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Meet the New Boss of Religious Freedom: The New Cases of the Court of Justice of the European Union

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Abstract

This Article analyzes how and why the Court of Justice of the European Union is rapidly becoming an important new forum for European religious freedom and threatening to eclipse the better-known European Court of Human Rights. Before 2017, the Court of Justice was largely silent on religious freedom, and it did little to implement the new religious freedom guarantees of the 2010 EU Charter of Fundamental Rights. Since 2017, however, this Court has issued landmark rulings on the rights and limits on Muslim employees to wear religious headscarves in the workplace and the rights of employers to make religious affiliation and conformity a prerequisite for employment or a basis for differential treatment of employees. The Court has balanced the rights of religious groups to continue ritual slaughtering

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with the growing concerns for animal wellbeing and organic food preparation. The Court has addressed hard questions of tax exemption and other state aid for religious schools; the rights and limits of refugees alleging religious persecution at home; the limits on state recognition of religious divorces; and the limits that privacy laws impose on Jehovah's Witnesses. And the Court has begun to question longstanding religion-state arrangements in selected countries, including those establishing or favoring traditional forms of Christianity.

Unlike the European Court of Human Rights in Strasbourg, which mostly relies on voluntary compliance by the individual State found in violation on the European Convention on Human Rights, the European Court of Justice produces cases that immediately bind all EU Member States and automatically preempt conflicting local laws. Moreover, local state courts regularly seek advisory opinions from this European Court on prevailing EU law before resolving local cases before them. This makes appeal to binding EU law more attractive for local litigants, religious freedom advocates ever more prominently amongst them. If present case trends continue, the world might well be watching the birth of an integrated European law of religious freedom; however, that birth could unsettle longstanding local traditions of church-state relationships and leave insular religious minorities, particularly Muslims, with little religious freedom protection.

INTRODUCTION

Scholars of European religious freedom often focus on Article 9 of the 1950 European Convention of Human Rights (ECHR)[1] and related cases on religious freedom issued by the European Court of Human Rights (ECtHR).[2] They sometimes compare these cases with those of other international and domestic courts.[3] Even the United States Supreme Court, long (in)famous for eschewing foreign law in its decisions, has recently cited ECtHR's jurisprudence.[4]

But this is true only in the sense that the 47 European States that are signatories to the ECHR are generally obliged to comply with

1. Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter Convention].

2. Javier Martínez-Torrón & Rafael Navarro-Valls, *The Protection of Religious Freedom under the European Convention on Human Rights*, 29 REV. GEN. 307, 309 (1998); Brett G. Scharffs, *The Freedom of Religion and Belief Jurisprudence of the European Court of Human Rights: Legal, Moral, Political and Religious Perspectives*, 26 J.L. & RELIG. 249, 249 (2010).

3. Jean-Francois Flauss, *The European Court of Human Rights and the Freedom of Expression*, 84 IND. L.J. 809, 810 (2009); Scharffs, *supra* note 2.

4. Lawrence v. Texas, 539 U.S. 558, 573 (2003).

the ECtHR's rulings. However, these rulings are not binding law per se, and they have only weak means of enforcement.[5] A ruling that a State has violated a right protected by the Convention usually triggers only payments of modest damages to the aggrieved party, and even then the payment is well after the fact. These rulings are not binding precedents for the individual State found in violation of an ECHR right; they do not trigger automatic legislative changes or govern future domestic case law in that State. Indeed, all European states can ignore an ECtHR's ruling with only modest consequences beyond the risk of being sued in the same Court for similar violations and being subject to diplomatic pressure or public shame for falling out of step. These are the current realities not only for religious freedom cases but for many other areas of law covered by the ECHR.

By marked contrast, the Court of Justice of the European Union (CJEU) "has emerged as the most powerful supranational court in world history."[6] Its judgments have much more powerful legal effects for the Member States and their citizens; and its interest in religious freedom is rapidly growing. This Court enforces the EU's 2010 Charter of Fundamental Rights ("Charter"), including its Article 10 guarantee of religious freedom. Its rulings are binding law, immediately enforceable, and automatically part of the domestic law of the 28 (27 after Brexit) States that are members of the European Union.[7]

Religious freedom concerns were largely absent from the CJEU's case law until 2017.[8] Since then, the Court issued eleven new cases on religious freedom, several with striking results. So far, the CJEU has held that employers can introduce internal regulations that ban the use of religious symbols but not target specific employees for discretely wearing religious apparel.[9] Religious affiliation can be a legitimate employment requirement if religious identity and practice affects the type of activity carried out by the employee.[10] A lay doctor's decision to divorce and remarry does not justify his termination from employment in a Catholic hospital committed to

5. Veronika Fikfak, *Changing State Behaviour: Damages before the European Court of Human Rights*, 29 EUR. J. INT'L L. 1091, 1092 (2018) ("non-compliance with the Court's judgments remains a major problem for the Council of Europe").

6. R. Daniel Kelemen, *The Court of Justice of the European Union in the Twenty-First Century*, 79 L. & CONTEMP. PROBS. 117, 117–18 (2016).

7. Gundega Mikelsone, *The Binding Force of the Case Law of the Court of Justice of the European Union*, 20 JURISPRUDENCIJA 469, 484 (2013) (Lat.).

8. *See generally* Case C-130/75, Prais v. Council of European Cmtys., 1976 E.C.R. 1589; Case C-41/74, Van Duyn v. Home Office, 1974 E.C.R. 1337 (tangentially discussing religious freedom and the EU judiciary). These decisions were delivered in the 1970s and the religious angle has sporadically appeared within the CJEU's case law ever since. *See* Ronan McCrea, *Singing from the Same Hymn Sheet? What the Differences Between the Strasbourg and Luxembourg Courts Tell Us About Religious Freedom, Non-Discrimination, and the Secular State*, 5 OX. J.L. & RELIGION 183, 185 (2016) (noting that as of 2016, "religion-related case law in the European Court of Justice [was] much smaller").

9. 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).

10. Case C-414/16, Egenberger v. Evangelisches Werk für Diakonie und Entwicklung eV, 2018 WL CELEX 62016CJ0414 (Apr. 17, 2018).

religious doctrines that prohibit divorce.[11] The Jehovah's Witnesses' practice of keeping records of proselytizing activities must be conducted in a way that complies with EU privacy rules.[12] The religious affiliations of employees can be reflected in a private company's different holiday schedules, but it cannot justify unequal compensation.[13] Religious schools can benefit from State tax exemption for education without violating EU competition regulations that prohibit state aid to religion.[14] Muslim ritual slaughtering cannot be reconciled with EU requirements for labeling of meat as "organic food" nor can it take place in temporary unregulated slaughtering facilities, even when Muslim religious festivals create a temporary high demand for *halal* meat.[15] EU regulations do not require Member States to mutually recognize divorces issued by religious courts.[16] Refugee protection against religious persecution covers only cases of real threats against public or private religious practice; and a high burden of proof is on the refugee applicant.[17] Several more cases in the CJEU are pending. These cases have already built a wave of religious freedom litigation that is likely to grow.[18]

The CJEU is rapidly emerging as the new boss of religious freedom in Europe, and the world would do well to take notice. Not only does this rapidly growing body of cases have substantial ramifications for EU Member States, but also for their citizens and non-EU citizens living within EU territories. Some trends in these CJEU religious freedom cases also bear close watching. The CJEU has already shown preference for state policies of "religious neutrality." That policy is intuitively attractive in post-modern, pluralistic, and liberal societies to address a number of legal questions, and it is already providing more nuanced protection for religious freedom claims than the aggressive policies of *läicité* and secularization at work in some EU Member States.[19] But religious neutrality norms, when pressed too strongly, can also come at the cost of accommodations for discrete religious minorities who operate outside of the cultural mainstream or other parties whose pressing

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11. Case C-68/17, IR v. JQ, 2018 WL CELEX 62017CJ0068 (Sept. 11, 2018).

12. Case C-25/17, Tietosuojavaltuutettu v. Jehovan todistajat, 2018 WL CELEX 62017CJ0025 (July 10, 2018).

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

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

15. Case C-497/17, Œuvre d'assistance aux bêtes d'abattoirs (OABA) v. Ministre de l'Agriculture et de l'Alimentation (Grand Chamber), 2019 WL 62017CJ0497 (Feb. 26, 2019); Case C-426/16, Liga van Moskeeen en Islamitische Organisaties Provincie Antwerpen VZW v. Gewest, 2018 WL CELEX 62016CJ0426 (May 29, 2018).

16. Case C-372/16, Sahyouni v. Mamisch, 2017 WL CELEX 62016CJ0372 (Dec. 20, 2017).

17. Case C-56/17, Fathi v. Predsedatel na Darzhavna agentsia za bezhantsite, 2018 WL CELEX 62017 CJ0056 (Oct. 4, 2018); Case C-71/11, Bundesrepublik Deutschland v. Y, Z, 2012 WL CELEX 62011CJ0071 (Sept. 5, 2012) (judgment for joined cases C-71/11 and C-99/11).

18. *See generally* THE COURT OF JUSTICE OF THE EUROPEAN UNION, https://curia.europa.eu /jcms/jcms/Jo2_7052/en/?annee=2019 (discussing pending religious freedom cases in press releases).

19. *See generally* George Letsas, *Two Concepts of the Margin of Appreciation*, 26 OXFORD J. OF LEGAL ST. 705–32 (2006).

claims of conscience or faith prevent them from abiding by the State's neutral laws.[20] Furthermore, this neutrality policy has prompted the CJEU to begin to question the longstanding Western principle of "religious autonomy" that counsels judicial deference to peaceable religious groups to govern their own internal affairs concerning property, employment, membership, and more—so long as all parties have the unconditional freedom to leave that group.[21] This policy has already led the CJEU to probe and question longstanding national church-state arrangements in constitutions and concordats, particularly those that establish or privilege one or more traditional forms of Christianity.[22] Even without a "disestablishment of religion" clause in the EU Charter, these latter cases are beginning to challenge local religion-state traditions and arrangements. It is too soon to tell whether these early case trends will solidify into enduring religious freedom principles for the CJEU. But EU litigants have taken notice and are beginning to swell the CJEU's docket and to bypass Strasbourg's European Court of Human Rights.[23]

This Article analyzes how and why the CJEU is becoming an important forum for European religious freedom issues and why its impact is likely to grow in the near future. Part I briefly outlines the scope and power of the CJEU in comparison with the more familiar ECtHR. Part II analyzes in some detail the eleven new CJEU cases on religious freedom and what they reveal about the CJEU's emerging principles of religious freedom and their connections with other rights covered in the EU Charter. We conclude that, if present case trends continue, the CJEU is likely to have a more profound and pervasive impact on religious freedom and related rights than the ECtHR. Indeed, we might well be watching the birth of a real integrated European law of religious freedom.

I. THE ECTHR: ITS SCOPE, POWERS, AND LIMITS

The European Court of Human Rights ("Court")—sitting in Strasbourg—is the Council of Europe's forum where individuals can file complaints that their State has not respected their rights as enshrined in the 1950 European Convention on Human Rights (the

20. *See infra* p. 53; Employment Division v. Smith, 494 U.S. 872 (1990) (holding that neutral and generally applicable laws are not a violation of the First Amendment protection of free exercise of religion); JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 143–53 (4th ed. 2016) (exploring subsequent cases and statutory responses); 2–5 DOUGLAS LAYCOCK, RELIGIOUS LIBERTY (2011–18).

21. *See generally* NORMAN DOE, LAW AND RELIGION IN EUROPE: A COMPARATIVE INTRODUCTION (2011); CHURCH AUTONOMY IN EUROPE: A COMPARATIVE SURVEY (G. Robbers ed., 2001); 2 LAYCOCK, *supra* note 22.

22. *See infra* notes 208–227 and accompanying text.

23. *See generally* THE COURT OF JUSTICE OF THE EUROPEAN UNION, https://curia.europa.eu/jcms/jcms/j_6/en/ (providing access to court reports on current and past cases of the CJEU).

"Convention").[24] The ECtHR's jurisdiction extends to 47 European countries of the Council of Europe—not just the 27 countries of the European Union—and reaches nearly 900 million people. Its case law feeds scholarship and the global human rights agenda and provides other jurisdictions with an uninterrupted flow of judgments that progressively unfold the scope and the meaning of the ECHR and comparable language in other international human rights instruments.[25]

For the past 25 years, the ECtHR has issued a growing number of cases on religious freedom, based on the language of Article 9 of the ECHR:

> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or 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.[26]

Article 14 supplements Article 9's religious freedom's protection by requiring that the rights enshrined in the ECHR be enforced without discrimination, including religious discrimination:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[27]

Given these fundamental texts and their expansive interpretation since the first Article 9 case of *Kokkinakis v. Greece*[28] in 1993, scholars of European religious freedom have been attentively scrutinizing this emerging jurisprudence of the ECtHR. The Court and Convention also enjoy a special reputation in the fields of both international law and constitutional law. Scholars of international law regard the ECHR as "the poster child of international human rights

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24. *See* Convention, *supra* note 1, art. 19 ("To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights").

25. Françoise Tulkens, *La Cour européenne des droits de l'homme: le chemin parcouru, les défis de demain*, 53 CAHIERS DE DROIT 419, 422 (2012).

26. Convention, *supra* note 1, art. 9 para. 2.

27. Convention, *supra* note 1, art. 14.

28. *See generally* Kokkinakis v. Greece, 260-A Eur. Ct. H.R. (ser. A) (1993).

law."[29] Comparative constitutional lawyers find the ECtHR appealing because its approach is close to that of national constitutional courts.[30] Indeed, the ECtHR has occasionally described itself as a "constitutional instrument of European public order."[31]

This Strasbourg Court's rulings, however, suffer from severe weaknesses that undermine their effectiveness and authority and may hinder this Court's attractiveness to litigants if the CJEU continues to become a more effective forum for religious freedom claims. First, while any individual or group can apply to the ECtHR to complain that their Member State has violated one or more ECHR's rights, they can do so only after they have exhausted all domestic remedies in their home State, which is usually a time-consuming and expensive process. Failure to do so renders their application to the ECtHR inadmissible.[32]

Moreover, since the European Convention on Human Rights is an international treaty, the ECtHR is an international court. It is not formally a supreme court nor a higher national court of appeal for any State. This means that its effectiveness depends on the Member State's cooperative attitude and domestic mechanisms.[33] An ECtHR ruling creates only an international obligation that Member States "undertake to abide by the final judgment of the Court in any case to which they are parties," as Article 46 of the Convention put it.[34] This normally includes paying modest monetary compensation to the applicant, and removing the offending policy or practice that caused the violation.[35] But the ruling does not reverse or alter the judgment of the domestic courts that heard the case before it went to the European court, nor does it affect the State's legislation or future case law. It is certainly true that "important areas of [domestic] law . . . have changed as a result of the influence of the ECHR and the case law of the [ECtHR]."[36] Some Member States have further incorporated provisions of the ECHR within their constitutional structures, aligned their laws with the ECtHR's rulings, and voluntarily and "frequently refer to the ECtHR's

29. Kai Möller, *From Constitutional to Human Rights: On the Moral Structure of International Human Rights*, 3 GLOBAL CONSTITUTIONALISM 373, 398 (2014).

30. Andrea Pin, *The Costs and Consequences of Incorrect Citations: European Law in the U.S Supreme Court*, 42 BROOK. J. INT'L L. 129, 149 (2016).

31. *See* Loizidou v. Turkey (Preliminary Objections), 310 Eur. Ct. H.R. (ser. A), para. 75 (1995) ("the effectiveness of the Convention as a constitutional instrument of European public order"); Robin C.A. White & Iris Boussiakou, *Separate Opinions in the European Court of Human Rights*, 9 HUM. RTS. L. REV. 37, 37–38 (2009) (recalling instances in which the Court has been described as a constitutional court); Wojciech Sadurski, *Is There Public Reason in Strasbourg?*, 35 SYDNEY L. SCH., Legal Studies Research Paper No. 15/46, (2015) (describing the Court as "an emerging European constitutional court for human rights").

32. European Convention on Human Rights art. 35, Nov. 4, 1950 (entered into force June 1, 2010).

33. *See generally* 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 13 (Janneke Gerards & Joseph Fleuren eds., 2014).

34. European Convention on Human Rights art. 46, Nov. 4, 1950 (entered into force June 1, 2010).

35. *Practical Guide on Admissibility Criteria* para. 55, EUR. CT. ON H.R. (Aug. 31 2019).

