionate, and applied without discrimination against any

254 *Id.* ¶¶ 8–12.
255 *Id.* ¶ 27.
256 *Id.* ¶16.
257 *Id.* ¶ 36.
258 *Id.* ¶ 78.
259 *Id.* ¶ 51.
260 *Id.*
261 *Id.* ¶ 54.
262 *See* Witte, *supra* note 44, at 620.

religion.[263] But categorical criminal bans on all missionary activity, prosecution, retention, and detention for preaching,[264] or patently discriminatory licensing or registration provisions on proselytizing faiths remain violations of the religious rights of the proselytizer, as has the Court has made clear since *Kokkinakis v. Greece*.

The CJEU has only touched lightly on this issue in a 2018 case of *Tietosuojavaltuutettu.*[265] There the CJEU likewise found no religious freedom violation when a group of Jehovah's Witnesses challenged a Finnish privacy law that prohibited them from keeping unregistered personal data gathered during their door-to-door solicitation.[266] The Witnesses kept a list of contacted people who did not want to be contacted again.[267] An EU directive required that such personal data were subject to the protections of the EU privacy directive, and the Witnesses were not exempt from compliance just because the data were collected as part of their evangelical work.[268] The EU's interest in protecting their privacy of all citizens outweighed the Witnesses' interest in conducting their evangelism without regulatory impediments.[269]

So far, the ECtHR has issued much more substantial case law on proselytism than the CJEU. The Court's contribution, however, does not provide guidance beyond the basic rule that per se bans on proselytism violate Article 9. Balancing countries with very different sensitivities on the topic has led to a case-by-case balancing approach, rather than a set of broader and predictable principles.

2. Holy Days and Salary

The ECtHR generally has held against religious minorities who seek Article 9 accommodations to observe their holy days. While individual Member States are free to adopt and apply their own religious holidays and Sabbath day laws, their citizens have no prima facie right to observance of their holidays. Thus, in *Kosteski v. The Former Yugoslav Republic of Macedonia*, a Muslim employee

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263 *See* Tad Stahnke, *Proselytism and the Freedom to Change Religion in International Human Rights Law*, 1999 BYU L. REV. 251, 326 (1999).

264 Nasirov v. Azerbaijan, App. No. 58717/10, ¶¶ 59–60 (June 20, 2020), http://hudoc.echr.coe.int/eng?i=001-201088 (citing Kokkinakis v. Greece, App. No. 14307/88, ¶ 31 (1993)).

265 Case C-25/17, Tietosuojavaltuutettu v. Jehovah's Witnesses, 2018 WL CELEX 62017CJ0025 (July 10, 2018).

266 *Id.* ¶ 2.

267 *Id.* ¶¶ 16, 62.

268 Council 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 on the Free Movement of Such Data, art. 2–3, 1995 O.J. (L 281) 31, 38–39 (EC).

269 *Tietosuojavaltuutettu*, 2018 WL CELEX 62017CJ0025 ¶ 18.

was fined for taking a day off to celebrate a Muslim religious festival without giving notice to his employer.[270] He alleged violations of his Article 9 rights to engage in religious worship.[271] The Court rejected these claims, arguing that his attendance at the religious festival was not a clear act of religious worship; moreover, the ostensibly religious nature of the festival did not justify Kosteski's failure to notify his employer that he planned to miss work.[272]

Six years later, in *Sessa v. Italy*, a Jewish lawyer objected to a court order that scheduled a hearing date on his religious holiday (Yom Kippur) without granting a continuance in a case where he served as counsel.[273] The ECtHR found no Article 9 violation, concluding that the judge was acting reasonably to vindicate the public's right to the proper administration of justice, and the lawyer could have arranged for substitute counsel at that hearing.[274]

In *Cresco Investigation GmbH v. Markus Achatzi*,[275] the CJEU went further and outlawed Austria's law giving special treatment to Good Friday observers.[276] The law allowed members of selected Christian faiths to take Good Friday off, or required their employers to give them double pay if they worked.[277] Non-members, however, had to work that day and with no extra pay.[278] An employee without the requisite religious affiliation sued, arguing that this policy constituted indirect religious discrimination.[279] The CJEU agreed that this policy discriminated against non-Christians.[280] Moreover, the Court said, the Austrian law, paradoxically, incentivized and remunerated Christians for breaching their religious obligations on Good Friday by doubling their salary for working instead.[281] As the CJEU could not strike down the Austrian law, it ordered instead the domestic court to require "a private employer . . . also to

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[270] Kosteski v. The Former Yugoslav Republic of Macedonia, App. No. 55170/00, ¶¶ 3, 8, 9 (Apr. 13, 2006), http://hudoc.echr.coe.int/eng?i=001-73342.

[271] *Id.* ¶ 12.

[272] *Id.* ¶ 39.

[273] Sessa v. Italy, 2012-III Eur. Ct. H.R. 165, 167.

[274] *Id.* at 174.

[275] Cresco Investigation GmbH v. Markus Achatzi, Case C-193/17, 2019 WL CELEX 62017CJ0193 (Jan. 22, 2019).

[276] *Id.* ¶¶ 9, 69 (outlawing special treatment for the Old Catholic Churches, Evangelical Churches of the Augsburg and Helvetic Confessions, and the United Methodist Church).

[277] *Id.* ¶ 12.

[278] *Id.* ¶ 48.

[279] *Id.* ¶ 37.

[280] *Id.* ¶ 69.

[281] *Id.* ¶ 50.

grant his other employees a public holiday on Good Friday" or double pay if they worked.[282]

3. *Religious Dress Cases in the European Court of Human Rights*

Both the ECtHR and the CJEU have weighed in heavily on issues of religious dress and ornamentation. Until recently, the ECtHR has interpreted Article 9 to allow states to impose restrictions on Muslim women who wore headscarves in manifestation of their religion, but contrary to public school dress codes. In each case, the Court sided with the Member State against the Muslim petitioner, granting the State ample margins of appreciation to regulate this controversial issue of Muslim female apparel. Other more recent Article 9 cases involving religious apparel, however, have been more successful for religious freedom claimants.

In *Dahlab v. Switzerland*, a state elementary schoolteacher, newly converted to Islam from Catholicism, was banned from wearing a headscarf when she taught her classes.[283] The government highlighted the value of maintaining secularism in a public school that was open to young students from various traditions.[284] Invoking the margin of appreciation doctrine, the Court determined that this school dress code and its application to Ms. Dahlab were necessary and proportionate, and dismissed her claim that the State had violated Article 9.[285] The Court plainly admitted that it was "very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children."[286] But the Court worried "that the wearing of a headscarf might have some kind of proselytizing effect," especially since the teacher was acting as "a representative of the State."[287] Moreover, the Court continued in rather explicit anti-Islamic tones, the headscarf "appear[ed] to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality."[288] It was "therefore . . . difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others

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282 *Id.* ¶ 89.
283 Dahlab v. Switzerland, 2001-V Eur. Ct. H.R. 447, 449.
284 *Id.* at 451–52.
285 *Id.* at 463.
286 *Id.*
287 *Id.*
288 *Id.*

and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils."[289]

> Accordingly, weighing the right of a teacher to manifest her religion against the need to protect pupils by preserving religious harmony, the Court considers that, in the circumstances of the case and having regard, above all, to the tender age of the children for whom the applicant was responsible as a representative of the State, the Geneva authorities did not exceed their margin of appreciation and that the measure they took was therefore not unreasonable.[290]

Dahlab was only the first of a series of decisions upholding bans on wearing an Islamic headscarf in public. In its more recent cases, the Court largely abandoned its proselytization-based rationale and displayed a rather hostile attitude toward the public wearing of this garment. In *Şahin v. Turkey*,[291] an Islamic medical student at Istanbul University was forbidden to take certain courses and exams because she was wearing a headscarf, contrary to state rules governing dress. When the university brought disciplinary actions against her, she filed an Article 9 claim.[292] The Court sided with Turkey, and again granted a "margin of appreciation" to the Turkish constitutional and cultural ideals of gender equality and state secularism.[293] "The principle of secularism," the Court noted, created "a modern public society in which equality was guaranteed to all citizens without distinction on grounds of religion, denomination or sex."[294] It made possible "[s]ignificant advances in women's rights," including "equality of treatment in education, the introduction of a ban on polygamy," and "the presence of women in public life and their active participation in society. Consequently, the ideas that women should be freed from religious constraints and that society should be modernised had a common origin."[295] Since "secularism" is "one of the fundamental principles of the Turkish state," and since this principle is "in harmony with the rule of law and respect for human rights," religious "attitude[s]" and actions to the contrary "will not enjoy the protection of Article 9."[296]

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289 *Id.*

290 *Id.*; *see also* Kurtulmuş v. Turkey, 2006-II Eur. Ct. H.R. 297, 306–07 (declaring inadmissible an Article 9 objection by a Muslim university professor who was prohibited from wearing her Islamic headscarf in the exercise of her functions).

291 Şahin v. Turkey, 2005-XI Eur. Ct. H.R. 173, 181, ¶ 17.

292 *Id.* at 182, ¶ 18.

293 *Id.* at 204, ¶ 110.

294 *Id.* at 185, ¶ 31.

295 *Id.* at 186, ¶¶ 31–32.

296 *Id.* at 205–06, ¶ 114.

The ECtHR continued on this path in *Dogru v. France*.[297] There, a Muslim girl refused to follow her public school's dress code that required her to take off her headscarf during physical education classes and sports events.[298] Dismayed by the breach of its rules and the tensions it caused among the other students, the school initiated disciplinary action against her.[299] When she persisted in her claim to wear her headscarf in all public settings, the school offered to teach her through a correspondence program.[300] She and her parents rejected this, so she was expelled from the school. She claimed violations of her Article 9 rights.[301] The Court again held for the State, and again accorded France an ample "margin of appreciation" for its state policy of secularism.[302]

In its most recent case on point, *Osmanoğlu v. Switzerland*,[303] the Court also ruled against two Muslim girls whose parents challenged a Swiss public school's compulsory swimming lessons program that had boys and girls swimming together in the same pool. The parents claimed that mixed-gender swimming violated their and their daughters' Article 9 rights, and they refused to send their nine- and eleven-year-old daughters to swimming lessons.[304] Although school authorities offered to let the girls wear "burkinis" and change clothes in a private dressing room, the parents insisted that mixed-gender swimming—even before puberty—contradicted their religious belief and practice, since their daughters were preparing to observe Muslim customs of female modesty as adults.[305] Moreover, the girls were already taking private swimming lessons.[306] Thus, the parents sought a full exemption from the program.[307] The Court, however, determined that, although the swimming program interfered to some degree with the applicants' ability to manifest their religious beliefs, it also advanced legitimate public goals beyond teaching children to swim, including, most notably, fostering socio-economic inclusiveness and integration among a diverse

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297 Dogru v. France, App. No. 27058/05 (Dec. 4, 2008), http://hudoc.echr.coe.int/eng?i=001-90039.

298 *Id.* ¶ 7.

299 *Id.* ¶ 8.

300 *Id.* ¶ 11.

301 *Id.* ¶ 33.

302 *Id.* ¶ 77; *see also* Köse v. Turkey, 2006-II Eur. Ct. H.R. 339, 359 (declaring inadmissible claims under Article 9 and its Protocol against Turkey's general prohibition against wearing an Islamic headscarf in school); Kervanci v. France, App. No. 31645/04, ¶¶ 7, 8, 78 (Dec. 4, 2008), http://hudoc.echr.coe.int/eng?i=001-90048 (finding no Article 9 violation when a 12-year-old applicant was expelled for non-participation in school sports activities when she would not remove her headscarf).

