Religion and Equality

Law in conflict

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Routledge
Taylor & Francis Group
LONDON AND NEW YORK

3 Freedom of Religion

Strasbourg and Luxembourg Compared

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Two Pan-European Courts

Europe has the benefit of (or is burdened by, depending on one's viewpoint) two pan-national courts, which are distinctly different in a number of ways. The European Court of Human Rights (ECtHR) in Strasbourg was established in 1959 pursuant to the European Convention on Human Rights (ECHR) under the auspices of the Council of Europe. The Convention charges the Court with the enforcement and implementation of the ECHR in all 47 member states of the Council of Europe.

The Court of Justice of the European Union (ECJ) in Luxembourg is not related to the ECtHR. However, all European Union (EU) states are members of the Council of Europe and signatories to the ECHR. The ECJ refers to the case-law of the ECtHR and treats the ECHR as though it were part of the EU's legal system, since the legal principles of the ECHR apply to EU member states. All EU institutions are bound under Article 6 of the EU Treaty of Nice to respect human rights under the ECHR. Furthermore, since the Treaty of Lisbon took effect on 1 December 2009, the EU is expected to become a party to the ECHR. This would mean that the ECJ will be bound by the case law of the ECtHR.[1]

This chapter considers religious liberty claims brought in the ECtHR under Article 9 (freedom of religion) and Article 14 (prevention of discrimination) of the ECHR. In parallel, it considers the role and function of the ECJ, in the exercise of its pan-national jurisdiction overseeing EU treaties and directives. It examines the emergent trajectories of the jurisprudence of these key European institutions in promoting and safeguarding religious liberty and equality, and considers their relative effectiveness in securing such rights. It also considers the likely impact for litigants of developments within both courts, as the dynamic of collaboration or conflict amongst the two jurisdictions evolves.

1 For some hints on collaborative practice as between the Strasbourg and Luxembourg courts, see the views expressed by a former President of the European Court of Human Rights when delivering the 2013 *Sir David Williams Annual Lecture*: Jean-Paul Costa, 'The Relationship between the European Court of Human Rights and National Constitutional Courts', University of Cambridge, 15 February 2013.

Freedom of Religion in the ECtHR

For a systematic overview of the protection of religious freedom in Strasbourg, readers must look elsewhere.[2] For present purposes, this chapter considers the relevant features refracted through the prism of the ECtHR's seminal judgment in the recent case of *Eweida and Others v. UK*.[3] In these conjoined applications the principles were already well known and had earlier been adverted to in a lecture by Sir Nicolas Bratza.[4] They are helpfully gathered up in paragraphs 79 and 80 of the Court's judgment, which include the following succinct propositions. As enshrined in Article 9, freedom of thought, conscience, and religion is one of the foundations of a democratic society. In its religious dimension it is one of the most vital elements that go to make up the identity of believers and their conception of life. But it is also a precious asset for atheists, agnostics, sceptics, and the unconcerned. Religious freedom is primarily a matter of individual thought and conscience, which is absolute and unqualified. Manifestation of belief, alone and in private, but also in community with others and in public (in worship, teaching, practice, and observance)[5] may have an impact on others. Article 9(2) qualifies the right by such that any limitation placed on a person's freedom to manifest religion or belief must be prescribed by law and necessary in a democratic society in pursuit of one or more legitimate aims.

After setting out these broad, well-established, and non-controversial statements of principle, the majority opinion then identifies three subtle but significant elucidations through which the Article 9 right to freedom of religion is reinforced. In re-articulating the ambit of Article 9, through this carefully voiced judgment, the effective reach of the provision as an instrument for securing religious liberty is significantly increased.[6] First, the ECtHR has made plain that, provided a religious view demonstrates a certain level of cogency, seriousness, cohesion, and importance, the duty of neutrality of individual governments 'is incompatible with any power on the state's part to assess the legitimacy of religious beliefs or the way those beliefs are expressed'.[7] Second, the judgment outlaws the narrow interpretation