36. Janneke Gerards & Joseph Eleuren, *Introduction* to IMPLEMENTATION OF THE ECHR ON HUMAN RIGHTS AND OF THE JUDGMENTS OF THE ECTHR IN NATIONAL CASE-LAW, at 1 (2014).

case law."[37] But these changes in domestic laws remain voluntary; a State found to be in violation of the ECHR need not necessarily embrace the ECtHR's reasoning.[38]

The Council of Europe soon realized that both the weak status of the ECtHR's rulings and the requirement that a party first exhaust all domestic remedies undermined the Court's effectiveness. Particularly worrisome to the Council was that the Court has no power to persuade a State to reconsider its human rights policies, however out of step, since the ECtHR has no jurisdiction until the human rights dispute is over.[39] In response, the Council of Europe issued the Additional Protocol XVI to the ECHR.[40] The Protocol allows a high domestic court hearing a case that involves a controversial interpretation of an ECHR rights provision to suspend their proceedings and refer the legal issue to the ECtHR for a nonbinding, advisory opinion to the referring court.[41] The domestic court can then resume the proceeding and issue a judgment in light of the interpretation of the ECHR given by the ECtHR itself.[42]

It is too early to predict whether and how domestic courts will heed the Council of Europe's call to refer such cases to the ECtHR. So far, the Additional Protocol has been met with a lukewarm reception, and only a minority of Member States have, in fact, signed onto and ratified the Protocol.[43] No ECtHR religious freedom case to date has followed the Protocol.

II. THE EU AND ITS COURT: AN EFFECTIVE NEW PLAYER IN THE GLOBAL FIELD OF RELIGIOUS FREEDOM

A. *The EU's Genealogy and Purpose*

The Court of Justice of the European Union (CJEU) has far more formidable power. EU laws are immediately enforceable,[44] and CJEU judgments are automatically part of the law of the land in the 27

37. *Id*.
38. Janneke Gerards, *supra* note 35, at 24.
39. GUIDE ON ARTICLE 1, at 20 (2019), EUR. CT. ON H.R.
40. Protocol No. 16, *Convention for the Protection of Human Rights and Fundamental Freedoms*, *opened for signature* Oct. 2, 2013, (entered into force Aug. 1, 2018) [hereinafter Protocol No. 16].
41. *See id*. art. 1 paras. 1–2 (stating that "highest courts and tribunals of a High Contracting Party, as specified in accordance with Article 10, may request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto. The requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it").
42. *Id*.
43. *See Chart of signatures and ratifications of Treaty 214*, COUNCIL OF EUR. (Aug. 1, 2018), https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/214/signatures (showing an updated list of signatures and ratifications).
44. *See* Case 26/62, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, 1963 E.C.R. 3 (determining that provisions of the Treaty Establishing the European Economic Community were capable of creating legal rights which could be enforced by both natural and legal persons before the courts of the Community's member states).

EU countries (28 before Brexit). The jurisprudence of the CJEU is "binding,"[45] while that of the ECtHR is only "influential."[46]

It takes a bit of acquaintance with European political and legal history to appreciate the current power of the CJEU. The European Union is the offspring of the prior European Communities that the Continental States created in the aftermath of the Second World War.[47] Soon after re-establishing their democratic status, France, Germany, Italy, Belgium, Luxembourg, and the Netherlands signed three international treaties, establishing the Community of Coal and Steel,[48] the European Agency for Atomic Energy,[49] and the European Economic Community.[50] These three Communities were initially conceived as a preliminary form of European legal integration that focused on economic issues and aimed at achieving peace, stability, and prosperity for the whole Continent,[51] as well as re-legitimizing the States that were resurrected from the ashes of World War II.[52]

Fundamental freedoms and human rights were initially not among the core stated concerns of these new Communities.[53] Rights protection was seen as an obvious but indirect task of the new bodies. Poverty and hostility had fed the mass atrocities of the first half of the twentieth century in Europe. By coordinating their economies, the State Members aimed to overcome the rivalries over food and basic provisions that too often had erupted into open wars. The shared control of coal and steel aimed at preventing the accumulation of resources for war by any one country. The agency controlling atomic energy was designed both to deter nuclear weaponization and to coordinate the peaceful use of this new power source.[54]

The Economic Community embraced a practical notion of liberty. It secured freedom of movement for its citizens, services, goods, and capital.[55] This freedom drove the gradual removal of border customs and legal limitations on economic activities, thereby

45. Lady Hale, President of the Supreme Court of the U.K., Speech at the Public Law Project Conference 2013: Who Guards the Guardians? (Oct. 4, 2013) (transcript available at https://www.supremecourt.uk/docs/speech-131014.pdf).

46. *Id*.

47. A PEACEFUL EUROPE – THE BEGINNINGS OF COOPERATION, EUR. UNION (May 9, 2017), https://europa.eu/european-union/about-eu/history/1945-1959_en.

48. Treaty Establishing the European Coal and Steel Community (1951), 261 U.N.T.S. 140 (expired 2002).

49. Treaty Establishing the European Atomic Energy Community (1957), 298 U.N.T.S. 167.

50. Treaty Establishing the European Economic Community (1957), 298 U.N.T.S. 11.

51. Matthias Matthijs, *Europe after Brexit: A Less Perfect Union*, 96 FOREIGN AFF. 85, 87 (2017).

52. *Id*.

53. PAUL P. CRAIG & GRÁINNE DE BÚRCA, EU LAW 362 (5th ed. 2011).

54. Elaine Ursula Ettmueller, *El Presente y Futuro de La Libertad de Conciencia y de Religión en la Unión Europea* [The Present and Future of Freedom and Conscience and Religion in the European Union], 14 UNISCI DISCUSSION PAPERS 95, 98 (2007).

55. CRAIG & DE BÚRCA, *supra* note 53, at 582.

creating a single European market with free trade for all residents within its territories.[56]

State membership in the Economic Communities became a valuable economic and social asset for many States. This was especially true for those countries that liberated themselves from dictatorial regimes, such as Greece (which joined the EU in 1981), Portugal (1986), and Spain (1986). Following the collapse of the Soviet Union, a later wave of entries into the Community came mostly from Central and Eastern Europe, including Poland (2004), Hungary (2004), Lithuania (2004), and Romania (2007). These new members aimed to exploit and contribute to the vast opportunities of the unified European market, to participate in its social dimensions, and to benefit from the funds made available by the Communities to underdeveloped territories.[57]

The European integration process was so successful that the Community of Coal and Steel ceased to exist after 2002.[58] The European Economic Community developed into the European Union between 1993 (when the Treaty of Maastricht set the ground for its establishment) and 2009 (when the Lisbon Treaty last modified the constitutional structure of the EU).[59] The European Union's constitutional structure is now regulated by the European Union Treaty (TEU, 2007) and the Treaty on the Functioning of the European Union (TFEU, 2007).[60] By the time the EU was born, its law had come to govern many of the economic activities within its territories, greatly influencing the lives of its peoples.[61]

Topics ranging from the economy to finance, from privacy to agriculture, and from environmental protection to public procurement are now within the EU's direct or indirect influence. The Communities' legal sources are (1) the founding Treaties; (2) the regulations, which establish rules that are immediately applicable and enforceable; (3) the directives, which create specific obligations for the Member States to implement domestic legislation with the contents of the directives; and (4) court decisions, which are wholly binding but can also be directed only to specific subjects to whom they apply.[62]

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56. Matthijs, *supra* note 51, at 89.

57. *See* CRAIG & DE BÚRCA, *supra* note 53, at 21, 582 (listing the dates Poland, Hungary, Lithuania, and Romania joined the EU and describing the opportunities that the Economic Community provided for its member states).

58. *See id*. at 1 (stating that the European Coal and Steel Community expired in 2002).

59. *See id*. at 14–28 (discussing the TEU signing in Maastricht and the Libson Treaty in relation to their effect on the development of the European Union).

60. *See id*. at 26 ("The EU is henceforth to be founded on the TEU and the TFEU, and the two Treaties have the same legal value.").

61. *See* Kelemen, *supra* note 6, at 124 (describing the scope of EU law as expanding into "more sensitive areas of national policy, such as healthcare, education, collective bargaining, fundamental rights, and fiscal policy").

62. Council Directive 202/171 art. 288, 2016 O.J. (C 202) 42, 171–72 [hereinafter TFEU 2016]; *see also* CRAIG & DE BÚRCA, *supra* note 53, at 304 (stating that the TFEU shall be guided by the principles "laid down in Chapter 1 of Title V of the Treaty on European Union").

These legal sources are the four normative tools that have had the greatest impact on domestic legislation.

B. The CJEU

The Court of Justice of the European Union (CJEU) is divided into the General Court and the Grand Chamber; the latter is the court of last resort.[63] The CJEU operates as the high court of the European Union (EU), from which it took its new name. Earlier, under the European Communities, it was called the European Court of Justice (ECJ).[64] The CJEU, like the ECJ before it, has five main functions: (1) reviewing the acts of EU institutions; (2) ruling on actions against the Member States, when they fail to comply with their Treaty obligations; (3) rendering opinions on the international agreements concluded by the EU; (4) hearing claims for damage compensation; and (5) interpreting EU laws at the request of the domestic courts of Member States through the so-called "preliminary procedure."[65] The Court's ample use of these powers over the decades helped first to integrate the law of the Member States of the European Communities, and then to create a supranational law for the European Union.

Among these judicial powers, the "preliminary ruling procedure" has proved to be the most effective and efficient tool to ensure that EU law is part of the law of each Member State. This procedure allows a domestic court of any Member State to suspend a domestic proceeding[66] and request that the CJEU issue a judgment on the correct interpretation of EU law that is relevant for the local case. The ruling that the CJEU then delivers is binding not just on the referring domestic court, but on any other EU domestic court, should a similar case arise within its jurisdiction.[67] Since it is the domestic judge, not the parties, who refers the case to the CJEU, the parties incur no additional litigation expenses or undue delay. They need only persuade the domestic judge that clarification from the CJEU is needed to decide their case. Local courts have proved amenable to making such requests of the CJEU in no small part in order to settle cases finally, with lower risk of appeal and reversal.[68]

In the early days of the European Communities, the ECJ used this preliminary ruling procedure to create the conceptual framework that made the Community's laws binding at the Member State level. The seminal 1963 case of *Algemene Transporten Expeditie*

63. Giulio Itzcovich, *The European Court of Justice*, *in* COMPARATIVE CONSTITUTIONAL REASONING 277, 278 (András Jakab et al. eds., 2017).

64. *See* CRAIG & DE BÚRCA, *supra* note 53, at 58 (describing the ECJ as a component of the Community Courts prior to the Libson Treaty).

65. Itzcovich, *supra* note 63, at 280.

66. *Preliminary ruling proceedings — recommendations to national courts*, EUR-LEX (Oct. 31, 2017), http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:l14552.

67. *Id*.

68. ROBERT LECOURT, L'EUROPE DES JUGES 309 (1976).

Onderneming Van Gend & Loos v Nederlandse Administratie der Belastingen[69] first stated this rule clearly:

> The community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals.[70]

Within this "new legal order of international law," the Court continued, the European Treaty had to be seen "as producing direct effects and creating individual rights which national courts must protect.[71] This added doctrine of "direct effect" internalizes state compliance with EU law and renders this EU law supreme.[72] The direct effect doctrine mandates that when the European Union enacts a law, it is immediately binding and enforceable by all domestic courts in Member States.[73] There is no need for a Member State legislature to ratify or execute it through separate domestic legislation.[74] Moreover, not only is the EU law part of the law of all Member States; it is the supreme law in each State. The local legislature cannot remove, revise, or replace EU law by passing a new domestic statute, nor can local courts interpret it contrary to European Court precedents or favorably to cater to local interests. As the ECJ put it in *Costa v. ENEL:*

> [T]he law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.
>
> The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent

69. Case C-26/62, N.V. Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie der Belastingen [Netherlands Inland Revenue Administration], 1963 E.C.R. 2–3.

70. *Id*. at 12.

71. *Id*. at 16.

72. Joseph Weiler, *Deciphering the Political and Legal DNA of European Integration: An Exploratory Essay*, *in* PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW 150, 154 (Julie Dickson & Pavlos Eleftheriadis eds., 2012).

73. *Id*. at 155.

74. Carl Baudenbacher, *How the EFTA Court Works – and why it is an Option for Post-Brexit Britain*, LONDON SCH. OF ECON. & POL. SCI. (Aug. 25, 2017), https://blogs.lse.ac.uk/brexit/2017/08/25/how-the-efta-court-works-and-why-it-is-an-option-for-post-brexit-britain/ (stating that the jurisdiction of the CJEU spills over beyond EU borders, thanks to the Court of the European Free Trade Association, which encompasses EU states as well as three more states: Iceland, Liechenstein, and Norway. This Court rules on these three outsiders in economic fields through a jurisprudence that normally follows the CJEU in order to keep the whole European Economic Area legally homogeneous).

> unilateral act incompatible with the concept of the Community cannot prevail.[75]

Because EU law has supremacy, domestic courts must enforce EU law instead of domestic law when there is a conflict between the two. The practical result is that domestic courts *act,* in effect, as EU courts when they apply and give necessary priority to EU law.[76] Moreover, the ECJ and its successor CJEU is, in effect, a powerful *sui generis* constitutional court,[77] and "*de facto* empowered to assess . . . not only the validity of [EU] law but also the conformity to [EU] law of Member States' legislation and practices."[78]

The legal integration of the EU and the supremacy of its law have been further enhanced by the European Court's unique method of legal interpretation. From the start, the ECJ rejected merely textual interpretation of European Community laws, but insisted on interpreting them in light of the European Treaty's stated goal of integrating the Member States' legal systems.[79] As early as in the 1963 case of *Van Gend En Loos*, the ECJ made its judicial philosophy crystal clear, calling for interpretation according to "the spirit, the general scheme and the wording" of the Treaty.[80] It is telling that the "wording" of the Treaty comes third in this list of priorities. The Court's primary interpretive approach is purposive.[81]

The ECJ and its CJEU successor court have applied this approach rather consistently in an effort to integrate the laws of its Member States. Since one of the purposes of the EU Treaty is a commitment to an "even closer union"[82] of EU Member States, the CJEU usually interprets EU laws in light of this ultimate purpose instead of following originalist or textualist methods.[83] Its judgments are so strongly directed toward the integration of EU law that even "EU lawmakers frequently write legislation that invites the ECJ [and CJEU] to play a central role in governance."[84]

Furthermore, the structure, functioning, and judicial style of the CJEU are particularly well suited to the progressive reading of existing laws. The CJEU's procedure is quintessentially inquisitorial,[85] and the scope of its arguments and rulings is not limited by the parties'

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75. Case C-6/64, Flaminio Costa v. ENEL, 1964 E.C.R. 585, 594.
76. Julie Dickson, *Towards a Theory of European Union Legal Systems*, *in* PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW 25, 43–44 (Julie Dickson & Pavlos Eleftheriadis eds., 2012).
77. Itzcovich, *supra* note 63, at 280.
78. *Id*. at 281.
79. *Id*.
80. Algemene Transport, 1963 E.C.R. 2, 13.
81. Nial Fennelly, *Legal Interpretation at the European Court of Justice*, 20 FORDHAM INT'L L.J. 656, 664 (1996).
82. Consolidated Version of the Treaty on European Union art. 1, June 7, 2016, 2016 O.J. (C 202) 13, 16 [hereinafter 2016 TEU].
83. Itzcovich, *supra* note 63, at 294.
84. Kelemen, *supra* note 6, at 121.
85. Itzcovich, *supra* note 63, at 283.

allegations or arguments. Legal integration among Member States is a regular and explicit component of the Court's proceedings. In fact, the CJEU employs an Advocate General (AG), who is a member of the CJEU, to deliver a written opinion before the CJEU discusses the case.[86] The Advocate General provides the Court with a reasoned reflection on the EU's interests involved in each case, thereby fleshing out what she judges to be the view of the EU on a given matter. The AG's written opinion is thus very influential. It is normally much longer and more detailed than the CJEU's own judgment, which is usually an extremely technical and concisely written single opinion, with no concurring or dissenting opinions allowed. Because of this, the AG's "opinions are indispensable for understanding what arguments might have influenced the Court without being explicitly endorsed in the final judgment and what arguments have been implicitly rejected."[87]

Each of these general features of EU law and its CJEU adjudication—the preliminary ruling procedure, the direct effect doctrine, and the judicial preference for legal integration of the EU, informed by the detailed opinions of the Advocate General—apply in the religious freedom field as well. CJEU cases on religious freedom apply universally in Member States, overriding conflicting domestic constitutions, statutes, and cases.[88] The CJEU can intervene early in the litigation, providing a prompt response and direction to an ongoing domestic dispute. The Advocate General's opinion, together with the Court's purposive mode of interpretation, allows each religious freedom case to be decided on the merits, in light of prevailing EU law and with an eye to producing an integrative religious freedom jurisprudence for the European Union.[89] Member States seem ready for this effort.