303 Osmanoğlu v. Switzerland, App. No. 29086/12, ¶¶ 9, 106 (Jan. 10, 2017), http://hudoc.echr.coe.int/eng?i=001-170436.

304 *Id.* ¶¶ 9, 33.

305 *Id.* ¶¶ 9, 66.

306 *Id.* ¶ 57.

307 *Id.* ¶ 17.

student body.[308] Insofar as Swiss authorities had also offered reasonable accommodations, the program did not violate the parties' Article 9 rights but fell within the margin of appreciation for state decision-making about the best forms and forums of education.[309]

The Court has also accepted alternative logics to support other state restrictions on public displays of religious apparel. Twice the Court rejected Article 9 complaints by airline passengers who were forced to remove religious apparel during airport security checks. Safety concerns clearly outweighed Article 9 rights, the Court stated.[310] In *Mann Singh v. France*, the Court upheld France's decision to withhold a driver's license from a Sikh who refused to remove his turban for his picture on the license.[311] France's public safety concerns again outweighed the applicant's genuine religious interest in wearing his turban at all times in public, the Court concluded.[312]

Similarly, in *S.A.S. v. France*, the Court upheld France's controversial ban on full-face coverings in public against a claim by a devout Muslim who wore the *niqab* and *burqa* as expressions of her "religious, personal and cultural faith."[313] The Court recognized that the ban interfered with her religion.[314] It rejected France's arguments that the ban was justified because it promoted the rights of women, protected safety and security, and respected the dignity and equality of men and women alike.[315] Instead, the Court embraced France's tertiary argument that the ban ensured and promoted "respect for the minimum requirements of life in society"—namely, face-to-face communication.[316] "[T]he face plays an important role in social interaction," the Court reasoned, and "individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life."[317]

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308 *Id.* ¶¶ 95–96.

309 *Id.* ¶¶ 105–06.

310 El Morsli v. France, App. No. 15585/06, ¶ 1 (Mar. 4, 2008), http://hudoc.echr.coe.int/eng?i=001-117860 (finding no violation when a Muslim passenger was forced to remove her headscarf); Phull v. France, 2005-I Eur. Ct. H.R. 409, 415 (finding no violation when a Sikh passenger was forced to remove his turban).

311 Mann Singh v. France, App. No. 24479/07 (Nov. 13, 2008), http://hudoc.echr.coe.int/eng?i=001-89848.

312 *Id.*

313 S.A.S. v. France, 2014-III Eur. Ct. H.R. 341, 353–54, ¶ 12.

314 *Id.* at 367, ¶ 107.

315 *Id.* at 370–71, ¶¶ 118, 120–21.

316 *Id.* at 371, ¶¶ 121–22; *see also id.* at 345, 355, 358–59, 369.

317 *Id.* at 371, ¶ 122.

The Court held similarly in *Ebrahimian v. France*[318] that the French authorities' decision not to renew the contract of a Muslim social worker who worked at a public hospital—and refused to take off her headscarf—did not violate her Article 9 rights.[319]

In *Belcacemi and Oussar v. Belgium* (2017),[320] the ECtHR upheld a similar Belgian ban on clothing that covers the face in whole or in part. Borrowing heavily from *S.A.S. v. France*, the Court argued that the restriction sought to guarantee the conditions of social coexistence and to protect the rights and freedoms of others in a democratic society.[321] The applicants in this case were two Muslim women who were born and lived in Belgium.[322] They chose to wear the *hijab* in expression of their religious convictions.[323] One of the applicants had stopped wearing her *hijab* in public after the ban was enacted, while the other chose to keep her *hijab* but remain at home to avoid violating the law and risking a fine or even imprisonment.[324] The Court affirmed that such laws prohibiting religious headscarves would violate Article 9 if they lacked objective and reasonable justifications or failed to advance a legitimate purpose or aim;[325] states must also demonstrate a reasonable relationship of proportionality between the goals and means of such laws.[326] However, while the headscarf ban had far-reaching effects on the applicants and members of their religious community, the Court held that Belgian authorities were best situated to determine what was necessary in their society and should be granted an ample margin of appreciation.[327] In *Dakir v. Belgium* (2017),[328] the ECtHR similarly ruled that headscarf bans in various Belgian municipalities did not violate the Article 9 rights of Muslim women.

In a few recent cases, however, the ECtHR has become more sympathetic and upheld Article 9 claims involving religious clothing and ornamentation.[329]

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318 Ebrahimian v. France, 2015-VIII Eur. Ct. H.R. 99.

319 *Id.* at 106, 134.

320 Belcacemi v. Belgium, App. No. 37798/13 (July 11, 2017), http://hudoc.echr.coe.int/eng?i=001-175636.

321 *Id.* ¶ 51.

322 *Id.* ¶¶ 5–6.

323 *Id.* ¶¶ 8–9.

324 *Id.* ¶¶ 9–10.

325 *Id.* ¶ 66.

326 *Id.*

327 *Id.* ¶ 51.

328 Dakir v. Belgium, App. No. 4619/12, ¶ 68 (July 11, 2017), http://hudoc.echr.coe.int/eng?i=001-175660.

329 A third relevant case, *Barik Edidi v. Spain*, App. No. 21780/13 (Apr. 26, 2016), http://hudoc.echr.coe.int/eng?i=001-163303, was dismissed for the failure to exhaust domestic remedies after the applicant failed to

In *Ahmet Arslan v. Turkey* (2010), the Court found that Turkey had violated Article 9 rights by arresting a group of Muslims for wearing, on a public street, traditional religious garb including a turban, baggy trousers, a tunic, and a stick.[330] Local antiterrorism laws prohibited such dress, except during religious ceremonies and on public holy days.[331] The ECtHR stated that restrictions on religious dress are permissible if they are explicitly designed to protect the state principle of secularism in a democratic society, or to prevent disorder or violation of the rights of others.[332] But without such rationales, this antiterrorism law was neither a necessary nor proportionate limitation on such religious dress in public.[333]

Likewise, in *Eweida and Others v. The United Kingdom* (2013), the Court upheld the right of Ms. Eweida, a check-in staff member for British Airways, to wear to work a small necklace with a crucifix that reflected her Coptic Christian faith.[334] When British Airways introduced a more rigid policy that prohibited religious symbols, she refused to remove or hide the necklace.[335] She was suspended.[336] Later, British Airways amended its policy, and Ms. Eweida returned to work.[337] She then sued to recover the income lost while suspended.[338] After losing in British courts, she filed her case in Strasbourg.[339] The ECtHR held in favor of Ms. Eweida,[340] arguing that her "insistence on wearing a cross visibly at work was motivated by her desire to bear witness to her Christian faith,"[341] and that "there is no evidence of any real encroachment on the interests of others."[342] It found that British Airways's interference with Ms. Eweida's religious freedom was disproportionate, especially since the company had a history of permitting turbans and hijabs in the past and had shifting policies on religious apparel.[343] It is notable in this case that U.K. law was silent on the right

lodge her appeal before the domestic court in time. *Id.* ¶¶ 46–49. The court could not therefore examine her other grounds of appeal including the alleged violation of Article 9. This case concerned the Article 9 rights of a lawyer to wear her *hijab* in a Spanish courtroom while representing her clients. *Id.* ¶ 30.

330 Arslan v. Turkey, App. No. 41135/98 (Feb. 23, 2010), http://hudoc.echr.coe.int/eng?i=001-97535.

331 *Id.* ¶ 21.

332 *Id.* ¶ 43.

333 *Id.* ¶¶ 43, 52.

334 Eweida v. United Kingdom, 2013-I Eur. Ct. H.R. 215, 226, ¶ 12.

335 *Id.* 226, ¶ 13–14.

336 *Id.*

337 *Id.*

338 *Id.* at 226, ¶ 14.

339 *Id.* at 228, ¶ 17.

340 *Id.* at 257, ¶ 95.

341 *Id.* at 255, ¶ 89.

342 *Id.* at 257, ¶ 95.

343 *Id.* at 257, ¶ 94.

to wear religious clothing or symbols in the workplace, and it was her private employer that had imposed the restriction.[344] Nonetheless, the Court chose to "consider the issues in terms of the positive obligation on the State authorities to secure the rights under Article 9" even in the private sector.[345] The ECtHR balanced the concerns for danger, security, safety, or the rights of others against her right to wear a small cross, and ruled in favor of the flight attendant.[346]

In *Hamidović v. Bosnia and Herzegovina* (2018), a divided Court upheld the right of a Muslim defendant, indicted for a terroristic attack on the United States Embassy, to wear his skullcap in a criminal court.[347] The presiding judge had repeatedly ordered the defendant to remove the skullcap, in accordance with local court rules that defendants were not permitted to have head coverings of any sort in the courtroom.[348] The defendant protested that he wore the skullcap out of religious duty, and he persisted despite the judge's repeated orders and time to reflect on the consequences.[349] Eventually, the Court fined the defendant for contempt of court, and then imprisoned him for thirty days for not paying the fine.[350] He appealed citing Articles 9 and 14 violations.[351] The ECtHR held for the defendant.[352] It distinguished the cases of religious head coverings in the workplace, since this case involved compulsory appearance, rather than voluntary employment. The Court saw "no reason to doubt that the applicant's act was motivated by his sincere religious belief . . . without any hidden agenda to make a mockery of the trial, incite others to reject secular and democratic values or cause a disturbance. Pluralism, tolerance and broadmindedness are hallmarks of a 'democratic society.'"[353] And punishing this defendant for contempt, the Court argued, "was not necessary in a democratic society," even though the local court generally deserved a wide margin of appreciation.[354] A few months later in another Article 9 case, the ECtHR held similarly that a Belgian court was not justified in excluding a Muslim relative of a defendant from visiting a courtroom just because she wore a veil.[355]

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344 *Id.* at 256, ¶ 92.

345 *Id.* at 254, ¶ 84.

346 *Id.* In a companion case, the Court upheld a hospital decision to prohibit a geriatric nurse from wearing her cross on duty in order to protect health and safety on the ward. *Id.* at 259, ¶¶ 100–01.

347 Hamidović v. Bosnia and Herzegovina, App. No. 57792/15 (Mar. 5, 2018), http://hudoc.echr.coe.int/eng?i=001-179219.

348 *Id.* ¶ 7.

349 *Id.*

350 *Id.* ¶ 9.

351 *Id.* ¶ 10.

352 *Id.* ¶ 43.

353 *Id.* ¶ 41 (internal citations omitted).

354 *Id.* ¶ 42.

355 Lachiri v. Belgium, App. No. 3413/09, ¶¶ 31–48 (Dec. 18, 2018), http://hudoc.echr.coe.int/eng?i=001-

4. Religious Dress Cases in the Court of Justice of the European Union

The CJEU has also weighed religious freedom claims of Muslim women to the *hijab* at private workplaces, with mixed results, one favoring the Muslim claimant, the other holding for her employer.