C. EU Rights and Religious Freedom

While the initial European integration process did not focus on any rights and liberties outside the economic field, the EU brought fundamental rights into its core business in the 1990s and 2000s as part of an effort to revitalize its fading legitimacy.[90] Religious freedom was included in this new discussion of "fundamental rights." The 1999 Treaty of Amsterdam, which helped solidify the European Union, first established the principle of religious deference to the status of churches

86. *Id*. at 285–86.
87. *Id*. at 286.
88. *See* Flaminio Costa, 1964 E.C.R. 585, 593 (establishing the primacy of European Union law over the laws of its member states).
89. *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 267, June 7, 2016, 2016 O.J. (C 202) 164 (prescribing that the CJEU "shall act with the minimum of delay").
90. Weiler, *supra* note 72, at 157.

and other religious organizations in Member States.[91] Declaration 11 of the Treaty provided:

> The European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.
>
> The European Union equally respects the status of philosophical and non-confessional organisations.[92]

The Treaty of Amsterdam and its Declarations triggered a broader interest in the protection of religious freedom and other fundamental rights in EU Member States.[93] The language of rights gained such momentum that in 2010 the EU issued its own Charter of Fundamental Rights,[94] which it later incorporated into its governing Treaty.[95] The Charter includes a religious freedom guarantee in Article 10:

> 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.[96]

Alongside the Charter, the EU also incorporates the 1950 European Convention on Human Rights, with its comparable language guaranteeing religious freedom.[97] Article 6 of the EU Treaty provides:

> 2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental

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91. Gabriela Alexandra Oanta, *The Status of Churches and Philosophical and Non-Confessional Organizations Within the Framework of the European Union Reform*, 15 LEX ET SCIENTIA INT'L J. 121, 123 (2008).

92. Treaty of Amsterdam Amending the Treaty on European Union, Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1, 133 [hereinafter Treaty of Amsterdam].

93. *See* Ian Ward, *Tempted by Rights: The European Union and its New Charter of Fundamental Rights*, 11 CONST. F. 112, 113 (2011) (explaining that the Treaty of Amsterdam "proclaimed a redrafted Article 6, the first section of which added that '[t]he Union is founded on principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.'").

94. Charter of Fundamental Rights of the European Union, Mar. 30, 2010, 2010 O.J. (C 83) 2 [hereinafter Charter].

95. Consolidated Version of the Treaty on the Functioning of the European Union art. 6, para. 1, Oct. 26, 2012, 2012 O.J. (C 326) 13, 19.

96. Charter, *supra* note 94, art. 10.

97. Note the right to conscientious objection in Article 10 is not in Article 9, though the European Court of Human Rights has interpreted Article 9 to include that right. *See generally* WITTE & NICHOLS, *supra* note 20, at 255–75 (documenting that the European Court has interpreted Article 9 to include as an individual right a person's right to accept, reject, or change beliefs without State involvement).

> Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
>
> 3. 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.[98]

Article 52/3 of the Charter elaborates further that

> [i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.[99]

Because of these two explicit references to the 1950 European Convention on Human Rights, the CJEU routinely takes into account relevant European Court of Human Rights rulings on religious freedom brought under Article 9 and related provisions of the Convention.[100] The CJEU does not, however, consider these ECtHR cases to be binding precedents or even necessarily normative. As the EU Charter states explicitly, EU law can provide "more extensive protection" of rights.[101] The ECtHR's cases on the Convention are thus probative but not dispositive for the CJEU. And, in turn, the CJEU's cases interpreting the EU Charter have no formal bearing on the ECtHR.

From 2010 to 2017, the Charter's new Article 10 guarantee of religious freedom produced little case law in the CJEU.[102] However, that is now changing rapidly for at least two reasons. First, migration from within and outside the EU is greatly altering the religious environment within each Member State. The old religious mosaic of Europe was largely homogeneous: Christian Orthodoxy dominated Eastern Europe; Southwestern Europe was Catholic; the North was mainly Protestant.[103] Local state laws reflected these realities, with many of them acknowledging a special place for their traditionally predominant religions. But that religious picture has rapidly changed, in no small part because of the EU and its economic liberties. Freedom of movement has brought millions of Catholic Poles to live in places

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98. Consolidated Version of the Treaty on the Functioning of the European Union art. 6, May 9, 2008, O.J. (C 115) 13, 19.

99. Charter, *supra* note 94, art. 52, para. 3.

100. WITTE & NICHOLS, *supra* note 20, at 255–56.

101. Charter, *supra* note 94, art. 52, para. 3.

102. 2016 TEU, *supra* note 82, tit. 1, art. 6, para. 1 (reaffirming the rights, freedoms, and principles set out in the Charter as binding law for Member States).

103. *See* CARLTON J. H. HAYES, A POLITICAL AND SOCIAL HISTORY OF MODERN EUROPE 112–30 (16th ed. 1924) (chronicling the religious history of Europe).

like the United Kingdom with its established Church of England or in the Protestant Länder of Germany.[104] Similarly, predominantly Orthodox Romanians have relocated in predominantly Catholic Italy and Spain.[105] Hindus, Buddhists, and Sikhs from East Asia have also found new homes in Europe and not just in the United Kingdom—their former colonizer. Muslims have formed sizable new communities almost everywhere in Europe, and their numbers have grown dramatically in recent years, in part because of mass migration from the war-torn Middle East.[106]

Second, many European States have seen the revival of religion in the public sphere. "God's Revenge" (in Gilles Kepel's pungent phrase[107]) has brought religiosity back to the European center stage, once dominated by talk of secularism and *laïcité.* Religious issues now get political attention and media attraction. This does not always translate into religious freedom-friendly narratives, but religion and religious freedom have again become key components of political and legal debate. And the CJEU has taken ample notice.

III. THE CJEU AND RELIGIOUS FREEDOM

Since 2017, the CJEU has released 11 cases on religious freedom—including landmark cases on the Islamic headscarf,[108] the selection and treatment of employees on religious grounds,[109] tax exemption and aid to religious schools,[110] religious databases,[111] religious slaughtering,[112] a religiously-performed Muslim divorce,[113] and the international protection against religious discrimination.[114]

These new CJEU religious freedom cases are usually tied to questions of EU economic rights and often involve other legal principles originally deployed to govern the emerging social market

104. Olly Barratt, *Polish influx changing the face of UK Catholic Church*, DEUTSCHE WELLE (Sept. 15, 2010), https://www.dw.com/en/polish-influx-changing-the-face-of-uk-catholic-church/a-6005169; Thomas M. Landy, *Waves of immigrants comprise Berlin's Catholic community*, CATHOLICS ET CULTURES (July 30, 2018, 11:36 AM), https://www.catholicsandcultures.org/germany/migration-immigration.

105. Matthijs, *supra* note 51, at 93.

106. *See* ANDREA PIN, THE LEGAL TREATMENT OF MUSLIM MINORITIES IN ITALY: ISLAM AND THE NEUTRAL STATE 2–3 (2016) ("The Muslim footprint in Europe has increased both in terms of population and social visibility").

107. GILLES KEPEL, THE REVENGE OF GOD: THE RESURGENCE OF ISLAM, CHRISTIANITY, AND JUDAISM IN THE MODERN WORLD (1994).

108. Achbita, 2017 WL CELEX 62015CJ0157; Bougnaoui, 2017 WL CELEX 62015CJ0188.

109. Cresco Investigation GmbH, 2019 WL CELEX 62017CJ0193; IR, 2018 WL CELEX 62017CJ0068; Egenberger, 2018 WL CELEX 62016CJ0414.

110. Congregación, 2017 WL CELEX 62016CJ0074.

111. Tietosuojavaltuutettu, 2018 WL CELEX 62017CJ0025.

112. *See generally* Œvre d'assistance aux bêtes d'abattoirs, 2019 WL CELEX 62017CJ0497; Liga van Moskeeen en Islamitische Organisaties Provincie Antwerpen VZW, WL CELEX 62016CJ0426.

113. Sahyouni, 2017 WL CELEX 62016CJ0372.

114. Fathi, 2018 WL CELEX 62011CJ0071.

economy of the EU. The cases on the Islamic headscarf, the selection and treatment of employees on a religious basis, and the enjoyment of religious holidays are all issues of general workplace discrimination.[115] The Muslim divorce case technically revolves around the enforcement of another country's judicial decision within the EU.[116] The issue of tax exemption for a religious school is a question in part of state aid to religion, which is prohibited under EU law.[117] The controversy about the Jehovah's Witnesses' practice of keeping records of the religious affiliation of the people they solicit turns into a case of data protection under EU law.[118] Highly contentious religious freedom claims are therefore subject to review that considers religious freedom often indirectly, and through the prism of other principles, and without necessary reference to the rights provisions of the EU Charter or the European Convention. This approach tends to downplay the importance of the stakes for religious freedom and for other competing rights.

These religious freedom decisions are still of paramount importance, however, since they are binding law for all the EU Member States and create immediately enforceable rights at the domestic level.[119] The CJEU principles of direct effect and legal supremacy make religious freedom and other rights litigation at the CJEU particularly attractive, despite the specific economic angle of many of the cases. The more the EU incorporates into its law various Charter rights, the more important the CJEU becomes for domestic litigation.

This trend is somewhat analogous to American developments in the aftermath of the New Deal in the 1930s, particularly when the Supreme Court began selectively incorporating the Bill of Rights into the Fourteenth Amendment Due Process Clause.[120] On many important matters, the United States Constitution and Supreme Court case law gradually eclipsed state law—constitutional, statutory, and judicial—making litigation in federal courts more attractive than litigation in state courts.[121] This has been notably true for American religious freedom, too. More than 170 religious freedom cases have reached the Supreme Court since 1940 when the Court first incorporated the First Amendment religious freedom clauses into the Fourteenth Amendment and began using them to review state and local law. Only 48 cases had reached the Court in the prior 150 years.

115. Achbita, 2017 WL CELEX 62015CJ0157; Case C-188/15, Bougnaoui, 2017 WL CELEX 62015CJ0188.

116. Fathi, 2018 2018 WL CELEX 62011CJ0071.

117. Congregación, 2017 WL CELEX 62016CJ0074.

118. Tietosuojavaltuutettu, 2018 WL CELEX 62017CJ0025.

119. CONGRESSIONAL RESEARCH SERVICE, RS21372, THE EUROPEAN UNION: QUESTIONS AND ANSWERS 2 (2019).

120. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 215–83 (1998).

121. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 8, 14 (2018).

Eighty percent of these post-1940 Supreme Court cases have dealt with state and local government issues, and roughly half of the cases found constitutional and related statutory violations.[122] For each of these Supreme Court cases, there have been scores, sometimes hundreds, of cases in the lower courts. This has all taken place within the explicit federalist framework of American constitutional law and of the First Amendment itself which says only that "*Congress* shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."[123]

Just like American litigants came to prefer litigation in federal courts instead of state courts to protect their fundamental rights, EU litigants are beginning to prefer the CJEU to their domestic courts. The supremacy of EU law over national law ensures the effectiveness of the CJEU's rulings.[124] Their direct effect protects these rights without the mediation of domestic institutions.[125] The nationwide jurisdiction of domestic courts does not compare with the quasi-continental breadth of CJEU jurisdiction. It is certainly true that "[e]nsuring respect for the freedom of religion is not, and was never intended to be, part of the EU's 'core business.'"[126] But this observation, grounded in history and in the structure of the EU, does not rule out the possibility that the CJEU may well become a main forum for religious freedom litigation.

IV. THE CJEU CASE LAW ON RELIGIOUS FREEDOM

A.Religious Nondiscrimination

The prohibition of discrimination on religious grounds in the field of employment has had the biggest judicial impact so far. Five cases out of eleven concerned religious discrimination in the workplace.[127] The cases can be broken into three main categories: (1) religious apparel, specifically the Islamic headscarf; (2) religious affiliation as a prerequisite for working in a denominational organization; and (3) differential treatment of employees of different faiths.[128]

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122. WITTE & NICHOLS, *supra* note 20, at 303–37 (displaying a table of all Supreme Court cases on religious freedom from 1815–2016).

123. U.S. CONST. amend. I (emphasis added).

124. Precedence of European law, EUR-LEX (Jan. 10, 2010), https://eur-lex.europa.eu /legal-content/EN/TXT/HTML/?uri=LEGISSUM:l14548&from=GA.

125. Itzcovich, *supra* note 63, at 281.

126. Philippa Watson & Peter Oliver, *Is the Court of Justice of the European Union Finding Its Religion?*, 42 FORDHAM INT'L L.J. 847, 872 (2019).

127. *See generally* Achbita, 2017 WL CELEX 62015CJ0157; Bougnaoui, 2017 WL CELEX 62015CJ0188; Cresco Investigation GmbH, 2019 WL CELEX 62017CJ0193; IR, 2018 WL CELEX 62017CJ0068; Egenberger, 2017 WL CELEX 62016CJ0414.

128. *See generally* Achbita, 2017 WL CELEX 62015CJ0157 (ruling against a plaintiff in an Islamic headscarf case); Bougnaoui, 2017 WL CELEX 62015CJ0188 (ruling in favor of a plaintiff in an Islamic headscarf case); Cresco Investigation GmbH2019, WL CELEX 62017CJ0193 (addressing salary discrimination between employees of different faiths); Egenberger, 2017 WL CELEX 62016CJ0414

The general EU law regulating discrimination in the workplace is the Council Directive 2000/78/EC of 27 November 2000. It establishes the general framework for equal treatment in employment and occupation and forbids discrimination on religious grounds among other grounds.[129] The law distinguishes two types of discrimination: (1) "direct" discrimination "when one person is treated less favourably than another is, has been or would have been treated in a comparable situation" and (2) "indirect" discrimination "where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief . . . at a particular disadvantage compared with other persons."[130] While direct religious discrimination is prohibited, indirect discrimination is permissible as long as it is "justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."[131] The Member States can permit different treatment where "by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate."[132]

B.The Islamic Headscarf Cases

The CJEU issued two 2017 cases on the use of the Islamic headscarf in the workplace.[133] In both instances, Muslim female employees were ordered to remove the apparel while at work. Both women refused, both lost their jobs, and both sued. One lost, one won.[134]

Achbita v. G4S Secure Solutions involved Samira Achbita, a receptionist in a global security company deployed in its Belgian branch. She had already been employed in the company for a while before she started wearing the *hijab* (the Muslim veil that leaves the face uncovered).[135] This conflicted with the company dress code that required employees to avoid wearing visible religious signs. She was thus ordered to remove her *hijab.* When she refused she was fired. Achbita sued G4S in a Belgian court for religious discrimination in violation of the EU's Council Directive. The Belgian judge requested

(addressing whether religious affiliation could be used as a prerequisite for employment); IR, 2018 WL CELEX 62017CJ0068 (addressing termination due to religious affiliation).

129. Directive 2000/78, of the Council of the European Union of 27 November 2000 on Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L 303) 16, 16 (EC) [hereinafter Council Directive 2000/78].

130. *Id*. art 2.

131. *Id*.

132. *Id*. art. 4.

133. Watson & Oliver, *supra* note 121, at 862.

134. *Id*. at 863, 867–70.