Achbita v. G4S Secure Solutions[356] concerned a dispute between a global security company and Samira Achbita, a receptionist in its Belgian branch. She had been employed in the company for a while before she started to wear the *hijab*.[357] This conflicted with the company dress code that required employees to avoid wearing any visible religious signs or apparel, and she was ordered to remove her *hijab*.[358] When she refused, she was fired.[359] Achbita sued G4S in a Belgian court for religious discrimination in violation of an EU's Council Directive governing religion in the workplace.[360]

The CJEU found that the employer's termination was not "direct discrimination" under the Directive, for its neutral dress code did not target any specific religious faith.[361] Nor was it "indirect discrimination," since the company had a stated legitimate interest in pursuing a policy of religious neutrality reflected in its prohibition of visible religious apparel in its workplace.[362] The CJEU weighed this right to preserve a religiously neutral environment against Achbita's new religious claim to wear the Islamic headscarf, and found that the indirect discrimination caused by the dress code was proportionate and therefore lawful.[363]

The *Achbita* Court cited ECtHR case law in ruling that a private employer's consistent general policy of maintaining religious, political, or philosophical neutrality in the private workplace was a legitimate aim under both the European Convention and EU employment law. "An employer's wish to project an image of neutrality" to its employees and customers must outweighs any restriction "imposed on the freedom of religion."[364]

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356 Case C-157/15, Achbita v. G4S Secure Sols. NV, 2017 WL CELEX 62015CJ0157 (Mar. 14, 2017).

357 *Id.* ¶¶ 11–13.

358 *Id.*

359 *Id.*

360 *Id.* ¶ 17.

361 *Id.* ¶¶ 30–32.

362 *Id.* ¶ 35.

363 *Id.* ¶ 40.

364 *Id.* ¶¶ 37–39.

Bougnaoui v. Micropole also involved wearing a *hijab* at work, but here her French employer had no clear dress code or policy on religious apparel.[365] When Micropole hired Ms. Bougnaoui, they told her that "the wearing of an Islamic headscarf might pose a problem when she was in contact with customers of the company."[366] Bougnaoui first wore a bandana, later, a *hijab*.[367] Neither head covering met with objection.[368] Micropole eventually hired her as a design engineer,[369] and she went to work for one of the company's customers at the customer's site. The customer complained to the company that "the wearing of a veil . . . had upset a number of its employees. It also requested that there should be 'no veil next time.'"[370]

Micropole then fired Bougnaoui.[371] The company stated that she had been warned from the beginning of her internship that wearing a veil could become a problem, and that the company retained "discretion . . . as regards the expression of the personal preferences of [the] employees."[372] The company further stated that, during the job interview, their officials had asked Bougnaoui if she had any difficulty respecting "the need for neutrality" when in the presence of customers, and she had "answered in the negative."[373] Therefore, the company found that Bougnaoui could not "provide services at [the] customers' premises."[374]

Bougnaoui sued for religious discrimination under EU law.[375] The CJEU found that Ms. Bougnaoui had been victim of direct discrimination on religious grounds. She had been dismissed because a company's customer complained about her headscarf.[376] Even though she had been warned about Micropole's neutrality policy, this policy had not been enforced until that customer complained. The CJEU again cited ECtHR cases in arguing that Bougnaoui's claim to wear religious dress deserved presumptive religious freedom protection.[377] While EU law permitted employers to place limits on that religious freedom, it could do so only by a "genuine and determining occupational requirement" that was "objectively dictated by the nature of the occupational

365 Case C-188/15, Bougnaoui v. Micropole SA, 2017 WL CELEX 62015CJ0188 (Mar. 14, 2017).
366 *Id.* ¶ 13.
367 *Id.*
368 *Id.*
369 *Id.*
370 *Id.* ¶ 14.
371 *Id.*
372 *Id.*
373 *Id.*
374 *Id.*
375 *Id.* ¶ 31.
376 *Id.* ¶ 41.
377 *Id.* ¶ 30.

activities concerned or of the context in which they [were] carried out."[378] But this was not the case here. Ms. Bougnaoui was ordered to remove her headscarf not in implementation of the company's neutral dress policy, but only "to take account of the particular wishes of the customer."[379] That did not justify such discrimination.[380]

It is worth noting that the AG, while opining in favor of Ms. Bougnaoui, made clear that employers could regulate religious apparel in the workplace, particularly full head coverings. "Western society regards visual or eye contact as being of fundamental importance in any relationship involving face-to-face communication . . . . [A] rule that imposed a prohibition on wearing religious apparel that covers the eyes and face entirely whilst performing a job that involved such contact with customers would be proportionate."[381] Although the AG did not cite ECtHR case law, she was clearly echoing *S.A.S. v. France* and other recent ECtHR cases that upheld Member State bans on the *niqab* and *burqa*. Her message was that employers, too, could use clear and consistent policies to put comparable limits on religious apparel without violating religious freedom and non-discrimination norms.[382]

Litigation about religious dress has been a staple of ECtHR jurisprudence and is now becoming prominent in CJEU case law on religious freedom. The topic will always generate controversy. Religious apparel pits secularism against religiosity, and often majorities against minorities. It channels the debates about the role and the content of the public sphere, challenges a country's cultural legacy, and brings to the surface disputes about migrants. The ECtHR has been quite deferential to the state's discretion, while the CJEU seems to support employers that enforce an approach of strict neutrality.

5. Religious Slaughtering Restrictions

In two recent cases, the CJEU dealt with *halal* (Islamic) ritual slaughtering practices. *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen VZW and Others* (2018)[383] concerned a specific provision of a broader regulation on animal food production.[384] The general EU rule requires that animals be

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[378] *Id.* ¶ 39.
[379] *Id.* ¶ 40.
[380] *Id.*
[381] *Id.* ¶ 130.
[382] *Id.* ¶ 30.
[383] Case C-426/16, Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen VZW and Others v. Gewest, 2018 WL CELEX 62016CJ0426 (May 29, 2018).
[384] Regulation 1099/2009 of Sept. 24, 2009 on the Protection of Animals at the Time of Killing, 2009 O.J.

slaughtered only after stunning them.[385] However, since *halal* religious rules require that the animal be awake during slaughtering, EU law carves out an exception, allowing such ritual slaughtering so long as it performed in licensed slaughterhouses.[386] The latter requirement was challenged in this case.

The dispute started in Belgian Flanders.[387] On the few days of *Eid Al-Adha* (the Feast of the Sacrifice), a major Islamic holiday, Islamic ritual slaughtering normally peaked.[388] Until 2015, the Flemish authorities had accommodated the extra demand for *halal* meat in preparation for the festival by licensing local temporary slaughterhouses for Islamic butchers.[389] In 2015, however, the authorities announced they would no longer issue approvals for temporary slaughter plants on the ground that such licenses violated EU rules on the structural and hygiene requirements for slaughterhouses.[390] Flemish Muslim communities sued in state court, claiming that this new denial infringed upon their religious freedom to celebrate the Feast properly.[391] Under this new rule, they argued, the only way to meet the peak demand for *halal* meat would be to build a series of permanent slaughterhouses that would be of no use for the rest of the year.[392] The local judge issued a request for a preliminary ruling, asking that the CJEU rule whether the EU regulation on ritual slaughtering, as implemented by national legislation, violated Article 9 of the ECHR, Article 10 of the EU Charter, or an EU law which calls the EU Council to fight discrimination on various grounds, including religion.[393]

The CJEU acknowledged the religious salience of the matter[394] during the "religious rite" of the Feast.[395] But it refused to resolve what it called "the

(L 303) 1 (EC).

385 *Id.* art. 4, ¶ 1.

386 *Id.* art. 4, ¶ 4.

387 Case C-426/16, Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen, VZW and Others v. Gewest, 2018 WL CELEX 62016CJ0426, ¶¶ 16–18 (Nov. 30, 2017)

388 *Id.* ¶ 3.

389 *Id.*

390 *Id.* ¶ 16; *see* Regulation 853/2004 of the European Parliament and of the Council of 29 Apr., 2004 on Laying Down Specific Hygiene Rules for Food of Animal Origin, 2004 O.J. (L 139) 55, *amended by* 2004 O.J. (L 226) 22.

391 *Van Moskeeën*, 2018 WL CELEX 62016CJ0426 ¶¶ 18–19.

392 *Id.* ¶ 70.

393 *Id.* ¶ 37; *see* TFEU, *supra* note 29, art. 13 ("In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.").

394 *Van Moskeeën*, 2018 WL CELEX 62016CJ0426 ¶ 44.

395 *Id.* ¶ 51.

theological debate among different religious tendencies within the Muslim community as to whether the obligation to slaughter animal[s] without prior stunning during the Feast of Sacrifice is absolute and the existence of alternative solutions in the event that it is impossible to perform such slaughter."[396] The Court thought EU law had done enough "to ensure effective observance of the freedom of religion, in particular of practicing Muslims during the Feast of Sacrifice."[397] Requiring that such ritual slaughtering must be performed in licensed slaughterhouses properly balanced the parties' religious freedom interests with the EU's interest in avoiding "excessive and unnecessary suffering of animals killed."[398] The EU's general slaughtering laws thus did not infringe upon religious freedom under the Charter.[399] The real challenge, the Court noted, was not to religious freedom, but to the financial cost for a local Islamic community in Belgium to set up permanent slaughterhouses for only a few days of use.[400]

The 2019 CJEU case of *Œuvre d'assistance aux bêtes d'abattoirs*[401] also involved *halal* slaughtering practices.[402] EU law reserved the "organic" label for food that had been produced in accordance with high animal welfare

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396 *Id.* ¶ 50.

397 *Id.* ¶ 56.

398 *Id.* ¶ 65.

399 *Id.* ¶ 59.

400 *Id.* ¶¶ 70, 77–78. As this Article was going to final press, the CJEU issued *Centraal Israëltisch Consistorie van België and Others*. Case C-336/19, *Centraal Israëltisch Consistorie van België and Others* (Dec. 17, 2020), http://curia.europa.eu/juris/document/document.jsf?text=&docid=235717&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=18489626. A new Flemish regulation required Jewish and Muslim butchers, even in their own slaughtering houses, to use a non-lethal form of stunning before cutting the animal's throat and letting it bleed out fully. This would spare the animal the pain and suffering of having its throat cut, but it ensured that the animal would regain consciousness before bleeding to death as religious ritual laws required. Jewish and Muslim litigants claimed violations of their religious freedom rights under EU Law; Articles 10, 21, and 22 of the EU Charter; and Article 9 of the European Convention. They argued that the new law specially burdened their core religious rituals and violated their ancient religious laws, obstructed religious butchers from practicing their traditional faith, deprived religious consumers of kosher and halal meat, and discriminatorily targeted the small communities of Jews and Muslims while leaving hunters, fishers, and other sportsmen to kill their captured animals without prior stunning. The Grand Chamber of the CJEU recognized the burden of religious freedom but judged it a permissible and non-discriminatory protection of animal welfare, arguing that Belgium "deserved a wide margin of appreciation in deciding whether, and to what extent, a limitation of the right to manifest religion or beliefs is 'necessary'." *Id.* ¶ 67.

401 Case C-497/17, Œuvre d'assistance aux bêtes d'abattoirs v. Ministre de L'Agriculture et de l'Alimentation, 2019 WL CELEX 62017CJ0497 (Feb. 26, 2019).

402 Commission Regulation 889/2008 of Sept. 5, 2008 Laying Down Detailed Rules for the Implementation of Regulation No 834/2007, 2008 O.J. (L 250) 1 (EC), *amended by* Regulation 271/2010 of Mar. 24, 2010, 2010 O.J. (L 84) 19 (EU); Council Regulation 834/007 of June 28, 2007 on Organic Production and Labelling of Organic Products and Repealing Regulation 2092/91 (EEC), 2007 O.J. (L 189) 1 (EC).

standards.[403] The issue was whether *halal* meat could be labeled "organic" when ritual slaughtering was performed without previous stunning, thus causing pain to the animals.[404] The CJEU ruled that *halal* ritual slaughtering practices and organic food labeling were irreconcilable.[405] The requirement that animals be stunned was meant to ensure that the animals avoid pain and suffering.[406] Slaughtering without stunning was an exceptional regime, "authorised only by way of derogation in the European Union and solely in order to ensure observance of the freedom of religion," but "insufficient to remove all of the animal's pain, distress and suffering as effectively as slaughter with pre-stunning."[407] Ritual slaughtering did not meet the high requirements of animal welfare that were among the core goals of organic food production and of the "organic" logo altogether.[408] While religious freedom norms were strong enough to allow for an exception to general slaughtering rules, they did not entitle a further exception to organic food labeling rules.

The CJEU's approach to religious slaughtering requirements is rather narrow. Despite the AG's efforts, the Court has adamantly denied Islamic slaughtering's compatibility with the requirements of "organic" food. Similarly, it has not accommodated the Islamic community's request to perform ritual slaughter in temporary facilities although it was customary until recently.

C. Religious Group Protections

Both the ECtHR and the CJEU have issued important cases concerning religious group rights. The ECtHR has been more protective of the rights and autonomy of religious groups over their own polity, property, and personnel, even when faced with claims brought by their own members against the religious leadership. The CJEU has been less deferential to religious groups in its first few cases on point, often holding for individuals against religious authorities.

1. Religious Personality, Autonomy, and Legal Limits

Article 9 of the European Convention on Human Rights, along with Article 11 (on freedom of assembly and association), protects religious groups from undue state intrusion, interference, or discriminatory regulation.[409] These

403 *Œuvre d'assistance aux bêtes*, 2019 WL CELEX 62017CJ0497 ¶ 36.
404 *Id.* ¶ 17.
405 *Id.* ¶ 50.
406 *Id.* ¶ 45.
407 *Id.* ¶ 48.
408 *Id.* ¶ 52.
409 Council of Europe, European Convention on Human Rights, as amended by Protocols Nos. 11 and 14,

Articles on their face and as applied by the Court protect religious groups per se, recognizing their rights to legal personality and religious autonomy.[410] These religious groups have rights to maintain their own standards of teaching, practice, membership, and discipline; to devise their own forms of polity and organization; to hold property; to lease facilities; to make contracts; to open bank accounts; to hire and pay employees, suppliers, and service providers; to maintain relations with coreligionists at home and abroad; to publish their literature; and to operate worship centers, clerical housing, seminaries, schools, charities, mission groups, hospitals, and cemeteries.[411]

The ECtHR has repeatedly held that Member States may not arbitrarily or discriminatorily withhold, withdraw, or condition a religious group's right to acquire legal personality,[412] to procure the necessary state licenses for religious marriages, nursery schools, or educational programs for their members,[413] or to receive state funding or other state benefits available to other properly registered religious groups.[414] Nor may the state impose an exorbitant or discriminatory tax on a religious organization that jeopardizes the organization's ability to operate.[415] Moreover, even if a religious group will not or cannot register as a separate legal entity, the state may not prohibit, intervene, or interfere with their collective worship or assembly in private homes or settings.[416] All these State actions, the ECtHR has held, violate Article 9 rights of religion and sometimes violate Article 11 and Article 14 rights of association and nondiscrimination. As the Court stated in 2000:

> [R]eligious communities traditionally and universally exist in the form of organized structures. They abide by rules which are often seen by followers as being of a divine origin. Religious ceremonies have their

art. 9, 11, Nov. 4, 1950.

410 JULIAN RIVERS, THE LAW OF ORGANIZED RELIGIONS: BETWEEN ESTABLISHMENT AND SECULARISM 53 (2010).

411 Jehovah's Witnesses of Moscow v. Russia, App No. 302/02, 53 Eur. H.R. Rep. 141, 167–68, ¶ 102 (2010); Metro. Church of Bessarabia and Others v. Moldova, *2001-XII Eur. Ct. H.R. 81, 113–14, ¶ 118.*

412 *Metro. Church of Bessarabia, 2001-XII Eur. Ct. H.R. at 110, 119*; Dimitrova v. Bulgaria, App. No. 15452/07, ¶¶ 25, 31 (May 10, 2015), http://hudoc.echr.coe.int/eng?i=001-151006.

413 Savez Crkava "Riječ Života" and Others v. Croatia, App. No. 7798/08, ¶ 58 (Mar. 9, 2010), http://hudoc.echr.coe.int/eng?i=001-102173.

414 Magyar Keresztény Mennonita Egyház and Others v. Hungary, 2014-I Eur. Ct. H.R. 449, 472.

415 Affaire Association les Témoins de Jéhovah v. France, App. No. 8916/05, ¶ 53 (June 30, 2011), http://hudoc.echr.coe.int/eng?i=001-105386.

416 Masaev v. Moldova, App. No. 6303/05, 57 Eur. H.R. Rep. 185, 191, ¶ 26 (2013); *see also* Cumhuriyetçi Eğitim Ve Kültür Merkezi Vakfı v. Turkey, App. No. 32093/10, ¶¶ 9, 52 (Feb. 19, 2014), http://hudoc.echr.coe.int/eng?i=001-148275 (finding a violation of Article 14 combined with Article 9, in a case where Turkey refused to grant the status of a place of worship, and the Court found no need to conduct a separate examination into Article 9).

> meaning and sacred value for the believers if they have been conducted by ministers empowered for that purpose in compliance with these rules. The personality of the religious ministers is undoubtedly of importance to every member of the community. Participation in the life of the community is thus a manifestation of one's religion, protected by Article 9.[417]

The ECtHR has placed special emphasis on the autonomy of religious bodies. In a 2013 case, for example, it opined:

> The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of these communities as such but also the effective enjoyment of the right to freedom of religion by all their active members.[418]

In implementing this religious autonomy principle, the ECtHR has held that a State may not force a religious group to admit new members, to exclude a member whom the State disfavors, or to retain a member who has departed or dissented from the group's teachings or practices.[419] So long as the group respects the individual's right to leave without impediment or interference, the group's internal authority trumps the individual's right to participate as a member of that group.[420]

The ECtHR has also held that States may not interfere in the resolution of internal disputes over church leadership, force denominations to unite or divide, compel them to accept one religious official over another, or prevent them from amending their internal legal structures or canons.[421] Even in those countries that have established churches or favored traditional religions, the Court held in a 2001 case that Article 9

> excludes assessment by the State of the legitimacy of religious beliefs or the ways in which those beliefs are expressed. State measures favouring a particular leader or specific organs of a divided religious community or seeking to compel the community or part of it to place

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417 Hasan and Chaush v. Bulgaria, 2000-XI Eur. Ct. H.R. 117, 137, ¶ 62.

418 Sindicatul "Păstorul cel Bun" v. Romania, 2013-V Eur. Ct. H.R. 41, 63, ¶ 136 (citing *Hasan*, 2000-XI Eur. Ct. H.R. at 137, ¶ 62).

419 Svyato-Mykhaylivska Parafiya v. Ukraine, App. No. 77703/01, ¶ 146 (Sept. 14, 2007), http://hudoc.echr.coe.int/eng?i=001-81067.

420 Holy Synod v. Bulgaria, App. Nos. 412/03 & 35677/04, ¶ 29 (Sept. 16, 2010), http://hudoc.echr.coe.int/eng?i=001-100433; *Svyato-Mykhaylivska Parafiya*, App. No. 77703/01 ¶ 150.

421 *Holy Synod*, App. Nos. 412/03 & 35677/04 ¶ 29; *Svyato-Mykhaylivska Parafiya*, App. No. 77703/01 ¶ 150; *Hasan*, 2000-XI Eur. Ct. H.R. at 144, ¶ *86*; Serif v. Greece, 1999-IX Eur. Ct. H.R. 73, 88–89, ¶ *54*.

> itself, against its will, under a single leadership, would also constitute an infringement of the freedom of religion.[422]

In a later case, the ECtHR stated further: "While it may be necessary for the State to reconcile the interests of the various religions and religious groups" when they come into conflict, "the State has a duty to remain neutral and impartial in exercising its regulatory authority and in its relations with the various religions, denominations and groups within them."[423]

Despite this insistence on state neutrality to religion and deference to religious autonomy, the ECtHR has allowed governments to regulate and restrict the activities of registered religious organizations "to protect its institutions and citizens."[424] These limitations, the ECtHR has said, "must be used sparingly, as exceptions to the rule" and allowed only for "convincing and compelling reasons" and in cases of "pressing social need."[425] But some limitations have passed muster under Article 9 review. In *Şerife Yiğit v. Turkey* (2010), for example, the Court upheld Turkey's law that required couples to marry monogamously in a civil ceremony before a state official.[426] Turkish law does not recognize a religious marriage ceremony as sufficient to create a valid marriage, and the state threatened to imprison any religious official or group who presided over a marriage without a prior civil registration of the marriage.[427] The stated purpose of the Turkish law, as the Court saw it, "was to protect women against polygamy. If religious marriages were to be considered lawful[,] all the attendant religious consequences would have to be recognized, for instance the fact that a [Muslim] man could marry four women."[428]

In the case of *Ouardiri v. Switzerland* (2011), the ECtHR further upheld Switzerland's new constitutional amendment prohibiting the building of minarets against the claim that this violated the rights of Muslims to have suitable mosques for public worship.[429] The Court dismissed the claim, arguing

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422 Metro. Church of Bessarabia and Others v. Moldova, *2001-XII Eur. Ct. H.R. 81, 113,* ¶ 117.

423 *Holy Synod*, App. Nos. 412/03 & 35677/04 ¶ 119; *see also* Magyar Keresztény Mennonita Egyház v. Hungary, 2014-I Eur. Ct. H.R. 449, 475–76, ¶ 115 (holding that a new Hungarian law that deregistered several longstanding minority churches in the state was a violation of Articles 9 and 11).

424 *Magyar Keresztény*, 2104-I Eur. Ct. H.R. ¶ 79.

425 *Id.* (quoting Gorzelik v. Poland, 2004-I Eur. Ct. H.R. 219, 262, ¶¶ 94–95).

426 Serife Yiğit v. Turkey, App. No. 3976/05, ¶ 39 (Nov. 2, 2010), http://hudoc.echr.coe.int/eng?i=001-101579.

427 *Id.* ¶ 84.

428 *Id.* ¶ 62.

429 *See* Press Release, Eur. Ct. of Hum. Rts., Prohibition on Building Minarets in Switzerland: Applications Inadmissible (July 8, 2011), http://hudoc.echr.coe.int/eng-press?i=003-3602217-4080719.

that, since the claimant was complaining against a constitutional provision with general applicability, there was no real victim in the case.[430]

But the ECtHR has stepped in with Article 9 protections when local religious communities were victimized by their neighbors and did not receive help from the police or other state authorities.[431] The case of *97 Members of the Gldani Congregation of Jehovah's Witnesses & 4 Others v. Georgia* (2007) provides a good illustration.[432] There, local Orthodox Christians repeatedly attacked and intimidated a local group of Jehovah's Witnesses in an effort to drive them out of the community or force them to convert to Orthodoxy.[433] The Witnesses were repeatedly assaulted and beaten with crosses, whips, and sticks—sometimes resulting in serious injuries.[434] Their literature was burned and their worship services were interrupted.[435] One man was shaved bald and forced to listen to Orthodox prayers designed to convert him.[436] Further, all of these actions were filmed and aired on national television.[437] Local authorities did nothing, despite hearing 784 formal complaints, because they perceived the Witnesses "as a threat to Christian orthodoxy."[438] The ECtHR held that this gross state indifference was a clear violation of the Witnesses' Article 9 rights.[439] It explained that freedom of religion means that one group may not "apply improper pressure on others from a wish to promote one's religious convictions."[440]

> [T]he role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other. This State role is conducive to public order, religious harmony and tolerance in a democratic society and can hardly be conceived as being likely to diminish the role of a faith or a Church with which the population of a specific country has historically and culturally been associated.[441]

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430 *Id.*

431 Gldani Congregation v. Georgia, App. No. 71156/01, 46 Eur. H.R. Rep. 613, 649, ¶¶ 151–52 (2007).

432 *Id.*

433 *Id.* at 622, ¶¶ 11–12.