135. Case C-157/15, Achbita v. G4S Secure Sols. NV, 2017 WL CELEX 62015CJ0157 para. 11 (Mar. 14, 2017).

the CJEU for a preliminary ruling on the correct interpretation of the phrasing "direct discrimination" in the EU's Council Directive.[136]

The CJEU found that the employer G4S's termination of the contract with Achbita was not an instance of direct discrimination.[137] The company was acting in pursuit of a neutral dress code, which did not target any specific religious faith. But the CJEU went beyond the Belgian court's request, at the encouragement of the AG and further declared the employer's action was not a form of "indirect discrimination" either.[138] In the CJEU's judgment, the company had a legitimate interest in pursuing a policy of religious neutrality, which included the prohibition of visible religious apparel in its workplace.[139] The CJEU weighed this right to preserve a religiously-neutral environment against Achbita's religious claim to wear the Islamic headscarf and found that the indirect discrimination caused by the dress code was proportionate and therefore lawful.[140]

The CJEU took American case law into consideration and rejected it. The Advocate General's opinion referenced *EEOC v. Abercrombie & Fitch Stores, Inc.*,[141] a United States Supreme Court case in which a Muslim applicant sued a company for discrimination. According to the plaintiff, Abercrombie had decided not to hire her because of her religious expression.[142] More precisely, she argued that Abercrombie, whose dress code forbade all head coverings, feared that she would seek an accommodation to wear the Islamic headscarf under Title VII of the Civil Rights Act of 1964.[143] The Supreme Court held that a violation occurs if an employer makes a religious practice a motivating factor in an employment decision (and stated that actual knowledge of a need for an accommodation was not required), and then the Court remanded the case for further investigation and litigation.[144] The Advocate General in *Achbita* wanted none of this for Europe, arguing that this approach would be unaffordable for employers, who would have to accommodate all employees' religious needs however expensive or inconvenient.[145]

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136. *Id*. para 21.
137. *Id*. para 47–48.
138. *Id*. 45–47
139. *See* Achbita, 2017 WL CELEX 62015CJ0157 para. 38 (holding that Article 16 of the Charter recognizes that an employer's wish to project an image of neutrality towards customers is legitimate).
140. *See id*. para. 35 (holding that the ban at issue does not unduly prejudice the legitimate interests of the employees and must therefore be regarded as proportionate).
141. Opinion of Advocate General Kokott in *Achbita* (C-157/15) 2017 WL CELEX 62015CC0157 para. 110 (May 31, 2016) (mentioning how the United States' legal position is different and under Title VII of the 1964 Civil Rights Act, the employer has an obligation to provide religious accommodation).
142. *See* EEOC v. Abercrombie & Fitch Stores, Inc., 135 U.S. 2031, 2031 (2015) (stating that the interviewee received a rating that qualified her to be hired, but was ultimately denied the position due to the assertion that the use of a headscarf would conflict the store's Look Policy).
143. *See generally id*.
144. *Id*. at 2032, 2034.
145. Achbita, 2017 WL CELEX 62015CJ0157 para. 110.

The CJEU agreed. Its directive in the *Achbita* case (1) allows private employers to require a religiously-neutral dress code; and (2) does not require them to accommodate religious apparel in order to protect the religious freedom of employees.[146] It is quite striking that religious accommodation was not required in this case. G4S is a global company with a work force of 600,000 persons. It could easily have found another receptionist and moved Ms. Achbita to another office where local custom readily accommodated headscarves.

Bougnaoui v. Micropole[147] originated in France and involved another Muslim woman employee, Ms. Bougnaoui. Micropole initially recruited her at a student fair, where she was warned that "the wearing of an Islamic headscarf might pose a problem when she was in contact with customers of the company."[148] Bougnaoui began her internship wearing a bandana; later, she wore a religious headscarf. Neither head covering met with objection. Micropole eventually hired her as a design engineer.[149] She went to work for one of the company's customers at the customer's site. After she visited the site, "the customer told [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.'"[150]

After a preliminary interview, Micropole dismissed Bougnaoui. 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 employees."[151] The company further stated that during the job interview its 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."[152] Therefore, the company found that Bougnaoui could not "provide services at [the] customers' premises."[153]

Bougnaoui sued in French court, claiming that she had suffered religious discrimination.[154] After the case went through two lower courts, the Court of Cassation (the French court of last resort) requested the CJEU to give an interpretation of the directive on religious discrimination in the workplace. The referring court, however, did not fully clarify if it meant direct or indirect discrimination.[155] In response, the CJEU gave only very general

146. *Id*. para. 141.
147. Case C-188/15, Bougnaoui v. Micropole SA, 2017 WL CELEX 62015CJ0188 (Mar. 14, 2017).
148. *Id*. para 13.
149. *Id*.
150. *Id*. para 14.
151. *Id*.
152. *Id*.
153. Bougnaoui, 2017 WL CELEX 62015CJ0188 para. 14.
154. *See id*. para. 13 (arguing that "the wearing of the Islamic headscarf by an employee . . . does not prejudice the rights or beliefs of others").
155. *Id*. para 25.

remarks, leaving room for the referring French court to decide how it played out in light of the circumstances of the case.

The Advocate General's opinion in this case, however, raised broader religious freedom concerns beyond the Council Directive. In her view, "discrimination has both a financial impact (because it may touch on a person's ability to earn a living in the employment market) and a moral impact (because it may affect that person's autonomy)."[156] In this case, Bougnaoui simply sought to practice her religion, not to proselytize. The employer could not violate that religious freedom right. In the AG's words:

> When the employer concludes a contract of employment with an employee, he does not buy that person's soul. He does, however, buy his time. For that reason, I draw a sharp distinction between the freedom to manifest one's religion—whose scope and possible limitation in the employment context are at the heart of the proceedings before the national court—and proselytising on behalf of one's religion. . . . It is therefore legitimate for the employer to impose and enforce rules that prohibit proselytising, both to ensure that the work time he has paid for is used for the purposes of his business and to create harmonious working conditions for his workforce.[157]

In the AG's view, freedom of religion included the employee's right to manifest her religion as, she noted, ECtHR case law also made this clear.[158] Once the AG brought the headscarf's usage within the scope of religious freedom's protection in Article 10 of the EU Charter, the exceptions carved out by the Directive no longer applied.[159]

More generally, the AG continued, cases involving conflicts of interest between the employer and the employee must appreciate the rights claims of both parties: "the starting point for any analysis must be that an employee has, in principle, the right to wear religious apparel or a religious sign but that the employer also has, or may have, the right to impose restrictions."[160] As required by the Council Directive, judges must determine the "proportionality" of each claim to ensure that the interests of the two are balanced and reconcile the conflict if possible. Reconciliation is possible even in these controversial headscarf cases, the Advocate General opined:

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156. Opinion of Advocate General Sharpston in *Bougnaoui* (C-188/15) 2017 WL CELEX 62015CC0188 para. 72 (July 13, 2016).

157. *Id*. para. 73.

158. *Id*. para. 85.

159. *See id*. para 87–102 (describing the conditions under which treatment would be removed from the scope of the Directive, regardless of whether the difference in treatment constitutes direct or indirect discrimination).

160. *Id*. para. 122.

> Western society regards visual or eye contact as being of fundamental importance in any relationship involving face-to-face communication between representatives of a business and its customers. It follows in my view that 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. The balancing of interests would favour the employer. Conversely, where the employee in question is asked to work in a role which involves no visual or eye contact with customers, for example in a call centre, the justification for the *same rule* would disappear. The balance will favour the employee. And where the employee seeks to wear only some form of headgear that leaves the face and eyes entirely clear, I can see no justification for prohibiting the wearing of that headgear.[161]

The CJEU's ruling did not decide this case. But it made clear its view that Ms. Bougnaoui had been dismissed because a company's customer complained about her headscarf. Even though she had been warned about Micropole's neutrality policy, this had not been enforced until that customer complained. The CJEU thus concluded that Ms. Bougnaoui had been subject to direct discrimination on religious grounds. The Court reiterated the AG's viewpoint and her reference to the ECtHR cases:

> In so far as the ECHR and, subsequently, the Charter use the term "religion" in a broad sense, in that they include in it the freedom of persons to manifest their religion, the EU legislature must be considered to have intended to take the same approach when adopting Directive 2000/78, and therefore the concept of "religion" in Article 1 of that directive should be interpreted as covering both the *forum internum*, that is the fact of having a belief, and the *forum externum*, that is the manifestation of religious faith in public.[162]

Limitations on the employee's religious freedom could not be ruled out in principle. However, this case left no doubts:

> The concept of a "genuine and determining occupational requirement," within the meaning of that provision, refers to a requirement that is objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out. It cannot, however, cover subjective considerations, such as the willingness of the employer to take account of the particular wishes of the customer.[163]

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161. *Id*. para. 130 (referring to Council Directive 2000/78, *supra* note 124, art. 2 para. 2(b)(i)).
162. Bougnaoui, 2019 WL CELEX 62015CJ018 para. 30.
163. *Id*. at 8.

Indirect discrimination was permissible only "in very limited circumstances," the Court continued.[164] It required that the employer prove a "genuine and determining occupational requirement" that was "objectively dictated by the nature of the occupational activities concerned or of the context in which they [were] carried out."[165] The "willingness of the employer to take account of the particular wishes of the customer" did not justify such discrimination.[166] The French Court of Cassation accepted this direction, and found for the employee.[167]

C. Religious Affiliation and Discrimination in the Workplace

Three recent judgments of the CJEU have set up what is likely to become the overarching theory of whether and how religious affiliation justifies discrimination in the workplace. *Egenberger v. Evangelisches Werk fur Diakonie und Entwickiung eV* (2018)[168] concerned whether religious affiliation could be used as a prerequisite for employment. *IR v. JQ* (2018) was a case in which an employee's religion was of crucial importance in the termination of her employment contract.[169] *Cresco Investigation GmbH v. Markus Achatzi* (2019) addressed salary discrimination between employees of different faiths.[170]

These three cases must be seen in light of the special protection of religious autonomy within the European Union. The principle of religious deference to religious groups set out already in Declaration 11 annexed to the Treaty of Amsterdam quoted above[171] has shaped the EU's special consideration of religious autonomy and of religious needs. The EU's anti-discrimination Directive Recital No. 24 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."[172] But Art 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

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164. *Id*. (stating that it is only in very limited circumstances that a characteristic related, in particular, to religion may constitute a genuine and determining occupational requirement).

165. *Id*.

166. *Id*.

167. *See* Cour de cassation [Cass.] [supreme court for judicial matters] soc., Nov. 22, 2017, Bull. civ. V, No. 2484 (Fr.) (holding that an employee wearing a headscarf cannot be regarded as an essential professional requirement within the meaning of Article 4(1) of the Directive of November 27, 2000).

168. Case C-414/16, Egenberger v. Evangelisches Werk für Diakonie und Entwicklung eV, 2018 WL CELEX 62016CJ0414 (Apr. 17, 2018).

169. Case C-68/17, IR v. JQ, 2018 WL CELEX 62017CJ0068 (Sept. 11, 2018).

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

171. Treaty of Amsterdam, *supra* note 92, at 133.

172. Council Directive 2000/78, *supra* note 129, pmbl. para. 24.

> 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.[173]

The CJEU has used these provisions to build its framework for dealing with permissible and impermissible religious line-drawing by religious employers.

In *Egenberger v. Evangelisches Werk fur Diakonie und Entwickiung eV* (2018), 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; ancillary duties included presenting the project to the political world and to the general public.[174] Among other requirements, the advertisement stated, the candidates had to be members of "a Protestant church or a church" belonging to the Working Group of Christian Churches in Germany.[175] Ms. Egenberger applied, although she was not religiously affiliated. After being shortlisted for the job, she was not offered an interview. She sued the Protestant institution in German court, complaining about the religious affiliation-requirement.[176]

The German court sent a preliminary ruling request to the CJEU, asking whether, per the Directive, "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."[177] *Egenberger* thus gave the CJEU the opportunity to clarify various aspects of the relevant rules. It tried to reconcile the general prohibition against religious discrimination with the right of churches and religious organizations to pursue their mission autonomously.

In her advisory opinion to the *Egenberger* Court, the AG made a series of striking observations and recommendations regarding the Court's scope of judicial review of the actions and policies of religious groups and the need for secular courts to balance competing moral values. Drawing mainly on ECtHR case law,[178] the AG boldly affirmed that

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173. *Id*. art. 4 para. 2.
174. Engenberger, 2018 WL CELEX 62016CJ0414. para. 24.
175. *Id*. para. 25.
176. *Id*. para. 27.
177. *Id*. para. 41.
178. Opinion of Advocate General Tanchev in *Egenberger* (C-414/16) WL CELEX 62016CC0414 para. 100. (Nov. 9, 2017).

> Article 4(2) of Directive 2000/78 might be viewed as the legislative manifestation within the EU of the defendant's right to autonomy and self-determination, as protected under Articles 9 and 11 of the ECHR with the phrase "having regard to the organisation's ethos" being the core element of Article 4(2) of Directive 2000/78 that is to be interpreted in the light of the relevant case-law of the European Court of Human Rights.[179]

She also stated that the ECtHR's case law did "not support a restriction on judicial review" of religiously affiliated organizations.[180]

Later in her opinion, the AG also spoke to the letter and spirit of EU laws governing church-state relations. While acknowledging that Member States had power to decide these relationships for themselves, she argued that EU law embraces "value pluralism."[181] This principle entails that "conflicts between differing rights, or approaches thereto, are considered to be normal and are resolved through balancing conflicting elements rather than according priority to one over another in a hierarchical fashion."[182] This approach stood in marked contrast with the traditional principle of religious autonomy that gives priority and deference to the interests of religious bodies.[183]

In *Egenberger,* the CJEU repeated the AG's general call for a proper balance between competing interests and values in these cases. But the Court made clear that this balancing was to be done by the local state judiciary. "[A]n independent authority, and ultimately . . . a national court" had to review whether the alleged discrimination fell within the scope of the EU Directive.[184] Local courts had to judge whether a church or another religious organization had lawfully exercised its right to engage in necessary religious line-drawing. Adducing ECtHR case law, 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.[185] A local 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."[186]

The *Egenberger* Court further clarified how the balancing assessment had to be carried out. The CJEU did not pre-determine the outcome of the domestic judgment, but it gave the domestic court three

179. *Id*. para. 56.
180. *Id*. para. 68.
181. *Id*. para. 100.
182. *Id*.
183. *See id*. (implying that prior conflicts of rights were settled in accordance with an understood hierarchy).
184. Egenberger, 2018 WL CELEX 62016CJ0414 para. 53.
185. *Id*. paras. 61–62.
186. *Id*. para. 63.

precise criteria for judgment. According to the EU directive, the Court noted, an act of seeming religious discrimination was lawful only if the religious requirement imposed by the employer was "genuine, legitimate, and justified."[187] 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."[188] 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."[189] To be "justified," the church or organisation imposing the requirement must show "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."[190]

In conducting this assessment, the CJEU made clear that domestic judges had to employ the principle of proportionality to balance the competing interests. 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 protection for individuals" suffering from the discrimination and its effects.[191] The CJEU thus did not rule specifically on the complainant's claim, but gave the domestic court the criteria to decide the case. The case went back to the German court, which complied with the CJEU's ruling and ordered the organization to indemnify the job applicant for unlawful discrimination.[192]

The *Egenberger* Court was aware that its ruling could alter the national settlements of church-state relations, to which EU law generally and presumptively defers.[193] After all, requiring that secular courts strike a balance between the rights of religiously-affiliated institutions and their employees might well place the EU policy of nondiscrimination within economic activities in direct tension with the strong EU principle of religious autonomy and state deference to a church's decisions about its own employees. The CJEU, however, stated clearly that EU laws required state courts to patrol this boundary. In the Court's words, the EU's general "respect for the status of churches" did not excuse the CJEU or domestic judges from their duty

187. *Id*. para. 61.
188. *Id*. para. 65.
189. *Id*. para. 66.
190. Egenberger, 2018 WL CELEX 62016CJ0414 para. 67.
191. *Id*. para. 79.
192 https://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=pm&Datum=2020&nr=21978&linked=urt
193. *See* Treaty of Amsterdam, *supra* note 92, at 133 ("The European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.").

"to take into consideration the balance struck between [competing] interests by the EU legislature in Directive 2000/78."[194]

In its 2018 case of *IR v. JQ,* the CJEU was more specific about the fate of the complainant.[195] IR was a nonprofit organization, subject to the supervision of the Roman Catholic Archbishop of Cologne. Established under German law, IR's purpose was to carry out the work of the Catholic federation of charitable organizations called Caritas, including the operation of its hospitals.[196] IR had to comply with the Basic Regulations on Employment Relationships in the Services of the Church ("Basic Regulations") issued by Church institutions, which subjected the employees of Catholic institutions to a specific "duty of loyalty."[197] The nature of this duty depended on the employee's religion. Non-Catholics had to "respect the truths and values of the Gospel and to contribute to giving them effect within the organisation."[198] Catholics were "expected to recognise *and observe* the principles of Catholic doctrinal and moral teaching . . . [and] *conduct themselves in a manner consistent with the principles of Catholic doctrinal and moral teaching*."[199] This latter requirement applied also to "employees performing managerial duties."[200] The same Basic Regulations contemplated dismissal as the last resort for the employees who did not comply with these requirements for employment.[201]

JQ, a member of the Catholic Church, was a physician employed as the head of a medicine department of an IR hospital, and had managerial duties. He got divorced and remarried. He was consequently dismissed by IR for failing to comply with Catholic marital doctrine, which forbids divorce and remarriage.[202] The doctor sued IR for discrimination in German court, arguing that such action by a Protestant doctor working in the same hospital would not constitute a legitimate ground for dismissal.[203] 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?[204]

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194. *See* Egenberger, 2018 WL CELEX 62016CJ0414 para. 81 ("where the national court is called on to ensure that Articles 21 and 47 of the Charter are observed, while possibly balancing the various interests involved, such as respect for the status of churches . . . it will have to take into consideration the balance struck between those interests by the EU legislature in Directive 2000/78").