434 *Id.* at 623–24, ¶¶ 15, 21.

435 *Id.* at 625, ¶ 30.

436 *Id.* at 623, ¶ 18.

437 *Id.* at 626, ¶ 34.

438 *Id.* at 646, ¶ 133.

439 *Id.* at 646, ¶ 135.

440 *Id.* at 646, ¶ 132 (citing Larissis v. Greece, 1998-I Eur. Ct. H.R., 362, 381–82, ¶¶ 54, 59; Serif v. Greece, 199-IX Eir. Ct. H.R. 73, 88, ¶ 53; Refah Partisi (the Welfare Party) v. Turkey, 2003-II Eur. Ct. H.R. 267, 301–02, ¶ 91).

441 *Id.*; *see also* Kuznetsov v. Russia, App. No. 184/02, 49 Eur. H.R. 355, 369, ¶ 62 (2007) (finding an Article 9 violation for a state's failure to prosecute officials who had illegally broken up a Jehovah's Witness

Likewise in *Dimitrova v. Bulgaria* (2015), the Court condemned local authorities' actions against a local chapter of an international Evangelical group, The Word of Life.[442] Authorities had first refused to permit the group to register as a religious body, then further restricted and intervened into the group's private home meetings, seizing their assets in a raid.[443] The government alleged that this group was a dangerous sect that isolated members from their families and prohibited them from getting medical care, going to school, watching television, or reading any literature besides the Bible.[444] The group charged the government with religious discrimination.[445] The Court held for the Word of Life group under Article 9.[446] The state's actions were not prescribed by law, not neutral and impartial, and "failed to respect the need for true religious pluralism."[447]

Similarly, in *Association for Solidarity with Jehovah's Witnesses and Others v. Turkey* (2016), the ECtHR stepped in to stop the government's interference with the right of a peaceable religious group to worship privately.[448] In this case, groups of Jehovah Witnesses alleged that the Turkish government violated their Article 9 rights by making it nearly impossible for them to conduct worship services.[449] For many years, these groups could worship in private premises.[450] However, a new Urban Planning Law limited religious gatherings to designated places of worship.[451] The authorities ordered these private worship premises closed and prohibited worship services at any other private apartment in the district.[452] They further denied the group's later application to build a place of worship and rejected their subsequent appeal to an administrative court.[453] All this, the Court held, violated the Witnesses' Article 9 rights; it was neither proportionate to a legitimate aim, nor necessary in a democratic society.[454]

Sunday worship service).

442 Dimitrova v. Bulgaria, App. No. 15452/07, ¶ 30 (May 10, 2015), http://hudoc.echr.coe.int/eng?i=001-151006.

443 *Id.* ¶¶ 6, 8.

444 *Id.* ¶ 7.

445 *Id.* ¶ 3.

446 *Id.* ¶¶ 48.

447 *Id.* ¶ 25.

448 Ass'n for Solidarity with Jehovah's Witnesses v. Turkey, App. Nos. 36915/10 & 8606/13, ¶¶ 3, 108 (Oct. 17, 2016), http://hudoc.echr.coe.int/eng?i=001-163107.

449 *Id.* ¶ 3.

450 *Id.* ¶ 8.

451 *Id.* ¶ 66.

452 *Id.* ¶¶ 10, 36.

453 *Id.* ¶¶ 30, 35–36.

454 *Id.* ¶ 108.

The Court held similarly two years later when a Ukrainian city council refused to grant Jehovah's Witnesses a building permit to convert a private residence into a church building.[455] A Ukrainian local court had found that the city council had improperly rejected the church's application because of the "vaguely described opposition from neighbours."[456] But the city council still refused to cooperate, so the Witnesses claimed an Article 9 violation.[457] The ECtHR repeated its earlier opinions that while "the Convention does not guarantee the right to be given a place to worship as such[,] . . . using buildings as places of worship is important for the participation in the life of the religious community and thus for the right to manifestation of religion" under Article 9.[458] Here, the Court found the city's "conduct was arbitrary and 'not in accordance with the law.'"[459]

In the case of *Metodiev and Others v. Bulgaria* (2017), the Court also found a violation of Article 9 as well as Article 11.[460] Here, Bulgarian authorities had refused to register an Ahmadi Muslim community as an official denomination, ostensibly because their community's constitution lacked a precise and clear indication of the beliefs and rites of the Ahmadi religion, as required by the Religions Act, which sought to distinguish between the various religions and to avoid confrontation between religious communities.[461] The ECtHR held that this refusal amounted to a violation of Article 9.[462] The state was to remain neutral between religious beliefs and groups and did not have a valid interest in preventing religious sub-groups from forming their own separate organizations instead of integrating into larger religious communities.[463]

These cases on religious autonomy fall into two main patterns. On the one hand, the Court has rejected blunt discrimination, victimization, and persecution of religious minorities, as well as stigmatized state intervention in religious matters. On the other hand, religious communities are not laws unto themselves and are subject to permissible limitations designed to protect the health, safety,

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455 Religious Cmty. of Jehovah's Witnesses of Kryvyi Rih's Ternivsky District v. Ukraine, App. No. 21477/10, ¶¶ 55, 57, 59 (Dec. 3, 2019) http://hudoc.echr.coe.int/eng?i=001-195539.

456 *Id.* ¶ 54.

457 *Id.* ¶ 55.

458 *Id.* ¶¶ 49–50 (citing Griechische Kirchengemeinde München v. Germany, App. No. 52336/99 (Sept. 18, 2007); Izzettin Dogan v. Turkey, App. No. 62649/10, ¶ 111 (Apr. 26, 2016)).

459 *Id.* ¶¶ 57 (internal quotations omitted).

460 Metodiev v. Bulgaria, App. No. 58088/08, ¶ 48 (Sept. 15, 2017), http://hudoc.echr.coe.int/eng?i=001-174412.

461 *Id.* ¶¶ 3, 12

462 *Id.* ¶ 48.

463 *Id.* ¶ 46.

and welfare of the community and the fundamental rights of others. The issue is how to draw a line between discrimination and permissible limitations. So far, the ECtHR has accepted only exceptional and narrow limitations on religious autonomy. But if religious communities become more abusive—or their past abuses comes to light, as evident in the recent pedophilia and financial scandals involving Christian churches—these limitations are likely to grow.

2. Religious Employers and Labor Rights

The exact line between the autonomous religious and regulable secular dimensions of a religious group has proved hardest to negotiate in cases of labor and employment.[464] In these cases, the ECtHR and CJEU have diverged quite significantly. In general terms, the ECtHR has held that States may not force a church to accept the unionization of its clerical and lay employees, since that "would therefore be likely to undermine the Church's traditional hierarchical structure . . . [and] create a real risk to the autonomy of the religious community."[465] A state may not force a church to retain the services of a religious education teacher who publicly opposed its religious doctrines,[466] or a public relations director who committed adultery in violation of church teaching and in breach of his employment contract.[467] Conversely, the CJEU has been more prone to second-guess a church body's judgment on the religious angles of work relations.

The ECtHR's case law on the rights of individuals employed by religious organizations reached its apex in the 2014 case of *Fernández Martínez v. Spain*.[468] Fernández Martínez was an ordained priest of the Roman Catholic Church.[469] In 1984, he had sought, but was denied, a dispensation from the obligation of clerical celibacy.[470] The following year he married a woman in a civil ceremony.[471] Together they had five children.[472] In 1991 he was employed

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[464] Daniel Sabbagh, *Discrimination in the Workplace: Toward a Transatlantic Comparison*, 102 DROIT ET SOCIÉTÉ 321, 331 (2019).

[465] Sindicatul "Păstorul cel Bun" v. Romania, 2013-V Eur. Ct. H.R. 41, 68–69, ¶¶ 161–62.

[466] Fernández Martínez v. Spain, 2014-II Eur. Ct. H.R. 449, 490–91, ¶¶ 149–50.

[467] Obst v. Germany, App. No. 425/03, ¶ 51 (Sept. 23, 2010), http://hudoc.echr.coe.int/eng?i=001-100463. *But cf.* Schüth v. Germany, 2010-V Eur. Ct. H.R. 397, 403, 426, ¶¶ 3, 67 (involving an organist in a Catholic Church who was fired for his adultery). In *Schüth*, the Court said that the pro forma approval of this discharge by the employment tribunal in Germany did not go far enough to protect the organist's right to privacy under Article 8 of the Convention. *Id.* at 399–401.

[468] *Fernández Martínez*, 2014-II Eur. Ct. H.R. 449.

[469] *Id.* at 459, ¶ 13.

[470] *Id.*

[471] *Id.*

[472] *Id.*

in a state-run secondary school of the Region of Murcia.[473] He taught Catholic religion and ethics pursuant to an agreement between the Holy See and Spain.[474] Per the agreement, public authorities can assign such teaching posts only to teachers who have been proposed every year by the diocesan Bishop.[475]

While Fernández Martínez was teaching Catholic religion and ethics, he participated in the activities of an association advocating for married priests.[476] He wrote articles defending his views, and a picture of him and his family was posted in a local newspaper.[477] He finally received a dispensation from the rules of mandatory clerical celibacy from the Pope in 1997.[478] Within weeks, the local Diocese informed the Ministry of Education that Fernández Martínez's assignment had been terminated,[479] and the Ministry duly notified him.[480] The Diocese also issued a statement, explaining that it had terminated the contract because of Fernández Martínez's marital status, which was now common knowledge and ran the risk of causing "scandal" among the students and their Catholic families.[481]

Fernández Martínez sued in state court citing the right to equality and to privacy, as well as the freedom of expression.[482] Having lost, he brought his claim to Strasbourg, complaining that the State had failed to protect his Article 8 rights under the ECHR,[483] which reads: "Everyone has the right to respect for his private and family life, his home and his correspondence."[484] Fernández Martínez lost before both the first Chamber and the Grand Chamber of the ECtHR.[485] A divided Grand Chamber found no violation of Article 8.[486] The limitation imposed on Fernández Martínez's rights was in accordance with state law, and his dismissal was consistent with church canon law.[487] The ECtHR found that the limitation was in pursuance of a "legitimate aim" of protecting the freedom "of the Catholic Church, and in particular its autonomy in respect

473 *Id.* at 459, ¶ 14.
474 *Id.*
475 *Id.*
476 *Id.* at 461, ¶ 16.
477 *Id.* at 460–61, ¶ 136.
478 *Id.* at 461, ¶ 16.
479 *Id.* at 461, ¶ 17.
480 *Id.* at 461–62, ¶ 19.
481 *Id.*
482 *Id.* at 465–69, ¶¶ 38–48.
483 *Id.* at 469–70, ¶ 68.
484 Convention, *supra* note 2, art. 8.
485 *Fernández Martínez*, 2014-II Eur. Ct. H.R. at 470, 491, ¶¶ 71, 153.
486 *Id.* at 469–70, ¶ 68.
487 *Id.* at 480–81, ¶¶ 118–21.

of the choice of persons accredited to teach religious doctrine."[488] The Court found that among the Member States there was no consensus on the scope of religious autonomy, and thus each State in the Council of Europe had ample discretion to devise and implement its rules and procedures in this field.[489] Finally, the ECtHR noted that religious organizations had a right to expect loyalty from those who, like Fernández Martínez, represented them at the societal level.[490] Considering the circumstances of the case and the publicity that the applicant gave to his situation, the Court found that the balance of rights struck in favor of the church was not disproportionate.[491]

By contrast to the ECtHR, the CJEU has confronted the status of religiously affiliated institutions in the framework of labor relations.[492] Many EU provisions are at play in the labor field. Declaration 11, annexed to the Treaty of Amsterdam, established the EU's respect for the domestic settlements between church and state.[493] EU law protects the freedom of religious groups, as we have seen.[494] More specifically, the EU's anti-discrimination Directive specifies what religious autonomy means for labor relations.[495] Recital No. 24 of this Directive affirms that "Member States may maintain or lay down specific provisions on genuine, legitimate and justified occupational requirements which might be required for carrying out an occupational activity."[496] But Article 4(2) of the same Directive allows that:

> in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement.[497]

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488 *Id.* at 481, ¶ 122.