195. *See generally* Case C-68/17, IR v. JQ, 2018 WL CELEX 62017CJ0068 (Sept. 11, 2018).

196. *Id*. para. 23.

197. *Id*. paras. 19–20.

198. *Id*. para. 20.

199. *Id*. (emphasis added).

200. *Id*.

201. IR v. JQ, 2018 WL CELEX 62017CJ0068 para. 21.

202. *Id*. paras. 24–26.

203. *Id*. para. 27.

204. *Id*. para. 37.

The AG's opinion followed *Egenberger* rather closely. A labor policy that imposed different "duties of loyalty" to Catholicism based on the employee's religious affiliation, she argued, could be legitimate only if their jobs have a specific significance in light of the organization's Catholic religious ethos.[205] In this case, the IR hospital did not require its doctors or medical department managers to be Catholic; in fact, IR routinely hired non-Catholics for such posts. Yet Catholic and non-Catholic employees in that same position were held to different ethical standards that had nothing to do with their jobs.[206]

In its opinion in *IR*, the CJEU repeated the *Egenberger* criteria that the hospital's policy of different religious standards for and treatment of its employees had to be "genuine, legitimate, and justified."[207] The Court again deferred to the domestic judge to make that judgment in this case. But the CJEU could not resist suggesting that "[a]dherence to . . . [the Catholic understanding] of marriage d[id] 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.[208] 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. [Moreover, 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, bearing in mind the nature of the occupational activities concerned or the context in which they are carried out, 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.[209]

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205. *Id*. para. 52, 59 (explaining that the "use of the term 'legitimate' show[ed] that the EU legislature intended to ensure that the requirement of profession the religion of belief on which the ethos of the church or organisation is founded is not used to pursue an aim that has no connection with that ethos or with the exercise by the church or organisation of its right of autonomy").

206. *Id*. para. 59

207. IR v. JQ, 2018 WL CELEX 62017CJ0068 para. 43.

208. *Id*. para. 58.

209. *Id*. para. 61.

The German court resumed the proceeding, found that the hospital's loyalty requirement was disproportionate and therefore ruled in favor of the plaintiff.[210]

Cresco Investigation GmbH v. Markus Achatzi (2019) is the most recent case in this series on religious affiliation and discrimination in the workplace.[211] Achatzi was an employee of a private company in Austria. Austrian national law recognized Good Friday as a holiday for members of Old Catholic Churches, Evangelical Churches of the Augsburg and Helvetic Confession, and the United Methodist Church.[212] Those church members were exempt from working on Good Friday, but if they did work that day, they would receive double pay.[213]

Achatzi did not belong to any of these religions and thus could not claim this same indemnity when he worked on Good Friday. He thus sued in Austrian court for religious discrimination. The Austrian Supreme Court called on the CJEU to assess whether this differential treatment of employees could be justified either (1) as a permissible form of "indirect discrimination" under the Council Directive;[214] or (2) as a case that fit into an exception in the same Directive allowing "measures which, although discriminatory in appearance, [were] in fact intended to eliminate or reduce actual instances of inequality that may exist in society."[215] This latter exception allowed for favorable treatment of parties affected by social inequalities. But any such treatment, the Directive also made clear, could not prejudice "measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedom of others."[216]

The AG saw this as an easy case of discrimination. The case did not originate in the employer's religious practices or beliefs, the AG noted, but in a national law that accorded different treatments to members of different faiths.[217] The law could certainly allow some believers to have Good Friday off. The real problem stems from doubling the pay of religiously observant employees for working on a Good Friday, but not giving the same double pay to other employees

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[210] https://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=pm&Datum=2019&anz=11&pos=1&nr=22558&linked=urt.

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

212. *Id*. para. 12.

213. *Id*.

214. Council Directive 2000/78, *supra* note 124, at art. 2.

215. *Id*. art. 7 para. 1.

216. *Id*. art. 2 para. 5.

217. Opinion of Advocate General Bobek in *Cresco*, (C-193/17) WL CELEX 62017CC0193 para. 51 (Jul. 25, 2018).

who worked on the same day.[218] For the AG, the case thus did not fall within the delicate field of religiously-motivated exceptions allowed by the Council Directive, but instead was a more routine case of impermissible salary discrimination based on religion.

The CJEU's opinion in this case followed the AG's views rather closely and did not ground the case in religious freedom concerns. The Court also ruled out any justification for this law under the two exceptions in the Council Directive. The special indemnity of double salary accorded only to select believers could not be regarded as reducing "social inequality." Nor could the indemnity be justified on religious freedom or any other public interest grounds. To the contrary, the law's promise of double pay for work on Good Friday discouraged, rather than encouraged, these church members to observe their religion's holy day.[219]

The CJEU was even more specific here than in prior cases about how it wanted the case to be solved. It called on the Austrian judge to provide immediate redress to the complainant.[220] Although the discrimination stemmed from the legislation and not from the employer's discretionary salary policies, the CJEU concluded that the domestic court must require "a private employer who is subject to such legislation . . . also to grant his other employees a public holiday on Good Friday . . . and, consequently, to recognize that those employees are entitled to [the daily pay plus the indemnity] where the employer has refused to approve such a request."[221]

Egenberger, *IR*, and *Cresco* form an important trio of cases on religious discrimination in the workplace. The first two cases, in particular, carve out an important role for the CJEU as well as for domestic judges in employment cases that involve religiously affiliated institutions. Contrary to ECtHR and United States Supreme Court cases that strongly support religious autonomy and judicial deference to religious employers,[222] the CJEU requires domestic courts to scrutinize whether the religious affiliation and the private morality of employees are relevant to their duties; if not, their religious or moral conduct can have no bearing on the employee's status or treatment by their employer. *Egenberger* further requires domestic courts to balance the competing interests of the religious institution and a job applicant, using the principle of "proportionality." Proportionality is a staple of the CJEU and broader EU domestic court jurisprudence,[223]

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218. *Id*. para. 41.
219. Cresco Investigation GmbH v. Achatzi, WL CELEX 62017CJ0193 para. 50.
220. *See generally id*.
221. *Id*. para. 89.
222. *See*, *e.g*., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 132 S. Ct. 694 (2012); Case C-188/15, Bougnaoui v. Micropole SA, 2016 WL CELEX 62015CC0188 (July 13, 2016).
223. ALEC STONE SWEET & JUD MATHEWS, PROPORTIONALITY BALANCING AND CONSTITUTIONAL GOVERNANCE: A COMPARATIVE AND GLOBAL APPROACH 68 (2019).

but it is a very delicate and context-dependent process. It requires judges to ponder which interests are involved in a case, which one prevails, and to what extent.[224] In these religious employment cases, it compels judges to balance the secular interests, individual rights, and private life choices of an employee or job applicant with a religious institution's loyalty to its religious beliefs and practices. But this balance must now be done without the traditional presumption of religious autonomy for private religious employers along with strong protections for (prospective) employees to leave the religious group or employer without encumbrance or reprisal.

Cresco virtually rules out any direct or indirect discrimination that is not grounded in public interest reasons, while legitimizing measures that favor persons and groups who suffer from social inequalities. We can thus expect the CJEU to begin favoring state measures that protect new or minority religious groups who are more likely to suffer from social discrimination and begin questioning state policies that favor members of longstanding established churches and traditional religious groups. This approach may well have powerful ramifications for EU member states, which have very long traditions of church-state relations that have favored—if not established—Catholic, Lutheran, Anglican, Reformed, or Orthodox Christian faiths.

Cresco's further insistence that the domestic judge accord relief to the plaintiff notwithstanding contrary domestic legislation on religion may also become practically very important. The CJEU, in effect, thereby empowers local judges to override—or at least erode—local laws governing national religious establishments and religious freedom norms when a local plaintiff proves the discriminatory effects of those traditional local laws. The Court's *IR* case has language to the same effect. There the CJEU recognized that the German constitution grants ample autonomy to Evangelical churches.[225] But the Court states that:

> a national court hearing a dispute between two individuals is obliged, where it is not possible for it to interpret the applicable national law in conformity with Article 4(2) of Directive 2000/78, to ensure within its jurisdiction the judicial protection deriving for individuals from Article 21 and 47 of the Charter and to guarantee the full effectiveness of those articles by disapplying, if need be any contrary provision of national law.[226]

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224. *Id*. at 3.

225. *See* Case IR v. JQ, 2018 WL CELEX 62017CJ0068 (holding Article 140 of the Basic Law grants churches "the right of self-determination . . . to undertake and fulfill the church's mandate and mission").

226. Egenberger v. Evangelisches Werk für Diakonie und Entwickiung eV, 2018 WL CELEX 62016CJ0414 para. 82.

This logic has the potential to dismantle significant areas of church autonomy, despite the EU's basic starting rule of deference to local church-state relations, set out in the 1999 Treaty of Amsterdam.

The CJEU's approach stands in marked contrast to the ECtHR's judgments which give much stronger protection to religious autonomy interests,[227] but have only weak mechanisms of enforcement.[228] If present trends continue in the CJEU, the more apt comparison might well become the United States Supreme Court's strong reading of the First Amendment Establishment Clause in its cases from 1971–86, which gave minority faiths and those with no faith a "heckler's veto" over state laws and policies on religion, no matter how old these laws were or how strong the legislative majority was that supported them.[229]

D. Religion and State Aid

In *Congregación de Escuelas Pías Provincia Betania contra Ayuntamiento de Getafe* (2017), the CJEU addressed more directly the nature and privileges of established churches and church-state agreements under EU law.[230] EU law expressly prohibits state aid to religion to the extent that it "distort[] or threaten[] to distort competition by favouring certain undertakings or the production of certain goods."[231] The Congregación de Escuela Pías Provincia Betania was a school owned by the Catholic Church and located in the Spanish municipality of Getafe. Given its Catholic ownership, the school was governed by the concordat or agreement between Spain and the Holy See entered into force in 1979, before Spain joined the EU.[232] The agreement accords the Catholic Church in Spain a set of distinct privileges based on its ancient pedigree and presence in the land since the time of the Roman Empire. The agreement or concordat enjoys general protection under EU law, which is bound to "respect . . . the status under national law of churches and religious associations or

227. *See generally*, Hasan and Chaush v. Bulgaria, 2000-XI Eur. Ct. H.R. 117, 143 (Grand Chamber); Sindicatul "Păstorul cel Bun" v. Romania, 2013-V Eur. Ct. H.R. 41 (Grand Chamber); Svyato-Mykhaylivska Parafiya v. Ukraine, Eur. Ct. H.R., App. No. 77703/01 (2007); Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) v. Bulgaria, Eur. Ct. H.R., App. No. 412/03 and 35677/04 (2009); Fernández Martínez v. Spain, Eur. Ct. H.R. App. No. 56030/07 (2014) (Grand Chamber); Affaire Obst c. Allemagne, Eur. Ct. H.R., App. No. 425/03 (2010).

228. *See* Merilin Kiviorg, *Collective Religious Autonomy Versus Individual Rights: A Challenge for the ECtHR?*, 39 REV. CENT. & E. EUR. L. 315, 322 (2014) (arguing that the Court should follow the personal-autonomy-based approach to protect religious freedom); *see generally* Gerhard Robbers, *Church Autonomy in the European Court of Human Rights—Recent Developments in Germany*, 26 J.L. & RELIGION 281, 281 (2010).

229. *See* WITTE & NICHOLS, *supra* note 20, at 156–58 (discussing liberal standing rules in Establishment Clause cases), 173–80, 192–96, 209–16 (exploring strict separation cases under the Establishment Clause). The term "heckler's veto" was used by Justice Alito in *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009).

230. *See generally* Congregación de Escuelas Pías Provincia Betania v. Ayuntamiento de Getafe, 2017 WL CELEX 62016CJ0074.

231. TFEU 2016, art. 107 para. 1.

232. Opinion of Advocate General Wahl in *Congregación*, (C-74/16) WL CELEX 62016CC0074 paras. 9, 14 (Feb. 16, 2017).

communities in the Member States."[233] 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, including the Holy See, before joining the EU,[234] although Member States must "take all the appropriate steps to eliminate the incompatibilities" between these older agreements and EU law.[235]

In 2011, this Catholic school of Congregación de Escuela Pías was remodeled and expanded to include a new hall. The school initially paid the construction tax to the municipality. The agreement between the Holy See and Spain, however, 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."[236] Thus the school later submitted a request for a tax refund.[237] The municipality refused the refund, and the school sued. The Spanish judge requested that the CJEU to issue a preliminary ruling on whether the tax exemption for Catholic-owned buildings used for non-religious purposes of education violated the EU's prohibition on state aid to religion.[238]

The AG first noted that religious undertakings could still be viewed as economic in nature and subject to the prohibition on state aid. EU law endorsed a "functional perspective," which did not focus on the nature of the owner or operator, but on the objective activities carried out.[239] For the AG, a school was an economic undertaking if it operated in a "commercial manner, and provide[d] the instruction … essentially in exchange for the financial contributions and other payments or donations in kind made by the pupils or their parents."[240] This Catholic school, however, was "predominantly used for providing instruction equivalent to compulsory education in state schools … and the major part of the services [wa]s financed by public funds, with monetary payments and donations in kind by pupils or their parents playing only a marginal role."[241] This led the AG to conclude that the school was not primarily an economic activity[242] and that there was no violation of the EU's prohibition of tax aid by giving it a construction tax exemption or refund.[243]

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233. TFEU 2016, art. 17, para. 1.
234. *Id*. art. 351.
235. *Id*.
236. Opinion of Advocate General Wahl in *Congregación*, *supra* note 230, para. 9 (citing the 1979 Agreement on Financial Matters).
237. Congregación de Escuelas Pías Provincia Betania v. Ayuntamiento de Getafe, 2017 WL CELEX 62016CJ0074, para. 15.
238. *Id*. at 4.
239. Opinion of Advocate General Wahl in *Congregación*, *supra* note 230, para. 37.
240. *Id*. para. 42.
241. *Id*. para. 46.
242. *Id*. para. 54.
243. *Id*. para. 101.

The AG, however, did not confine her reasoning to the tax exemption issue at stake.[244] She explored much more widely the compatibility between EU regulations and Spanish church-state relations, portending major possible changes in later cases.[245] 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.[246] Indeed, a day may well come, she said, when Spain will have to use the dispute resolution procedures in the agreement to reconcile its obligations toward the Catholic Church and the EU.[247] The AG forecasted even more gravely: "If, in that way, a solution in conformity with EU law were not achieved within a reasonable space of time, Spain would have to give notice of termination of the Agreement."[248]

The CJEU's ruling in *Congregación de Escuelas* adopted the AG's reasoning that the tax exemption in this did not violate EU Law, but it avoided broader commentary on Spain's church-state agreement. The CJEU drew heavily from its own precedents on the meaning of state aid to religion and gave rather precise guidelines for the domestic court to ultimately decide.[249] The Court noted that not all activities fell within the EU notion of economic undertakings. EU law did not distinguish whether the entity was religious or non-religious, nor did it distinguish whether the nature of the undertaking was for-profit or not-for-profit.[250] What was essential to trigger the EU prohibition on state aid to religion was whether the activity was remunerated and served educational activities. "Services normally provided for remuneration" counted as an economic undertaking: if the services were offered in exchange for money, that fell within the EU area of competition.[251] In this case, however, the school was part of the system of public education. It was financed "from public funds and not by pupils or their parents."[252] The Court concluded that, as long as the hall served educational purposes, the school's tax exemption fell outside the scope of the state aid's prohibition. Some aspects of the religious school, such as the extracurricular activities which were detached from the public education system, could still be considered economic activities and subject to the no-aid prohibition.[253] The CJEU thus opined that the new hall for which the local construction tax had been levied was intended to serve the educational purpose of the school and could thus be exempt from construction tax.[254] The Spanish domestic judge,

244. *Id*. para. 88.
245. Opinion of Advocate General Wahl in *Congregación*, *supra* note 230, para. 88.
246. *Id*. para. 87.
247. 1979 Agreement on Financial Matters, Holy See-Spain, art. VI, Jan. 3, 1979.
248. Opinion of Advocate General Wahl in *Congregación*, *supra* note 230, para. 100.
249. *Id.* paras. 38–40
250. Congregación de Escuelas Pías Provincia Betania v. Ayuntamiento de Getafe, 2017 WL CELEX 62016CJ0074, paras. 43, 46.
251. *Id*. para. 47.
252. *Id*. para. 50.
253. *Id*. para. 57.
254. *Id*. para. 53.

however, dissented from the CJEU's reading of the facts, found that the hall also served religious purposes, and ruled that the school did not enjoy the tax exemption.[255]

This ruling, too, might well have powerful ramifications for future religious freedom cases. The CJEU has made remuneration for services the tipping point for application of the EU prohibition of state aid to religion. Wealthy, well-endowed, and state-established churches with an integrated private-public partnership scheme can often avoid remuneration for their education and other services. But smaller religious groups and new educational institutions that are still making their way into the public education system and therefore receive no public funds often do not simply have enough to support themselves, without state aid. *Congregación de Escuelas* might call such aid into question.

E. Ritual Slaughtering and Animal Welfare

The CJEU has issued two recent cases about *halal* (Islamic) ritual slaughtering practices. *Liga van Moskeeen en Islamitische Organisaties Provincie Antwerpen VZW* (2018) tackled a narrow, but highly symbolic topic.[256] The issue at stake was the validity of a specific provision of a broader regulation on rules for animal food production.[257] The general EU rule requires that animals be slaughtered only after stunning them.[258] *Halal* religious rules, however, require that the animal be awake during slaughtering. EU law grants an explicit exception for this form of ritual slaughtering, so long as it performed in licensed slaughterhouses.[259] The latter rule was challenged in this case.[260]

The case arose in Flanders, Belgium. Islamic ritual slaughtering normally peaks during the few days of *Eid Al-Adha* (the Feast of the Sacrifice), a major Islamic holiday. Before 2015, the Flemish authorities gave temporary licenses to local temporary slaughterhouses to accommodate the extra demand for *halal* meat in preparation for the festival.[261] In 2015, however, the Flemish Minister responsible for animal welfare announced that it would not issue approvals for temporary slaughter plants, since this violated EU rules

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255 http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=AN&reference=8267031&links=%25221%252F2018%2520%2522&optimize=20180124&publicinterface=true.

256. *See generally* Case C-426/16, Liga van Moskeeen en Islamitische Organisaties Provincie Antwerpen VZW v. Gewest, 2018 WL CELEX 62016CJ0426 (May 29, 2018).

257. Council Regulation 1099/2009 of Sept. 24, 2009, on the Protection of Animals at the Time of Killing, 2009 O.J. (L 303) 1.

258. *Id*. art. 4, para. 1.

259. *Id*. art. 4, para. 4.

260. Opinion of Advocate General Wahl in *Liga* (C-426/16), 2018 WL CELEX 62016CJ0426 paras. 14–23 (Nov. 30, 2017).

261. *Id*. para. 14.

on the structural and hygiene requirements for slaughterhouses.[262] Flemish Muslim communities sued in state court, claiming that this new denial infringed upon their religious freedom to celebrate the Feast properly.[263] The only way to meet the peak demand for ritually slaughtered meat under this new rule, they argued, would be to build a series of permanent slaughterhouses that would lie unused for the rest of the year.[264] The local judge requested the CJEU to 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, and Article 13 of the TFEU, which calls the EU Council to fight discrimination on a variety of grounds, including religion.[265]

The AG addressed two preliminary issues. The first was whether the CJEU could review the contested piece of EU law in light of the ECHR. The AG was adamantly opposed to such review, since the EU had not, in itself "acceded to [the ECHR]," and therefore it was not "a legal argument which ha[d] been formally incorporated into EU law."[266] Instead, the AG drew extensively from the ECtHR case law in reviewing religious freedom claims for ritual slaughtering.[267]

The second more sensitive issue in the case was whether the CJEU had the capacity to judge whether ritual slaughtering, especially during the Feast of the Sacrifice, was a truly religious obligation, especially since some submissions to the Court maintained that Muslim authorities disagreed on this point.[268] The AG clearly stated that "it is not for the Court to rule on the question whether the stunning of animals is actually prohibited by the Muslim faith or whether . . . it is a tenet only among certain branches of [Islam]."[269] It was also "equally inappropriate to determine whether that requirement is perceived by all Muslims as a fundamental religious obligation or if there is a possible alternative to performing the obligation . . . . [T]he Court may only take note of the existence of certain religious streams. It is not for the Court to rule on the orthodoxy or heterodoxy of a given religious teaching or precept."[270] The AG, therefore, contented himself with noting that "the slaughtering of an animal without

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262. *Id*. paras. 15–16; Commission Regulation 853/2004 of Apr. 29, 2004, Laying Down Specific Hygiene Rules for Food of Animal Origin, 2004 O.J. (L 139) 55, *amended by* 2004 O.J. (L 226) 22.

263. Opinion of Advocate General Wahl in Liga (C-426/16), 2018 WL CELEX 62016CJ0426 paras. 18 (Nov. 30, 2017).

264. Liga van Moskeeen en Islamitische Organisaties Provincie Antwerpen VZW v. Gewest, 2018 WL CELEX 62016CJ0426 para. 70.

265. Consolidated Version of the Treaty on the Functioning of the European Union, art. 13, 2012 O.J. (C 326/47) 8 ("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.").

266. Opinion of Advocate General Wahl in Liga (C-426/16), 2018 WL CELEX 62016CJ0426 paras. 47 (Nov. 30, 2017).

267. *Id*. para. 58.

268. *Id*. para. 54.

269. *Id*. para. 55.

270. *Id*. para. 57.

stunning on the occasion of the Islamic Feast of the Sacrifice is indeed a religious precept that benefits from the protection of religious freedom."[271]

The EU's general law on slaughtering, however, the AG opined, was "perfectly *neutral* and applies to any party that organises slaughtering. Legislation that applies in a neutral manner, *with no connection to religious convictions*, cannot in principle be regarded as a limitation on freedom of religion."[272] Its neutrality means that it does not target religious practices. EU law has already made a religious freedom exception to accommodate ritual slaughtering.[273] The issue is whether requiring that such ritual slaughtering be performed only in approved slaughterhouses that were bound by rules to protect the animals' welfare was disproportionate to the damage to religious freedom that it created.[274]

The CJEU acknowledged the religious salience of the matter [275] during what it described as the "religious rite" of the Feast.[276] But the Court also noted that it had no competence to judge "the theological debate among different religious tendencies within the Muslim community as to whether the obligation to slaughter animals without prior stunning during the Feast of Sacrifices is absolute and the existence of alternative solutions in the event that it is impossible to perform such slaughter."[277] The Court concluded that granting religious communities the right to slaughter animals without stunning them first was enough "to ensure effective observance of the freedom of religion, in particular of practicing Muslims during the Feast of Sacrifice."[278] Requiring that such ritual slaughtering be performed in proper slaughterhouses properly balanced the parties' religious freedom interests with the EU's interest in avoiding "excessive and unnecessary suffering of animals killed."[279] The EU's general slaughtering laws thus did not infringe upon religious freedom under the Charter.[280] The fact that the challenge was based on the financial impracticality of setting up permanent slaughterhouses for only a few days of use in a specific province of Belgium confirmed that it was not

271. *Id*. para. 58.
272. Liga van Moskeeen en Islamitische Organisaties Provincie Antwerpen VZW v. Gewest, 2018 WL CELEX 62016CJ0426 para. 78.
273. *See id*. para. 113 ("there is a general interest in preventing 'savage' slaughtering from being carried out").
274. *See id*. para. 124 ("the obligation for slaughtering to be carried out in an approved slaughterhouse may go beyond what is strictly necessary in order to attain the objective of protecting animal welfare").
275. *Id*. para. 44.
276. *Id*. para. 51.
277. *Id*. para. 50.
278. *Id*. para. 56.
279. *Id*. para. 65.
280. Liga van Moskeeen en Islamitische Organisaties Provincie Antwerpen VZW v. Gewest, 2018 WL CELEX 62016CJ0426 para. 59.

EU law that created an obstacle to the enjoyment of religious freedom for Muslims.[281]

Shortly thereafter, in the 2019 case of *Œuvre d'assistance aux bêtes d'abattoirs*,[282] the CJEU addressed whether EU law permitted ritually slaughtered meat to be labeled as "organic."[283] EU law reserved the "organic" label for food that had been produced in accordance with specific animal welfare standards.[284] In this case, some French parties requested that the local Ministry of Agriculture take measures to end the practice of certifying *halal* meat as "organic," given that animals suffered more when ritually slaughtered without first being stunned.[285] The Ministry did not take action, and the complainants sued. The French domestic judge reached out to the CJEU, asking whether EU regulations on organic products allowed for the use of the label "organic" on *halal* meat.

The AG noted that the EU law on "organic" farming methods required that animals' suffering be kept to a minimum, including when they are slaughtered.[286] Since there was no explicit ban on ritual slaughtering, the AG pondered whether slaughtering an animal without first stunning it met that "organic" standard. The AG highlighted that the exceptions accorded by EU law to ritual slaughtering could not be read as an admission that "ritual slaughter ignore[s] animal welfare." To the contrary, "[s]uch slaughter must . . . be carried out in conditions that ensure that the suffering of animals will be limited."[287] Since the rules on organic food did not prohibit ritual slaughtering, and ritual slaughtering itself was considered an acceptable form of animal welfare, such practices could produce meat properly labeled as "organic."[288] Otherwise, "[p]racticing Jews and Muslims would be denied the right to obtain organic products and to benefit from the guarantees which those products provide in terms of quality and food safety."[289]

The CJEU rejected the AG's opinion and found that *halal* ritual slaughtering practices and organic food labeling were irreconcilable. In the CJEU's eyes, the requirement that animals be stunned was an

281. *Id*. paras. 70, 77–78.

282. *See generally* Case C-497/17, Œuvre d'assistance aux bêtes d'abattoirs (OABA) v. Ministre de l'Agriculture et de l'Alimentation (Grand Chamber), 2019 WL 62017CJ0497 (Feb. 26, 2019).

283. Commission Regulation 889/2008 of Sept. 5, 2008, 2008 O.J. (L 250) 1 (EC), *amended by* Commission Regulation 271/2010 of Mar. 24, 2010, 2010 O.J. (L 84) 19 (EU); Council Regulation 834/2007 of June 28, 2007, 2007 O.J. (L 189) 1 (EC).

284. Œuvre d'assistance aux bêtes d'abattoirs v. Ministre de l'Agriculture et de l'Alimentation (Grand Chamber), 2019 WL 62017CJ0497 para. 36.

285. *Id*. para. 17.

286. Opinion of Advocate General Wahl in *OABA* (C-497/17), WL CELEX 62017CC0497 para. 31. (Sept. 20, 2018).

287. *Id*. paras. 78–79.

288. *Id*. para. 85.

289. *Id*. para. 98.

"obligation"[290] of "organic" food production, since it avoids pain and suffering for the animals.[291] Slaughtering without stunning was an exceptional regime.

The CJEU further stated,

> While it is true that [the EU rules on slaughtering], permit[] the practice of ritual slaughter as part of which an animal may be killed without first being stunned, that form of slaughter, which is authorised only by way of derogation in the European Union and solely in order to ensure observance of the freedom of religion . . . is insufficient to remove all of the animal's pain, distress and suffering as effectively as slaughter with pre-stunning, which . . . is necessary to cause the animal to lose consciousness and sensibility in order [to significantly] reduce its suffering.[292]

The Court concluded that religious freedom allowed for ritual slaughtering. However, ritual slaughtering did not meet the high requirements of animal welfare that was included among the core goals of organic food production and of the "organic" logo altogether.[293] The domestic proceeding resumed after the ruling, and the French court withdrew the certification of organic food that had been accorded to *halal* products, in pursuance of the CJEU's ruling.[294]

The *Liga van Moskeeen* case has broader significance for religious freedom. Scholars have long debated whether secular courts may assess disputes of a religious nature.[295] The CJEU's ruling in this case makes clear that it does not want to be involved in theological or religious disputes. Religious freedom claims thus are likely to be conducted according to what the believers of a certain religion—or a sizable portion of them—believe to be part of their religious creed. The CJEU is therefore inclined to assess religious arguments from the outside, viewing them sociologically, not theologically.

In reaching this position, however, the CJEU also made the bold statement that, in principle, neutral laws are incapable of infringing upon religious freedom. In its words, "the obligation to use an approved slaughterhouse . . . applies in a general and neutral manner to any party that organises slaughtering of animals and applies

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290. Œuvre d'assistance aux bêtes d'abattoirs v. Ministre de l'Agriculture et de l'Alimentation (Grand Chamber), 2019 WL 62017CJ0497 para. 47.

291. *See id*. para. 45 (stating that Regulation No. 1099/2009 contributed to "improving the protection of animals at the time of slaughter").

292. *Id*. para. 48.

293. *See id*. para. 52 (interpreting Regulation No. 834/2007 as not authorizing placing the logo on EU products).

294 https://www.conseil-etat.fr/arianeweb/#/view-document/?storage=true (N° 16VE00801, July 11, 2019).

295. *See*, *e.g.*, Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493 (2013) (assessing how parties should resolve disputes that turn on religious points).

irrespective of any connection with a particular religion and thereby concerns in a non-discriminatory manner all producers of meat in the European Union."[296] This approach sees legislative neutrality not just as the default solution, but as the ideal legislative solution for a pluralistic European society. If pushed further, this approach can lead to troubling consequences, as can be seen in the United States in the aftermath of the Supreme Court case of *Employment Division v. Smith*.[297] Neutral rules certainly do not target specific religious practices. But they can have a disparate impact on an increasingly pluralistic society, particularly for minority or disfavored religions who sometimes need exceptions and exemptions in otherwise general and neutral laws in order to practice their faith. The CJEU's statement does not anticipate heightened scrutiny over general and neutral EU legislation that may burden or discriminate against some religions whose practices are viewed as eccentric to the broader society.

F.Religious Courts & Religious Divorces

In *Soha Sayouni v. Raja Mamisch* (2017),[298] the CJEU for the first time tackled the issue of enforceability of a religious divorce. The case involved a Syrian couple who were married in 1999 in Syria in the Islamic Court of Homs and later moved to Germany. On May 19, 2013, Mr. Mamish divorced Ms. Sahyouni in accordance with Islamic law. His representative performed the ritual Islamic divorce formula before the Islamic Sharia court in Latakia, Syria.[299] The religious court declared the divorce on May 20, 2013. He sent the divorce settlement required under Islamic law to Ms. Sahyouni, who in turn issued a declaration stating that she was releasing Mr. Mamish from any further obligation toward her.[300] This declaration was pronounced in Syria shortly thereafter. Mr. Mamish then applied to a German court for recognition of the divorce.[301] Ms. Sayouni, however, objected and asked the German court to declare that the requisites for the recognition of divorce had not been satisfied.[302] The German court regarded EU law relevant to the case, and thus suspended the proceedings and submitted a request to the CJEU.[303]

The request involved the interpretation of a few articles of an EU Council Regulation ("Regulation") that aimed to harmonize the jurisdiction and the recognition and the enforcement of judgments in matrimonial matters and provide a "comprehensive legal framework

296. Liga van Moskeeen en Islamitische Organisaties Provincie Antwerpen VZW v. Gewest, 2018 WL CELEX 62016CJ0426 para. 61.

297. *See* 494 U.S. 872, 890 (1990) (holding that Oregon's prohibition on the religious use of peyote does not violate the Free Exercise Clause).

298. Case C-372/16, Sahyouni v. Mamisch, 2017 WL CELEX 62016CJ0372 (Dec. 20, 2017).

299. *Id*. para. 20.

300. *Id*. para. 21.

301. *Id*. para. 22.

302. *Id*. para. 23.

303. *Id*. para. 26.