489 *Id.* at 481–84, ¶¶ 123–30.

490 *Id.* at 484, ¶ 131.

491 *Id.* at 486–88, 491, ¶¶ 136–42, 152.

492 *See, e.g.*, Case C-414/16, Egenberger v. Evangelisches Werk für Diakonie und Entwickiung eV, 2018 WL CELEX 62016CJ0414 (Apr. 17, 2018); Case C-68/17, IR v. JQ, 2018 WL CELEX 62017CJ0068 (Sept. 11, 2018).

493 Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 11, 1997, 1997 O.J. (C 340) 1, 133.

494 RIVERS, *supra* note 410, at 36.

495 Council Directive 2000/78, *supra* note 95, art. 1.

496 *Id.* Recital No. 24.

497 *Id.* art. 4, ¶ 2.

The CJEU, however, has not interpreted these rules to endorse a "hands off" approach, granting autonomy to religious institutions to conduct their own internal labor relations.[498] On the contrary, the CJEU has tried to draw a clear line between what remains within religious autonomy and what is justiciable under EU law.[499]

Egenberger v. Evangelisches Werk für Diakonie und Entwicklung eV (2018) raised the question of whether a religious organization could make religious affiliation a condition for employment.[500] A Protestant institution advertised a new job that involved producing a report on the United Nations International Convention on the Elimination of All Forms of Racial Discrimination and various related activities, including presenting the project to the political world and to the general public.[501] The advertisement stated that the candidates had to be members of "a Protestant church or a church" belonging to the Working Group of Christian Churches in Germany.[502] Ms. Egenberger applied, although she was not religiously affiliated.[503] After being shortlisted for the job, she was not offered an interview.[504] She sued the Protestant institution in German court, complaining about the religious affiliation requirement.[505]

The German court sent a preliminary ruling request to the CJEU, asking whether the Directive allowed that:

> an employer . . . or the church on its behalf, may itself authoritatively determine whether a particular religion of an applicant, by reason of the nature of the activities or of the context in which they are carried out, constitutes a genuine, legitimate and justified occupational requirement, having regard to the employer or church's ethos[.][506]

The CJEU noted that the ECtHR in *Fernández Martínez* clearly stated that "the Member States and their authorities, including judicial authorities, must, except in very exceptional cases, refrain from assessing whether the actual ethos of the church or organisation concerned is legitimate."[507] But the CJEU also noted that EU labor law called for the national court to strike a proper balance

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498 Case C-414/16, Egenberger v. Evangelisches Werk für Diakonie und Entwickiung eV, 2018 WL CELEX 62016CJ0414, ¶¶ 54–55 (Apr. 17, 2018).

499 *Id.*

500 *Id.*

501 *Id.* ¶ 24.

502 *Id.* ¶ 25.

503 *Id.* ¶ 26.

504 *Id.*

505 *Id.* ¶ 27.

506 *Id.* ¶ 41.

507 *Id.* ¶ 61 (citing Fernández Martínez v. Spain, 2014-II Eur. Ct. H.R. 449, 484, ¶ 129).

between competing interests and values, and to review whether the alleged discrimination fell within the scope of the EU Directive.[508] Local courts had to judge whether a church or another religious organization had lawfully exercised its right to religious autonomy. This approach necessarily entailed religious line-drawing. The CJEU further noted that the "nature" of the activities and job responsibilities by the person who had allegedly suffered from religious discrimination and the "context" within which they were carried out had to guide the local court's review.[509] A domestic judge had to look for the "objectively verifiable existence of a direct link between the occupational requirement imposed by the employer and the activity concerned."[510]

The *Egenberger* Court further clarified how the balancing assessment had to be carried out, giving the domestic court three precise criteria for judgment.[511] According to the EU directive, an act of seeming religious discrimination was lawful only if the religious requirement imposed by the employer was "genuine, legitimate and justified."[512] To be found *genuine* required proof that "professing the religion or belief on which the ethos of the church or organisation is founded must appear necessary because of the importance of the occupational activity in question for the manifestation of that ethos or the exercise by the church or organisation of its right of autonomy."[513] To be *legitimate,* the affiliation requirement could "not [be] used to pursue an aim that ha[d] no connection with that ethos or with the exercise by the church or organisation of its right of autonomy."[514] To be *justified*, the "church or organisation imposing the requirement [had] to show, in the light of the factual circumstances of the case, that the supposed risk of causing harm to its ethos or to its right of autonomy is probable and substantial, so that imposing such a requirement is indeed necessary."[515]

In conducting this assessment, the CJEU made clear that domestic judges had to balance the competing interests.[516] If the stated religious qualifications put forward by the church or religious organization were deemed ill-founded, the domestic court would have to "ensure within its jurisdiction the judicial

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508 *Id.* ¶¶ 51–53.
509 *Id.* ¶¶ 61–62.
510 *Id.* ¶ 63.
511 *Id.* ¶ 61.
512 *Id.* ¶ 64 (referencing Council Directive 2000/78, *supra* note 95, art. 4, ¶ 2).
513 *Id.* ¶ 65.
514 *Id.* ¶ 66.
515 *Id.* ¶ 67.
516 *Id.* ¶ 61.

protection for individuals" suffering from the discrimination and its effects.[517] The CJEU thus did not rule specifically on the complainant's claim, but gave the domestic court the criteria to decide the case and not simply defer because of the religious employer's claim to autonomy.[518]

While *Egenberger* concerned hiring,[519] *IR v. JQ* (2018) concerned the firing of an employee by a religious organization, and the CJEU again gave local courts detailed direction in judging discrimination claims.[520] IR was a nonprofit organization established under German law and subject to the supervision of the Roman Catholic Archbishop of Cologne.[521] Its institutional goal consisted in carrying out the work of the Catholic federation of charitable organizations called Caritas, including the operation of its hospitals.[522] IR was subject to the *Basic Regulations on Employment Relationships in the Services of the Church* issued by church institutions.[523] Such rules subjected all employees of Catholic institutions to a specific "duty of loyalty."[524] The nature of this duty, however, varied with the employee's religion.[525] Catholics, including those who discharged only "managerial duties,"[526] were "expected to recognise *and observe* the principles of Catholic doctrinal and moral teaching . . . [and] *conduct themselves in manner consistent with the principles of Catholic doctrinal and moral teaching*."[527] For non-Catholics the duty was less demanding: they had to "respect the truths and values of the Gospel and . . . contribute to giving them effect within the organisation."[528] The same *Basic Regulations* contemplated dismissal as the last resort for the employees who did not comply with these requirements for employment.[529]

JQ, a physician, was a member of the Catholic Church.[530] He was employed as the head of a medicine department of an IR hospital, and had managerial duties.[531] After he divorced and remarried, he was dismissed by IR for failing to

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517 *Id.* ¶ 79.
518 *Id.* ¶ 83.
519 *Id.* ¶ 2.
520 Case C-68/17, IR v. JQ, 2018 WL CELEX 62017CJ0068 (Sept. 11, 2018).
521 *Id.* ¶ 23.
522 *Id.*
523 *Id.* ¶ 19.
524 *Id.* ¶ 20.
525 *Id.*
526 *Id.*
527 *Id.* (emphasis added).
528 *Id.*
529 *Id.* ¶ 21.
530 *Id.* ¶ 24.
531 *Id.* ¶¶ 24, 28.

comply with Catholic marital doctrine, which forbids divorce and remarriage.[532] He sued IR in German court, arguing that he had been discriminated against on religious grounds: such action by a Protestant doctor working in the same hospital would not constitute a legitimate ground for dismissal.[533] The German domestic court reached out to the CJEU with a very sensitive question: could the Catholic Church prescribe a code of moral or religious conduct for IR employees and, more specifically, could it differentiate between Catholic employees and those who practiced a different faith or no faith at all?[534]

Drawing on the *Egenberger* criteria, the CJEU in *IR* opined that the domestic judge had to assess whether the hospital's policy of different religious standards for its employees was "genuine, legitimate and justified."[535] While again deferring to the German court to make this assessment, the CJEU made its views crystal clear.[536] It suggested that "[a]dherence to . . . [the Catholic understanding] of marriage [did] not appear to be necessary for the promotion of IR's ethos, bearing in mind the occupational activities carried out by JQ, namely the provision of medical advice and care in a hospital setting and the management" of a department.[537] In its view:

> a church or other organisation the ethos of which is based on religion or belief and which manages a hospital in the form of a private limited company cannot decide to subject its employees performing managerial duties to a requirement to act in good faith and with loyalty to that ethos that differs according to the faith or lack of faith of such employees, without that decision being subject, where appropriate, to effective judicial review . . . [A] difference of treatment, as regards a requirement to act in good faith and with loyalty to that ethos, between employees in managerial positions according to the faith or lack of faith of those employees is consistent with that directive only if . . . the religion or belief constitutes an occupational requirement that is genuine, legitimate and justified in the light of the ethos of the church or organisation concerned and is consistent with the principle of proportionality, which is a matter to be determined by the national courts.[538]

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[532] *Id.* ¶¶ 25–26, 28.

[533] *Id.* ¶ 27.

[534] Case C-68/17, IR v. JQ, 2018 WL CELEX 62017CC0068, ¶ 39 (May 31, 2018).

[535] *Id.* ¶ 50 (citing Case C-414/16, Egenberger v. Evangelisches Werk für Diakonie und Entwickiung eV, 2018 WL CELEX 62016CJ0414, ¶¶ 62–63 (Apr. 17, 2018)).

[536] *IR*, 2018 WL CELEX 62017CJ0068 ¶¶ 56–58.

[537] *Id.* ¶ 58.

[538] *Id.* ¶ 61.

Neither the ECtHR nor the CJEU has given complete autonomy to religious institutions in the field of labor law and employment. The ECtHR, however, has been much more deferential to religious organizations, second guessing decisions only at the margins. By contrast the CJEU has demanded that denominational institutions justify their labor and employment policies and decisions, and it has balanced religious and secular rationales in judging an employee's claim of religious discrimination.