. . . [for] participating Member States."[304] The Regulation's overall goal was to secure legal certainty, predictability and flexibility, and to prevent forum shopping by litigants.[305] It set out a series of rules that would make a divorce or legal separation enforceable throughout EU Member States, regardless of whether the divorce was in accordance with "the law of a participating Member State."[306] But any such divorce, the Regulation made clear, had to grant "spouses equal access to divorce or legal separation on grounds of their sex,"[307] and could not be "manifestly incompatible with the public policy" of the Member State within which it had to be applied.[308]

The question raised by the German court in *Soha Sayouni* was whether the Council Regulation also applied to a private divorce, and if so whether the procedural asymmetry between husband and wife in a private Sharia divorce was also compatible with the Regulation. The issue at stake was thus very relevant for religious freedom. The CJEU had to decide whether a husband's unilateral declaration of divorce duly performed under Islamic law before a religious institution constituted a valid divorce under the Regulation.[309] If so, Islamic unilateral divorces could be recognized throughout the EU; if not, many EU nationals would be affected. The case was further complicated because the wife had issued a formal statement accepting that her husband had fulfilled his divorce obligations under Islamic law, but then backtracked in her petition to the German court.[310]

The AG opined that the EU Regulation did not include recognition of such religious divorces because, in his view, it was crucial that the Regulation spoke of a "court," "and the existence of a 'proceeding' at the centre of the process of dissolving or loosening a marriage bond."[311] Therefore, "the EU legislature intended 'divorces' within the meaning of that regulation to be covered only in the context of decisions issued by competent public authorities."[312]

The CJEU agreed, and found that Mr. Mamish's unilateral divorce from Ms. Sayouni did not fall within the scope of the Regulation and thus did not enjoy the EU's legal protection. The Regulation calls for "proceedings," "judgments," and "courts,"[313] the CJEU opined in echoing the AG. This wording and the broader context and policy of the Regulation made clear that it excluded divorces by a

304. Council Regulation 1259/2010, Implementing Enhanced Cooperation in the Area of the Law Applicable to Divorce and Legal Separation, 2010 O.J. (L 343) 10, 10–11.

305. *See id*. (establishing the supremacy of this regulation over member states to avoid forum-shopping issues).

306. *Id*. art. 4.

307. *Id*. art. 10.

308. *Id*. art. 12.

309. Sahyouni v. Mamisch, 2017 WL CELEX 62016CJ0372.

310. *Id*. para. 26.

311. *Id*. para. 60.

312. *Id*.

313. *Id*. paras. 39, 41.

religious tribunal that permitted a "unilateral declaration of intent" and without divorce "proceedings" involving both parties.[314]

This case leaves open the question whether unilateral divorces could enjoy the Regulation's protection if they are performed in front of a public body or a proper religious court with bilateral proceedings. It does not clarify what distinguishes public authorities from religious authorities. This is a sensitive topic not only for Muslims, but also Jews, Catholics, and some Protestant groups that operate with church courts, faith-based arbitration panels, and other forms of alternative dispute resolution in domestic cases.[315] The CJEU will likely need to hear other such cases to clarify the rules of religious divorce.

G. Privacy and Data Protection

The 2018 *Tietosuojavaltuutettu* case originated in Finland.[316] The case concerned the applicability of an EU privacy directive[317] to Jehovah's Witnesses who evangelized by visiting people at their homes and building relationships with them. Given the EU's growing concern about privacy and data protection and the rigid discipline that it maintains, the case is likely to have strong implications for such religious activities.

The case began in 2013, when the Finnish Data Protection Board prohibited Jehovah's Witnesses' community from collecting or processing personal data gathered during their door-to-door preaching, unless they complied with the relevant legislation on data processing then in force.[318] The Witnesses challenged the applicability of the relevant EU legislation to them. The national Finnish court eventually asked the CJEU to determine whether the data collected in door-to-door proselytization fell under the umbrella of the privacy directive and whether the Jehovah's Witness could be considered a data controller and therefore subject to the EU Directive.[319]

The AG thought the Jehovah's Witnesses' activities fell easily under the directive's umbrella.[320] The religious nature of their activities did not shield them from general Member State or EU

314. *Id*. para. 45.

315. Sahyouni v. Mamisch, 2017 WL CELEX 62016CJ0372 paras. 39, 49. *See also* MICHAEL J. BROYDE, SHARIA TRIBUNALS, RABBINIC COURTS, AND CHRISTIAN PANELS: RELIGIOUS ARBITRATION IN AMERICA AND THE WEST (2017); JOHN WITTE, JR., CHURCH, STATE, AND FAMILY: RECONCILING TRADITIONAL TEACHINGS AND MODERN LIBERTIES 300–35 (2019) (discussing the role of faith-based arbitration in matrimonial disputes).

316. Case C-25/17, Tietosuojavaltuutettu v. Jehovan todistajat, 2018 WL CELEX 62017CJ0025 (July 10, 2018).

317. Directive 95/46 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, arts. 2(c)–(d), 1995 O.J. (L 281) 31, 38–39 [hereinafter Directive 95/46].

318. Tietosuojavaltuutettu v. Jehovan todistajat, 2018 WL CELEX 62017CJ0025 para. 2.

319. *Id*.

320. Opinion of the Advocate General Mengozzi in *Tietosuojavaltuutettu* (C-25/17), WL CELEX 62017CJ0025 paras. 34–35 (Feb. 1, 2018)

regulations in privacy matters.[321] Their activities did not fall into one of the stated exceptions in the directive, which excluded data from public security, defense, state security, criminal law, or "purely personal or household" activities.[322] For the AG, the gathering and processing of data conducted by the Jehovah's Witnesses fell within the scope of the directive, and the Jehovah's Witness community qualified as a controller for the purpose of data processing.[323]

Building on a much earlier case that had penalized the Protestant Swedish Church for posting pictures of religious volunteers on the web without their consent,[324] the CJEU was of the same view as the AG in this case. The Court stated that the data protection rules then in force applied to the Jehovah's Witnesses' proselytizing activities, and that their governing board was responsible for the treatment of the information collected therein.[325] First, while recognizing that the Jehovah's Witnesses' proselytizing fell squarely within the protection of religious freedom accorded by Article 10 of the Charter,[326] the Court made clear that these religious activities were still subject to general regulations. The EU directive did exclude data collected from personal or domestic practices of recording information. But the Witnesses' practice of keeping notes about the private parties they visited during their proselytism was not "personal or domestic data," such as private letters or diaries; their notes were thus not excluded from the directive.[327] Second, the Witnesses' practice of filing their notes with the church on the people they met and on those who did not want to be contacted again amounted to a "filing system" for the sake of data protection.[328] Third, the Jehovah's Witnesses community that kept data constituted a data controller under the directive and was thus subject to the data protection regulation.[329] Although the church community did not issue specific guidelines or instruction in relation to data processing,[330] it was enough for the CJEU that the community "organised, coordinated and encouraged" the door-to-door activity,[331] thereby participating in "determining the purposes

321. *Id*. para. 34.

322. *Id*. paras. 35, 52; *see also* Directive 95/46, *supra* note 313, art. 3 (listing the uses of data that fall outside of the directive's scope).

323. *See* Opinion of Advocate General Mengozzi, *supra* note 316, para. 73 ("In the light of the foregoing, I suggest that the Court reply that Article 2(d) of Directive 95/46 must be interpreted as meaning that a religious community arranging proselytising activity in the context of which personal data is collected may be regarded as a controller even though it does not itself have access to the personal data collected by its members.").

324. *See generally* Case C-101/01, Sweden v. Lindqvist, 2003 WL CELEX 62001CJ0101 (Nov. 6, 2003).

325. *See* Opinion of Advocate General Mengozzi in *Tietosuojavaltuutettu* (C-25/17), *supra* note 316, para. 31 (building upon case law from *Lindqvist* revolving around unconsented posting on internet of personal details of a Swedish Church's volunteers but noting that the religious angle was absent in that case).

326. Tietosuojavaltuutettu v. Jehovan todistajat, 2018 WL CELEX 62017CJ0025 para. 46.

327. *Id*. para. 42.

328. *Id*. para. 62.

329. *Id*. para. 75.

330. *Id*. para. 75.

331. *Id*. para. 70.

and means of processing of personal data of the person contacted."[332] The domestic court resumed proceeding and followed the CJEU's ruling closely, subjecting the Witnesses' practice of keeping notes to the EU privacy rules.[333]

Tietosuojavaltuutettu demonstrates the spillover effects of privacy regulations on religious organizations.[334] In many other cases in Europe and North America, the Jehovah's Witnesses have been subject to general state "time, place, and manner" regulations of their proselytizing activities, and civil and criminal prohibitions on proselytizing activities that threaten or violate the privacy rights of others.[335] But this case reaches more deeply into a core component of the Jehovah' Witnesses' activities, namely keeping track of visits in order to facilitate later religious activities within a certain area where there is no tangible harm to a victim. Despite the technicality of the EU privacy regulation and the narrow application here, the case certainly epitomizes the potential clash between individual rights of privacy and the autonomous organization of religious institutions.

H.Religious Persecution and International Protection

The European refugee crisis, born of massive unrest in the Middle East and beyond, has also brought cases to the CJEU's docket. Among people seeking protection, some have claimed religious persecution at home. Already in 2012, in the case of *Y and Z*,[336] the CJEU ruled 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.[337] In that case, two Ahmadi worshippers from Pakistan sought refuge in Germany and submitted asylum applications. Their requests were denied, as their claims lacked evidence of a well-founded fear of persecution. As a result, they sued. The German judge requested that the CJEU issue a preliminary ruling on the meaning of an EU Directive that—closely following the Geneva Convention on the Status of Refugees[338]—

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332. Tietosuojavaltuutettu v. Jehovan todistajat, 2018 WL CELEX 62017CJ0025 para. 73.

333 https://www.kho.fi/en/index/decisions/summariesofselectedprecedentsinenglish_0/2018/kho2018171.html

334. *See* Allen Shoenberger, *Privacy Wars: EU Versus US: Scattered Skirmishes, Storm Clouds Ahead*, 17 IND. INT'L & COMP. L. REV. 355, 389 (2007) ("In the European system, each data subject (i.e. person) must give clear, explicit permission for the data to be collected, used, and/or transferred. American law has generally adopted an opt out approach, in which a data subject must affirmatively inform a business entity that he or she does not want the data shared.").

335. *See generally* Sweden v. Lindqvist, 2003 WL CELEX 62001CJ0101; *see also* WITTE & NICHOLS, *supra* note 20, at 272–303 (summarizing United States jurisprudence on religious liberty issues).

336. Case C-71/11, Bundesrepublik Deutschland v. Y, Z, 2012 WL CELEX 62011CJ0071 para. 1 (Sept. 5, 2012) (judgment for joined cases C-71/11 and C-99/11).

337. Council Directive 2004/83/EC 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/EC].

338. Geneva Convention on the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

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 of the protection of that country . . . ."[339] The Directive also included a "non-exhaustive list" of acts of persecution that would count as evidence of persecution, including "physical or mental violence, including acts of sexual violence," "legal, administrative, police and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner," or "prosecution or punishment, which is disproportionate or discriminatory[.]"[340]

The German court further asked whether the Directive protected only the "core area of religious freedom, limited to the profession and practice of faith in the areas of the home and neighborhood," or also the observance of faith in public, even if the applicant could abstain from such practice in public.[341] The court also asked whether the applicant or the religious community had to regard that religious observance to be indispensable or a central aspect of the faith.[342]

Drawing heavily on the ECtHR's case law, the AG thought it essential to differentiate the concept of an act of persecution from any other type of discriminatory measure. A distinction must accordingly be drawn between a situation where the individual suffers from a restriction or discrimination in the exercise of one of his fundamental rights and migrates for personal reasons or to improve his living conditions or social status, and a situation where the individual suffers from a restriction of such severity as to deprive him of his most essential rights such that he cannot avail himself of the protection of his country of origin.[343]

The AG thought it impossible for the Court to decide what is a central or a peripheral tenet or practice of a faith:

> It is obvious to anyone how such an exercise, however scrupulously approached, is, by definition, subject to the risk of arbitrariness. That may give rise to a risk, or even the certainty, that there will be as many views as there are individuals. Such relativity in the definition of a concept so essential and personal to each individual cannot meet the

339. Council Directive 2004/83/EC, *supra*, note 332, art. 2(c).

340. *Id*. art. 9(2).

341. Case C-71/11, Bundesrepublik Deutschland v. Y, Z, 2012 WL CELEX 62011CJ0071 para. 45 (Sept. 5, 2012) (judgment for joined cases C-71/11 and C-99/11).

342. *See id*. ("Does it suffice in that case, in order for there to be a severe violation of religious freedom, that the applicant feels that such observance of his faith is indispensable in order for him to preserve his religious identity[?]").

343. Opinion of Advocate General Bot in *Bundesrepublik* (C-71/11 & 99/11), WL CELEX 62011CC0071, para. 29 (Apr. 19, 2012).

objective of the Directive, which is to establish a common base identifiable by all.[344]

The AG continued,

> Thus, the performance of rituals may comprise ceremonial acts associated with certain stages of life, and various practices specific thereto, including building places of worship, using of ritual formulae and objects, displaying symbols, observing holidays and days of rest, observance of dietary regulations, and wearing clothing or head coverings in conformity with a person's religion. In addition, the practice and teaching of religion may involve the freedom to choose one's religious leaders, priests and teachers, to hold meetings, to establish seminaries or religious schools, to maintain charitable institutions, to write, print or disseminate publications.
>
> However, the specific importance of each of these acts will vary according to the precepts of the religion concerned and, within the same community, according to the personality of the individual. . . .
>
> All of these matters therefore militate in favour of a broad interpretation of freedom of religion, encompassing all components thereof, be they public or private, collective or individual.[345]

The AG also thought it impossible to judge whether a religious practice could be avoided in public. The only relevant consideration for a court to judge was the gravity of the threat to the applicant:

> In order to determine the actual act of persecution, the authority responsible for examining the application for asylum must therefore examine the nature of the specific situation to which the individual is exposed in his country of origin when exercising his fundamental freedom or infringing the restrictions imposed on the exercise of that freedom in his country of origin.
>
> For the reasons described above, relating to the objective of the common European asylum system, the act in question must, in my view, be particularly severe, such that the person concerned can legitimately no longer live in or tolerate living in his country of origin.[346]

344. *Id*. para 41.
345. *Id*. paras. 43–45.
346. *Id*. paras. 54–55.

Finally, in the AG's view, it was impermissible to deny asylum to applicants who could avoid persecution by renouncing their religious practices.[347] In this case, the AG concluded that:

> 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. Since . . . the law on blasphemy has strengthened . . . the Pakistan Penal Code by introducing the death penalty and the penalty of imprisonment for any individual who, by words, writings, gestures or visible representations, or by making direct or indirect insinuations, insults the sacred name of the prophet Muhammad or the symbols and places associated with Islam. In addition, [the code makes] an offence punishable by a term of three years' imprisonment and a fine for any individual member of the Ahmadiyya community who professes his faith in public, or identifies it with Islam, uses it for propaganda, encourages conversions, uses or borrows the epithets, descriptions, titles or greetings associated with the Muslim religion, quotes verses from the Koran in public, adopts practices associated with Islam such as funeral rites, or in any other way outrages Islam.[348]

Following the AG's remarks rather closely, the CJEU in the case of *Y and Z* detailed the scope of religious persecution according to EU law. 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,"[349] the Court argued, religious freedom protection covers both public and private expressions of religion.[350] And a home state's general prohibition on public worship can constitute persecution of an individual so long as the threat posed by this prohibition is concrete, not theoretical,[351] and the public religious practice is of particular salience for the individual seeking refuge.[352]

In the 2018 case of *Bahtiyar Fathi*,[353] the CJEU clarified how EU states had to assess the claim of religious persecution of refugee applicants, now under a new EU Directive.[354] The case involved an

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347. *See id*. para. 106. ("I consider that the authority responsible for examining the application for asylum cannot reasonably expect the asylum seeker to forego these activities, and specifically to forego manifesting his faith.").

348. *Id*. para. 80.

349. Bundesrepublik Deutschland v. Y, Z, 2012 WL CELEX 62011CJ0071 para. 58 (Sept. 5, 2012) (judgment for joined cases C-71/11 and C-99/11).

350. *Id*. paras. 62–63.

351. *Id*. para. 69.

352. *Id*. para. 70.

353. Case C-56/17, Fathi v. Predsedatel na Darzhavna agentsia za bezhantsite, 2018 WL CELEX 62001CJ0071 (Oct. 4, 2018).

354. Directive 2011/95, of the European Parliament and of the Council of 13 Dec. 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

Iranian national of Kurdish origin who claimed he was facing the threat of persecution on religious grounds in his home country and applied for international protection.[355] The applicant did not identify as a member of a traditional religious community, nor did he submit evidence of his religious practice.[356] He identified himself simply as a "normal Christian with Protestant leanings."[357] He submitted that he had been questioned and detained by Iranian officials for watching and calling into a program playing on a prohibited Christian channel. During his detention, he confessed his Christian faith.[358] He applied for refugee status in Bulgaria, but local authorities found his story of persecution implausible, and rejected his application. Fathi sued, and the Bulgarian court requested the CJEU to issue a preliminary ruling on a variety of issues, which implicated religious freedom.

The CJEU had to assess (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 states had to judge the veracity of the asylum seeker's claim. The AG and the CJEU addressed these aspects using *Y and Z* as well as existing ECtHR's case law.[359] In fact, the AG stated that in this case the religious freedom protection afforded by Article 10 of the EU Charter "correspond[ed] to the [religious freedom] right guaranteed by Article 9 of the ECHR."[360]

The AG reasoned that, in light of existing EU law, acts of persecution had to be "'sufficiently serious by [their] nature or repetition as to constitute a severe violation of basic human rights.'"[361] This included legal, administrative, policy or judicial measures that were discriminatory, as well as punishments and prosecutions that were disproportionate or discriminatory.[362] Not "any 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." On the contrary, the EU Directive requires proof of "a severe violation," which narrows the scope of international protection, the AG insisted.[363] The AG continued:

> It is clear from the principles established by the Court and recalled above that the existence of persecution on

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Protection, and for the Content of the Protection Ranked, 2011 O.J. (L 337) 9 [hereinafter Directive 2011/95].

355. Fathi v. Predsedatel na Darzhavna agentsia za bezhantsite, 2018 WL CELEX 62001CJ0071 para. 30.

356. *Id*. para. 73.

357. Opinion of Advocate General Mengozzi in *Fathi* (C-56/17), 2018 WL CELEX 62011CC0071 para. 2 (Jul. 25, 2018) (internal quotations omitted).

358. *Id*.

359. *Id*. para. 54.

360. *Id*. para. 53.

361. *Id*. para. 52.

362. *Id*. para. 52 (citing Directive 2011/95, *supra* note 349, art. 9).

363. *Id*. (citing Directive 2011/95, *supra* note 349, art. 9).

> religious grounds is dependent, first, on the severity of the interference with the freedom of religion of the applicant for asylum—with the interference having to constitute a violation of that freedom—and second, the seriousness of the acts to which the applicant is exposed to on account of the exercise of that freedom in his country of origin: those two aspects are independent of one another.[364]

The AG further proposed to focus on what religion is from the perspective of *those who actively persecute*, stating,

> [W]hen examining applications based on a fear of persecution on religious grounds, the question of what is covered by the concept of religion *from the perspective of the (potential) actors of persecution* is of fundamental importance. By answering that question, it is possible to determine the attitude that can be expected of such actors towards the applicant's religious beliefs or identity and in relation to acts (or omissions) which constitute external manifestations of those beliefs or that identity.[365]

This observation has the potential to expand the understanding of religion and of religious persecution by making it flexible to different cultural, legal, and political settings.

Finally, the AG proposed a holistic approach to the evidence of religious persecution. In his view,

> [T]he examination of the application for international protection must include an individual assessment of that application, taking into account all the relevant facts as they relate to the country of origin of the person concerned at the time the decision is taken on the application, the relevant information and documentation presented by that person, and his individual position and personal circumstances. That assessment takes place in two separate stages. The first stage concerns the establishment of factual circumstances that may constitute evidence that supports the application, while the second stage relates to the legal appraisal of that evidence, which entails deciding whether, in the light of the specific facts of a given case, the substantive conditions . . . for the grant of international protection are met. During the first stage . . . the Member States may consider that it is generally for the applicant to submit all the elements needed to substantiate his application, but the fact remains that it is the duty of the Member State concerned to cooperate with that applicant at the

364. Opinion of Advocate General Mengozzi in *Fathi*, *supra* note 352, para. 56.
365. *Id*. para. 48.

stage of determining the relevant elements of that application. . . .[366]

The AG suggested that the lack of evidence be considered when assessing an applicants' credibility.[367] Further, "when certain aspects of the statements of an applicant for asylum are not substantiated by documentary or other evidence, those aspects do not require confirmation provided that the cumulative conditions laid down . . . are met."[368]

Authorities in the asylum process must also take into account "his beliefs regarding the religion and the circumstances in which he acquired those beliefs, the way in which he understands and lives his faith (or his lack of faith), his relationship with doctrinal, ritual or prescriptive aspects of the religion to which he claims to belong or from which he seeks to distance himself, whether he has a particular role in spreading his faith, for example through teaching or proselytism, as well as the interplay between religious factors and factors linked to identity, ethnicity or gender."[369]

With respect to Mr. Fathi's story, the AG concluded that,

> his Kurdish origin, the fact that he has converted to Christianity and the process of that conversion, his participation in the broadcast by a Christian TV channel that is prohibited in his country of origin, his arrest and questioning by the authorities of that country, and his confessions regarding his conversion during his detention are all factors that the [Bulgarian authorities] w[ere] required to take into consideration as part of that first stage of its assessment, together with relevant factors as they relate to the applicant's country of origin.[370]

In its opinion in the *Bahtiyar Fathi* case, the CJEU followed the AG's detailed instructions rather closely. First, it stated that the penalties that a convert would face in case of return to his home country had to be "applied in practice"[371] and consist of a real threat.[372] Second, the concept of "religion" in the EU Directive protecting refugees included public and private expressions of religion, "theistic, non-theistic and atheistic beliefs," and "both 'traditional' religions and other beliefs."[373] It covered "participation in" those various forms of religion "either alone or in community with others, or the abstention

366. *Id*. para. 45.
367. *Id*. para. 46.
368. *Id*.
369. *Id*. paras. 47.
370. Opinion of Advocate General Mengozzi in *Fathi*, *supra* note 352, para. 49.
371. Fathi v. Predsedatel na Darzhavna agentsia za bezhantsite, 2018 WL CELEX 62011CJ0071 paras. 96, 98.
372. *Id*. para. 83.
373. *Id*. para. 80.

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."[374] Third, the CJEU placed the burden on the claimant to "duly substantiate his claims as to his alleged religious conversion, since the statements and no more relating to his religious beliefs or membership of a religious community constitute[d] merely the starting point in the process of assessment of the facts and circumstances" that could trigger the legal protection.[375] The claimant's statements had to be "coherent and plausible," without running "counter to available specific and general information relevant to [the] case. . . ."[376] More broadly, the claimant himself had to be credible.[377]

> The holistic approach recommended by the CJEU, however, required that domestic authorities consider a wide range of aspects, including the applicant's religious beliefs and how he developed such beliefs, how he understands and lives his faith or atheism, its connection with the 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.[378]

This pair of cases distills what the state and the refugee applicant owe each other. Under EU law, as interpreted by the CJEU, 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 practice or personality of the claimant that has or might trigger religious persecution. This approach is consistent with CJEU's general aversion to entering into religious disputes. It also tries to give a comprehensive reading of what can be considered religious persecution, while shortening the list of discriminatory practices that amount to persecution. This approach is also consistent with the EU's interest in balancing the need to shelter persecuted people and to control its borders in the midst of a refugee crisis. Both the EU's own reliance on the ECtHR's case law in setting its Directive and the resonance between the AG's opinions and the CJEU's rulings underscore the widespread effort of European authorities to make the EU as safe a place as possible for both foreign refugees escaping persecution and local residents enjoying their traditions.

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374. *Id*.
375. *Id*. para. 84.
376. *Id*. para 87.
377. Fathi v. Predsedatel na Darzhavna agentsia za bezhantsite, 2018 WL CELEX 62011CJ0071 para. 87.
378. *Id*. para. 88.

Since 2017, the CJEU has issued landmark rulings on the rights and limits on Muslim employees to wear religious headscarves in the workplace and the rights of employers to make religious affiliation and conformity a prerequisite for employment or a basis for differential treatment of employees. It has balanced the rights of religious groups to continue ritual slaughtering with the growing concerns for animal well-being and stricter hygiene standards for organic food labeling. The Court has addressed hard questions of tax exemption and other state aid for religious schools; the rights and limits of refugees alleging religious persecution at home; the limits on state recognition of religious divorces; and the limits that privacy laws impose on Jehovah's Witnesses. And it has begun to question longstanding religious autonomy claims and religion-state arrangements in certain countries, including those that establish or favor traditional forms of Christianity.

These are all highly important symbolic and substantive issues for religious freedom in Europe and beyond. The lengthy opinions by the Advocates General about the European Union's evolving interests in religion and religious freedom contextualize the terser but definitive opinions of the CJEU. Since this Court has a monopoly on the interpretation of EU law, and since its case law trumps domestic laws when there is conflict, the CJEU effectively rules supreme in all Member States of the European Union (27 after Brexit). Its rulings in individual cases are already proving to be effective in unifying and integrating pockets of religious freedom law in EU lands. Religious freedom litigants have begun to take notice, triggering a growing wave of religious freedom cases that have reached the CJEU, usually via requests from local courts about the meaning of EU law in their domestic cases. The more the CJEU spells out its jurisprudence, the more likely the EU will slowly integrate—if not unify—its treatment of religious freedom.

So far in its first eleven cases, the CJEU has largely echoed, and sometimes explicitly followed, the religious freedom jurisprudence of the older and more familiar ECtHR sitting in Strasbourg. That consistency in approach has aided the integration of European religious freedom law. The Strasbourg Court hears cases from any of the 900 million subjects living in the 47 European States that are part of the Council of Europe (which includes all 27 current Member States of the European Union). Since 1993, more than 100 of these cases have involved claims that a State has violated the religious freedom and related guarantees set out in the 1950 European Convention on Human Rights. When the Strasbourg Court finds a State in violation of these guarantees, it largely depends on voluntary compliance by the State as well as diplomatic pressure from other states. But when the CJEU issues a religious freedom opinion along

the same lines as the Strasbourg Court, that helps make the latter's jurisprudence more legally influential in the 27 EU states, for the CJEU's law is binding in those states.

That said, the CJEU has also begun to strike its own path which may not always lead to favorable treatment for all religious freedom claims by minority and majority faiths alike. The CJEU has already shown a strong preference for state policies of "religious neutrality." That policy is intuitively attractive in post-modern, pluralistic, liberal societies to address a number of legal questions. And it has already begun to provide more nuanced protection for religious freedom claims than the aggressive policies of *läicité* and secularization at work in some EU Member States, to which the Strasbourg Court has generally given an ample "margin of appreciation."[379] Noteworthy is the CJEU's 2017 case of *Bougnaoui v. Micropole* which protected a French Muslim woman's right to continue to wear her *hijab* in a private workplace. That case stands in marked contrast to several Strasbourg court cases that have repeatedly rejected rights claims by Muslim women to wear religious apparel in private and public settings.[380]

But religious neutrality norms, when pressed too strongly, can also come at the cost of accommodations for discrete religious minorities who operate outside of the cultural mainstream, or other parties whose pressing claims of conscience or central commandments of faith prevent them from abiding by the state's neutral laws. Minority Muslim litigants lost the four other CJEU cases heard so far, involving religious apparel in the workplace, *halal* ritual slaughter practices, and religious divorces, each time with the Court noting that the laws or policies in question were "neutral." And the ruling in the *Congregación de Escuelas Pías* tax exemption case that makes remuneration for services the tipping point for application of the EU prohibition of state aid to religion privileges wealthy, well-endowed majority churches over smaller religious groups.[381] Most of the CJEU cases have involved close interpretation of relevant EU laws, rather than direct review of the religious freedom guarantees in the EU Charter and the European Convention on Human Rights. But even when the Jehovah's Witnesses directly adduced Article 10 Charter

379. *See*, *e.g.*, Letsas, *supra* note 19.

380. *See*, *e.g.*, Dahlab v. Switzerland, 2001-V Eur. Ct. H.R. (Second Section) (forcing Muslim teacher to remove headscarf during lessons); Kurtulmuş v. Turkey, Eur. Ct. H.R., App. No. 65500/01 (Second Section) (forcing Muslim college teacher to remover headscarf during lessons); Leyla Şahin v. Turkey, 2005-XI Eur. Ct. H.R. (Grand Chamber) (prohibiting headscarves on college campus); Köse and Others v. Turkey, Eur. Ct. H.R., App. no. 26625/02 (Second Section) (preventing students from attending school while wearing headscarves); El Morsli v. France, 2008 Eur. Ct. H.R. (keeping Muslim woman from entering the country because she refused to remove her veil for security); Mann Sing v. France, 2007 Eur. Ct. H.R. (forcing Muslim woman to remove headscarf for ID picture); S.A.S. v. France, 2014 Eur. Ct. H.R., App. No. 43835/11 (Grand Chamber)(preventing Muslim woman from wearing full-face veil in public).

381. Congregación de Escuelas Pías Provincia Betania v. Ayuntamiento de Getafe, 2017 WL CELEX 62016CJ0074.

rights in *Tietosuojavaltuutettu*, the Court upheld the EU privacy directive because it was "neutral."[382]

Furthermore, this neutrality policy has prompted the CJEU to question the longstanding Western principle of "religious autonomy" echoed in EU treaties and statutes. But so far, this questioning has come only in cases dealing with Christian majorities. In cases involving religious minorities, the CJEU has explicitly abstained from judging internal religious claims, practices, or disputes about Muslim slaughtering and holiday practices, Sharia divorce proceedings, or the authenticity of religious conviction or vulnerability of foreign refugee applicants claiming religious persecution at home. In these cases, the CJEU professed its incompetence to enter the internal religious realm, preferring to judge only the sociological dimensions of religion on neutral criteria. In cases involving Christian religious majorities, however, the Court has shown more willingness to review and question internal religious practices and decision-making. In *Egenberger*, the CJEU declared that a private German Protestant diaconal organization could require its new employees to be religiously affiliated only if it could prove that this religious requirement was "genuine, legitimate, and justified" and "proportionate" to the competing secular interests, individual rights, and private life choices of an employee or job applicant.[383] In *IR v. JQ*, the Court held that a private Catholic hospital could insist on a "duty of loyalty" to Catholic doctrine and practice from its management staff only if it could prove that the religious affiliation and private morality of an employee were relevant to his particular duties.[384] In *Cresco,* a private employer could follow a traditional state rule that excused employees from work on Good Friday or gave them double pay to work that day, only if all other employees were treated the same way. Moreover, the Court said, this policy incentivized workers to ignore their religious observance of Good Friday. In *Congregación de Escuelas Pías,* the CJEU reviewed rather closely the inner workings of a private Catholic school, and its allocation of space and finances, and the Spanish court in response denied the school's tax exemption despite a specific concordat provision guaranteeing such exemptions.[385] These cases stand in marked contrast to traditional rules that give churches "autonomy" to govern their own internal affairs concerning property, employment, membership, and more so long as all parties have the unconditional freedom to leave that group.

In these latter cases, the CJEU has also begun to probe and question longstanding national church-state arrangements set out in

382. Tietosuojavaltuutettu v. Jehovan todistajat, 2018 WL CELEX 62017CJ0025

383. Egenberger v. Evangelisches Werk für Diakonie und Entwicklung eV, 2018 WL CELEX 62016CJ0414.

384. IR v. JQ, 2018 WL CELEX 62017CJ0068.

385. Congregación de Escuelas Pías Provincia Betania v. Ayuntamiento de Getafe, 2017 WL CELEX 62016CJ0074.

constitutions and concordats, particularly those that establish or privilege one or more traditional forms of Christianity. *Cresco* challenged Austria's recognition of the traditional Christian religious calendar in setting its workplace regulations. *Congregación de Escuelas Pías* threatened to review Spain's concordat with the Holy See in future cases. *Egenberger* queried the German territories' longstanding practices of church-state cooperation in diaconal and educational matters. These rapid-fire dicta have come despite the opening admonition of the 1999 Treaty of Amsterdam, which solidified the European Union on the express principle that "[t]he European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States."[386]

Scholars and advocates who see American-style principles of disestablishment of religion and strict separation of church and state as essential to the enhancement of religious freedom will likely applaud these latter queries by the CJEU. Those who favor traditional balances between individual religious freedom for all and settled religion-state relations in Europe and other parts of the world will have good reason to watch closely the CJEU's rapidly evolving case law.[387] Both should keep in mind, however, that the very recent CJEU case law on religious freedom sits atop a thick layer of decades of case law focusing largely on economic matters and liberties. The CJEU is not distilling a coherent and comprehensive understanding of religious freedom; it is rather broadening its judicial philosophy to include religious freedom as well. The CJEU is the offspring of European legal tradition as well as of its own ample precedents.

386. Treaty of Amsterdam, *supra* note 92.

387. *See generally* W. COLE DURHAM, JR. AND BRETT G. SCHARFFS, LAW AND RELIGION: NATIONAL, INTERNATIONAL, AND COMPARATIVE PERSPECTIVES (2010); W. Cole Durham, Jr., *Patterns of Religion State Relations, in* RELIGION & HUMAN RIGHTS 360–378 (John Witte Jr., & M. Christian Green eds., 2012).