3. State Aid for Religious Groups

Congregación de Escuelas Pías Provincia Betania v. Ayuntamiento de Getafe allowed the CJEU to clarify some of the boundaries that EU law puts to state aid to religious organizations.[539] As a general rule, EU law expressly prohibits state aid to religion to the extent that such aid "distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods."[540] There is, however, room left for the States to treat churches and their institutions differently.

The Congregación de Escuelas Pías Provincia Betania was a school owned by the Catholic Church and located in the Spanish municipality of Getafe.[541] Given its Catholic ownership, the school was governed by the Concordat or agreement between Spain and the Holy See, entered in 1979, before Spain joined the EU.[542] In 2011, this school built a new hall for its facilities, paying the construction tax to the municipality.[543] The school, however, later submitted a request for a tax refund,[544] on the basis that the Concordat between the Holy See and Spain accords the "complete and permanent exemption from property and capital gains taxes and from income tax and wealth tax in respect of properties of the Catholic Church."[545] The municipality refused the refund, and the school sued in state court.[546] The Spanish judge requested the CJEU to issue a preliminary ruling on whether the tax exemption for Catholic-owned buildings

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539 Case C-74/16, Congregación de Escuelas Pías Provincia Betania v. Ayuntamiento de Getafe, 2017 WL CELEX 62016CJ0074 (June 27, 2017).

540 TFEU, *supra* note 29, art. 107 ¶ 1.

541 Case C-74/16, Congregación de Escuelas Pías Provincia Betania v. Ayuntamiento de Getafe, 2017 CELEX 62016CJ0074, ¶ 14 (Feb. 16, 2017).

542 *Congregación de Escuelas*, 2017 CELEX 62016CJ0074 ¶¶ 3, 8, 13 (June 27, 2017); *Congregación de Escuelas*, 2017 CELEX 62016CJ0074 ¶ 5 (Feb. 16, 2017).

543 *Congregación de Escuelas*, 2017 CELEX 62016CJ0074 ¶ 15 (June 27, 2017).

544 *Id.*

545 *Congregación de Escuelas*, 2017 CELEX 62016CJ0074 ¶ 9 (Feb. 16, 2017) (citation omitted).

546 *Id.* ¶¶ 18.

used for non-religious purposes of education violated the EU's prohibition on state aid to religion.[547]

The CJEU's ruling in *Congregación de Escuelas* drew heavily from its own precedents on the meaning of state aid to religion—including religious schools—and gave rather precise guidelines for the domestic court to decide.[548] The Court noted that EU law did not distinguish between the religious and non-religious nature of the identity, or the for-profit and not-for-profit nature of the undertaking.[549] What was essential to trigger the EU prohibition on state aid to religion was whether the activity was remunerated.[550] "Services [that] normally provided for remuneration" count as an economic undertaking.[551] But in this case the school was part of the Spanish system of public education, and lived off of "public funds" and not fees paid by students or parents.[552] This put the school's educational activities outside the scope of the EU prohibition on state aid to religion, the Court concluded.[553] The new hall for which the local construction tax had been levied was intended to serve only the educational purpose of the school and could thus be properly exempt from construction tax.[554]

In its opinion, the CJEU did not go as far as the AG had proposed.[555] The AG did not confine her reasoning to the tax exemption issue at stake.[556] She explored the potential tensions between EU regulations and Spanish church-state relations, portending major possible changes in later cases.[557] She hypothesized that some tax exemptions accorded by the church-state agreement that benefit economic activities run by Catholic institutions would likely not survive scrutiny.[558] She even envisioned that one day Spain would have to use the dispute resolution procedures in the Concordat Between the Holy See and Spain to reconcile its obligations toward the Catholic Church and the EU.[559] The AG forecasted even more gravely: "If, in that way, a solution in conformity with EU

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547 *Congregación de Escuelas*, 2017 CELEX 62016CJ0074 ¶ 21 (June 27, 2017).
548 *Id.* ¶¶ 38–90.
549 *Id.* ¶¶ 43, 46.
550 *Id.* ¶ 47.
551 *Id.*
552 *Id.* ¶¶ 50, 55.
553 *Id.* ¶¶ 50–53.
554 *Id.* ¶¶ 53, 60.
555 Case C-74/16, Congregación de Escuelas Pías Provincia Betania v. Ayuntamiento de Getafe, 2017 CELEX 62016CJ0074, ¶ 94–100 (Feb. 16, 2017).
556 *Id.*
557 *Id.*
558 *Id.* ¶¶ 87, 99.
559 *Id.* ¶ 100 (citation omitted); TFEU, *supra* note 29, art. 107.

law were not achieved within a reasonable space of time, Spain would have to give notice of termination of the Agreement."[560]

The AG's prophecy about clashes between state compliance with EU regulations and with church-state agreements[561] is disturbing for those who understand EU integration as a smooth process that does not require its Member States to give away their traditions in order to become members of the European Union. But even as stated, this case might well have powerful ramifications for future religious freedom cases.[562] The CJEU divided admissible from inadmissible state aid to churches based on whether the church charged money for its tax-exempt services.[563] This has the paradoxical result of favoring wealthy, well-endowed, and state-established churches that receive public funds and thus do need not need to charge their users for their services. But smaller religious groups and new educational institutions that are still making their way into the public education system will have to pay taxes *precisely* because they receive no public funds and thus need to charge fees to recoup their costs.

SUMMARY AND CONCLUSIONS

Law and religion in Europe have changed dramatically in the past three decades. The European Union's strong commitment to open borders and freedom of movement has boosted the legal integration of Europe—Brexit notwithstanding. The Council of Europe's sweeping embrace of post-glasnost Russia and many former Soviet bloc countries as well as Turkey has brought East and West together as never before. The devastating conflicts in the Middle East and the failed promises of the Arab Spring have driven many émigrés to Europe in search of a better life. Many European countries have thus witnessed a massive influx of people of different faiths, ethnicities, and languages from, within, and beyond Europe.[564] And these countries now face mounting pressure to find common ground for the peaceful coexistence of their increasingly diverse societies. The new challenge for Europe is two-fold: (1) how to accommodate previously unknown religious practices now claiming religious freedom protections and (2) how to reconceptualize old Christian traditions and cultures,

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560 *Congregación de Escuelas*, 2017 CELEX 62016CJ0074 ¶ 100 (Feb. 16, 2017).

561 *Id.*

562 Alice Neffe, Congregación de Escuelas Pías Provicina Betania v. Ayuntamento de Getafe *(Case C-74/16): Tax Exemption for Church Non-religious Activity as Unlawful State Aid*, 7 OXFORD J.L. & RELIGION 143, 152 (2018).

563 *Congregación de Escuelas*, 2017 CELEX 62016CJ0074 ¶¶ 38–47 (June 27, 2017).

564 VERA HANEWINKEL, FOCUS MIGRATION, DOES THE CRISIS MAKE PEOPLE MOVE? EU INTERNAL MIGRATION BEFORE AND DURING THE ECONOMIC AND FINANCIAL CRISIS—AN OVERVIEW 2 (2013).

long protected by local constitutions, concordats, and customs, but now under attack.[565]

The two pan-European Courts sitting in Strasbourg and Luxembourg have become litigation hotspots for resolving these hard challenges. Both the European Court of Human Rights and the Court of Justice of the European Union operate with the strong and identically-phrased religious freedom mandates of the 1950 European Convention of Human Rights in Article 9 and the 2010 European Charter of Fundamental Rights and Liberties in Article 10: freedom of thought, conscience and belief for all; freedom from direct and indirect discrimination by state and private actors; freedom to manifest one's beliefs in public alone and in religious groups that deserve legal personality and religious autonomy.[566]

The ECtHR has interpreted Article 9 of the European Convention broadly to protect a person's right to hold religious beliefs in private and to manifest those beliefs peaceably in public.[567] The ECtHR has treated the "internal right to believe" as each person's right to accept, reject, or change his or her thoughts, beliefs, or religious affiliation without involvement, inducement, or impediment of the state.[568] It protects a person from pressure to reveal his or her religious identity or beliefs to the state, or to discuss religion with others. It protects persons from being forced to swear a religious oath. It protects the rights of pacifists to conscientiously object to military service and participation. And it protects school children and their parents from religious teaching in state schools, although not from classrooms that include crucifixes.

Not all claims of conscience have won relief in the two Courts. The CJEU allowed religious refugees a right to asylum only if they could provide strong evidence of their faith and strong evidence that they had or would face prosecution at home because of their faith.[569] The ECtHR denied conscientious objection exemptions to pacifists whose co-religionists bore arms, whose objections were deemed political rather than religious, or who sought to be excused from a celebratory parade or holiday celebration far removed in time and space from the battlefield.[570] The burden on religion was not heavy enough

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565 McCrudden, *supra* note 68, at 29.

566 Convention, *supra* note 2, art. 9, at 230; Charter, *supra* note 13, art. 10.

567 *See supra* Part III.A.

568 *See supra* Part III.A.

569 *See* Case C-56/17, Bahtiyar Fathi v. Predsedatel na Darzhavna agentsia za bezhantsite, 2018 WL CELEX No. 62017CJ0056 (Oct. 4, 2018).

570 *See* Bayatyan v. Armenia, 2011-IV Eur. Ct. H.R. 1; Aydemir v. Turkey, App. No. 26012/11 (July 9, 2016), http://hudoc.echr.coe.int/eng?i=001-163940; Valsamis v. Greece, 1996-VI Eur. Ct. H.R. 2312.

in those cases to warrant an exemption, in the Court's view. Even when there were ample burdens on conscience, the Court sometimes judged the burden on others' rights or on society's values to be too heavy to grant a religious accommodation. The ECtHR did go out of its way to accommodate the humanist parents in *Folgerø* to exempt their children from generic religious instruction in public schools.[571] But it refused to accommodate the Christian Romeike family who sought to protect their children from the secular liberal teachings of the public schools by homeschooling them.[572] The rights of children to proper state education trumped the parents' right to religion and religious parentage, the Court concluded.[573] Similarly, the Court denied relief to Christian private and public employees who claimed conscientious objection from newly enacted employment policies requiring them to serve same-sex couples.[574] The rights of same-sex couples to dignity and equal treatment, the Court concluded, outweighed the conscientious objections of claimants who held traditional Christian views of sexuality.[575]

Protecting the rights of others and the interests of society have also informed both Courts' rulings on limits to the right to manifest one's religion in public. Both Courts have repeated common human rights teachings that the right to manifest religion includes basic rights to peaceable religious worship, speech, press, diet, dress, holiday observance, pilgrimage, parenting, evangelization, charity services, and more.[576] While many religious claimants have won their claims to manifest their religion in public, both Courts have been disturbingly uneven in some of their recent judgments. The Courts have refused to accommodate full religious holiday observance—whether the Sabbath day claims in *Sessa*,[577] the Islamic holidays in *Kosteski* and *Liga van Moskeeën*,[578] or the Good Friday observance in *Cresco*.[579] The ECtHR did step in several times to outlaw blatantly discriminatory prohibitions on religious worship and proselytizing for Protestant minorities in Orthodox European lands, claiming

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571 Folgerø v. Norway, 2007-III Eur. Ct. H.R. 51.

572 *See* Konrad v. Germany, 2006-XIII Eur. Ct. H.R. 355.

573 *Id.* at 366.

574 *See* Eweida v. United Kingdom, 2013-I Eur. Ct. H.R. 215.

575 *Id.* at 261–62, ¶¶ 107–110.

576 For a typical summary of religious freedom protections, see, e.g., OSCE OFF. FOR DEMOCRATIC INSTS. & HUM. RTS., FREEDOM OF RELIGION OR BELIEF AND SECURITY: POLICY GUIDANCE (2019).

577 Sessa v. Italy, 2012-III Eur. Ct. H.R. 165.

578 Kosteski v. Macedonia, App. No. 55170/00 (Apr. 13, 2006), http://hudoc.echr.coe.int/eng?i=001-73342; Case C-426/16, Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen VZW and Others v. Gewest, 2018 WL CELEX 62016CJ0426 (May 29, 2018).

579 Case C-193/17, Cresco Investigation GmbH v. Achatzi, 2019 WL CELEX 62017CJ0193 (Jan. 22, 2019).

these as violations of religious freedom and religious nondiscrimination norms. But both Courts repeatedly upheld blatantly discriminatory prohibitions on Muslim headscarves, minarets, and slaughtering houses in Western European lands, claiming these were necessary applications of the margin of appreciation for local resolution of disputes. The Courts added that Muslim headscarves were demeaning to women and corrosive to society, and *halal* slaughtering was too cruel to animals to be viewed as organic.[580] But it is hard to resist the conclusion that, in these pan-European Courts, Western secularist states do better than Eastern Orthodox states; mistreated Christians do better than mistreated Muslims; and public non-religious speech, however provocative, fares better than public religious expression, however discrete. Indeed, in the *Achbita* case, the CJEU suggested that a private company could completely ban all religious speech, symbols, and dress in the workplace with impunity under EU law.[581]

With respect to religious group rights, the two Courts have begun to diverge rather significantly. The ECtHR has been more protective. It has upheld the rights of religious groups to maintain their own standards of teaching, practice, membership, employment, and discipline; to devise their own forms of polity and organization; to hold property; to lease facilities; to make contracts; to open bank accounts; to hire and pay employees, suppliers, and service providers; to maintain relations with coreligionists at home and abroad; to publish their literature; and to operate worship centers, clerical housing, seminaries, schools, charities, mission groups, hospitals, and cemeteries. The ECtHR has repeatedly held that Member States may not arbitrarily or discriminatorily withhold, withdraw, or condition a religious group's right to acquire legal personality; to procure the necessary state licenses for religious marriages, nursery schools, or educational programs for their members; or to receive state funding or other state benefits available to other properly registered religious groups. Nor may the state impose an exorbitant or discriminatory tax on a religious organization that jeopardizes the organization's ability to operate.

By contrast, the CJEU has been less deferential to religious groups in its first few cases on point. Rather than grant religious autonomy and deference to

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[580] *See* Şahin v. Turkey, 2005-XI Eur. Ct. H.R. 173.

[581] Case C-157/15, Achbita v. G4S Secure Sols. NV, 2017 WL CELEX 62015CJ0157 (Mar. 14, 2017); *see* Patrick Weil, *Headscarf Versus Burqa: Two French Bans with Different Meanings*, *in* CONSTITUTIONAL SECULARISM IN AN AGE OF RELIGIOUS REVIVAL, *supra* note 46, at 215 (regarding France's ban of the headscarf and of the *hijab*: "this art of separation [between the private and the public sphere] . . . might explain why France seems to have been more successful in building a liberal interaction between individuals raised in different faiths or beliefs").

religious employers as the ECtHR and other Western courts have done,[582] the CJEU requires domestic courts to scrutinize whether the religious affiliation and the private morality of employees are relevant to the duties of an employee of a religious organization.[583] If not, their religious or moral conduct can have no bearing on the employee's status or treatment by their employer.[584] *Egenberger* and *IR* were even more specific, requiring domestic courts to balance the competing interests of a job applicant or employee and the religious employer.[585] This balance requires judges to see which were more pressing—the secular interests, individual rights, and private life choices of an employee or job applicant or the religious institution's professed religious beliefs and practices. And it would uphold the latter only if they were found "genuine, legitimate, and justified," while making no such demand on the private parties.[586]

In *Congregación de Escuelas*, the AG in the CJEU suggested further that, even if a religious group's rights claims were based on a Concordat between the Member State and the Holy See, the right could not contradict EU regulations.[587] And if that contradiction persisted, the AG mused, the CJEU "would have to give notice of termination" of the Concordat,[588] leading skeptics to worry that local constitutional provisions on church-state relations might be next.

It is perhaps no surprise that the ECtHR in these cases has urged Member States to adopt the principle of "neutrality" in their treatment of religion, but also given them a wide margin of appreciation to resolve controversial issues in accordance with local customs and norms. Given the wide variety of constitutional settings and church-state structures in the forty-seven Member States of the Council of Europe, the Court has tried to avoid enforcing one model of religious freedom for all of Europe. The margin of appreciation principle has given individual States ample leeway to implement religious freedom in accordance with local culture and customs—a bit like the federalism principle

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582 *See, e.g.*, Hosanna-Tabor Evangelical v. E.E.O.C., 565 U.S. 171 (2012) (holding that the ministerial exemption for religious employment was mandated by the First Amendment Free Exercise and Establishment Clauses, and rejecting the argument that a neutral disability law should be applied); Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020) (holding that the ministerial exemption applied to religious schoolteachers).

583 Egenberger v. Evangelisches Werk für Diakonie und Entwickiung eV, 2018 WL CELEX 62016CJ0414 (Apr. 17, 2018).

584 *Id.*

585 *Egenberger*, 2018 WL CELEX 62016CJ0414; Case C-68/17, IR v. JQ, 2018 WL CELEX 62017CJ0068 (Sept. 11, 2018).

586 *IR*, 2018 WL CELEX 62017CJ0068 ¶ 43.

587 Case C-74/16, Congregación de Escuelas Pías Provincia Betania v. Ayuntamiento de Getafe, 2017 CELEX 62016CJ0074, ¶ 100 (Feb. 16, 2017).

588 *Id.*

in American constitutional law has allowed for diversity among individual American states in their treatment of religion.[589] But in Europe that margin of appreciation principle has sometimes come at the expense of religious minorities—like Muslim women whose religious head coverings were repeatedly banned or conservative Christians whose traditional sexual ethics were repeatedly spurned. And even when the ECtHR rules that a Member State has violated Article 9, the Court depends largely upon voluntary compliance by the offending State, some of whom remain indifferent, which only compounds the problem of localism.

The principle of "neutrality" has also permeated the new religious freedom case law of the CJEU, and it, too, has been used to deny requests for religious accommodation and autonomy. The CJEU's *Liga van Moskeeën* case stated plainly that neutral laws about slaughtering are incapable of infringing upon the religious freedom of *halal* butchers.[590] The "obligation to use an approved slaughterhouse," the Court held, "applies in a general and neutral manner to any party that organises slaughtering of animals and applies irrespective of any connection with a particular religion and thereby concerns in a non-discriminatory manner all producers of meat in the European Union."[591] This statement suggests that, for the CJEU, the ideal legislative solution for the increasing religious pluralism of European societies might lie less in granting a wide margin of appreciation for local customs, and more in the promulgation of broad, neutral, and generally applicable laws binding on the entire EU. This position echoes one of the most controversial United States Supreme Court's rulings in the religious freedom field, *Employment Division v. Smith* (1990).[592] Like the *Smith* Court, the *Liga van Moskeeën* Court holds that neutral and general laws are not violations of religious freedom, since they do not target specific religious practices.[593] This is true even if, in application, these laws impose major burdens on the exercise of religion, particularly of minority or disfavored religions with unusual religious practices or needs.[594]

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589 *See* JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 111–16, 143–49 (4th ed. 2016).

590 Case C-426/16, Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen VZW and Others v. Gewest, 2018 WL CELEX 62016CJ0426 (May 29, 2018).

591 *Id.* ¶ 61.

592 Emp. Div., Dept. of Hum. Res. of Or. v. Smith, 494 U.S. 872, 872, 882 (1990) (holding that Oregon's prohibition on the religious use of peyote does not violate the Free Exercise Clause), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* Holt v. Hobbs, 574 U.S. 352 (2015).

593 *Liga van Moskeeën*, 2018 WL CELEX 62016CJ0426 ¶ 61.

594 *Id.* ¶ 79.

The CJEU transplanted this neutrality approach from earlier ECtHR cases. But unlike the ECtHR's neutrality rulings that depend upon voluntary compliance by the Member State and that grant ample margins of appreciation for local application, the CJEU's neutrality rulings are immediately binding law on all EU members, and they leave far less room to Member States for local adjustments.[595] Add the fact that the CJEU encourages and sometimes requires Member State courts to second-guess a religious body's internal judgments when other rights or interests are affected, and that might well lead the CJEU to superimpose a specific legal order on its Member States, mostly driven by a secularist agenda.[596] This agenda might not only discourage Member States from accommodating religious believers and groups,[597] but leave standing neutral legal rules that have a disparate impact on religious parties.

When the Grand Chamber of the ECtHR in the 2011 *Lautsi* case addressed the issue of whether crucifixes were permitted in Italian public school classrooms,[598] Professor Joseph Weiler, an Orthodox Jew wearing his yarmulke in the courtroom, defended the continued display of the crucifix despite the objections of atheist parents.[599] Among other things, Weiler warned the ECtHR not to "Americaniz[e]" Europe, by superimposing a "neutrality" model of religious freedom and church-state relations, akin to what was being enforced in American courts at the time.[600] The European idea of neutrality first surfaced in ECtHR cases, but this idea has influenced the CJEU as well. Time will tell if the CJEU adopts a stronger version of religious neutrality. Ironically, the United States Supreme Court has backed away from the *Smith* neutrality test in its most recent cases, and it might soon abandon this test in favor of a more robust protection of the free exercise of religion as had been the law before *Smith*.[601] If

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595 *See* Mark Hill QC, *Eguaglianza e non discriminazione a Strasburgo e Lussemburgo*, *in* IL DIRITTO E IL DOVERE DELL'UGUAGLIANZA 61, 70 (Andrea Pin ed., 2015).

596 *See* CHRISTOPHER MCCRUDDEN, LITIGATING RELIGIONS: AN ESSAY ON HUMAN RIGHTS, COURTS, AND BELIEFS 143 (2018).

597 Professor Yossi Nehushtan recommends a "cautious, pershaps suspicious attitude towards religious claims to be granted conscientious exemptions." YOSSI NEHUSHTAN, INTOLERANT RELIGION IN A TOLERANT-LIBERAL DEMOCRACY 199 (2015).

598 Lautsi v. Italy, 2011-III Eur. Ct. H.R. 61.

599 Oral Submission by Professor JHH Weiler on behalf of Amenia et al. – Third Party Intervening States in the Lautsi Case Before the Grand Chamber of the European Court of Human Rights, ¶¶ 5, 7, 17 (June 30, 2018), https://7676076fde29cb34e26d-759f611b127203e9f2a0021aa1b7da05.ssl.cf2.rackcdn.com/eclj/weiler_lautsi_third_parties_submission_by_jhh_weiler.pdf.

600 *Id.*

601 *See, e.g.*, Hosanna-Tabor Evangelical v. E.E.O.C., 565 U.S. 171 (2012) (holding that the ministerial exemption for religious employment was mandated by the First Amendment Free Exercise and Establishment Clauses, and rejecting the argument that a neutral disability law should be applied); Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020) (holding that the ministerial exemption applied to religious

that proves true, perhaps the "Americanization" of Europe might be just what is needed after all, at least in protecting the free exercise of religion.

schoolteachers); Masterpiece Cakeshop v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018) (rejecting application of a state civil rights law to a religious freedom claimant, with concurring judges urging rejection of the *Smith* approach to free exercise cases).