2 For an authoritative analysis of the history of the Court's treatment of Article 9 applications, see Javier Martínez-Torrón, 'Religious Liberty in European Jurisprudence', in Mark Hill, ed., *Religious Liberty and Human Rights* (University of Wales Press 2002), 99–127. See also, for example, Maria J. Valero Estarellas, 'State Neutrality, Religion and the Workplace in the Recent Case Law of the European Court of Human Rights', Chapter 4 of this volume, as well as Paul Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge University Press, 2006); Ian Leigh, 'New Trends in Religious Liberty and the European Court of Human Rights', (2010) 12 *Ecclesiastical Law Journal* (3) 266–279; Marie A. Failinger, ed., AALS Symposium: The Freedom of Religion and Belief Jurisprudence of the European Court of Human Rights I, (2010–2011) 26 *Journal of Law and Religion* (1) xiii–xv.

3 *Eweida and Others v. United Kingdom*, App. Nos. 48420/10, 59842/10, 51671/10, 36516/10 (ECtHR Fourth Section, 15 January 2013). For a detailed analysis of the decision, see Mark Hill, 'Religious Symbolism and Conscientious Objection in the Workplace: An Evaluation of Strasbourg's Judgment in *Eweida and others v United Kingdom*', (2013) 15 *Ecclesiastical Law Journal* (2) 191–203. See also analysis by Maria J. Valero Estarellas in Chapter 4 of this volume.

4 Nicolas Bratza, 'The "Precious Asset": Freedom of Religion under the European Convention on Human Rights', (2012) 14 *Ecclesiastical Law Journal* (2) 256–271.

5 See *Kokkinakis v. Greece*, App. No. 14307/88 (ECtHR, 25 May 1993), § 31; also *Leyla Şahin v. Turkey*, App. No. 44774/98 (ECtHR Grand Chamber, 10 November 2005), § 105.

6 Significantly, this is the first adverse determination for the United Kingdom on Article 9 since it became a signatory to the Convention. It also runs counter to the trend identified by Professor Silvio Ferrari in his systematic analysis of Strasbourg judgments on pan-European violations of religious freedom: Silvio Ferrari, 'Law and Religion in a Secular World: A European Perspective', (2012) 14 *Ecclesiastical Law Journal* (3) 363.

7 *Eweida* § 81.

of manifestation which required a doctrinal mandate. While rightly acknowledging that liturgical acts are self-evidently outward expressions of belief, the ECtHR made clear that the manifestation of religion is much wider than this. The third, and most significant, aspect of the Court's judgment is the laying to rest of a principle that had been gaining currency in both Strasbourg and domestic jurisprudence, to the effect that if a person can take steps to circumvent a limitation placed upon him or her, such as resigning from a particular job, then there is no interference with the Article 9 right.[8]

The development of a European jurisdiction is valuable as a counter balance to denominational majorities and religious nationalism.[9] From the *Kokkinakis* case (1993) to the French case *Association Les Témoins de Jéhovah* (2011),[10] the ECtHR has developed a robust protection of the rights and interests of religious minorities. Sometimes national courts have paved the way, but the contribution of the ECtHR cannot be ignored. The role of the ECJ in Luxembourg, enforcing emerging principles of European Union law, has been as important as that of the ECtHR in Strasbourg.

Freedom of Religion in the ECJ

Article 10 of the EU Charter of Fundamental Rights is in very similar terms to Article 9 of the ECHR. The ECJ characterizes the ECHR as an instrument having 'special relevance' for the determination and interpretation of EU law.[11] Article 52(3) of the EU Charter (whose status is equivalent to a treaty)[12] states that Charter rights are to be interpreted consistently with corresponding rights guaranteed by the ECHR. The EU Charter, unlike the ECHR, is not a universal document of human rights protection. Instead the provisions of the Charter only apply to EU institutions and member states when they are 'implementing EU law'.[13]

Directive 2004/113,[14] implementing the principle of equal treatment between men and women in the access to and supply of goods and services, was adopted under Article 19 of the Treaty on the Functioning of the European Union (TFEU).[15] Recital 3 of the Preamble to the Directive states: 'While prohibiting discrimination, it is important to respect other fundamental rights and freedoms, including [. . .] the freedom of religion.' The *EU Guidelines on the Promotion and Protection of Freedom of Religion or Belief (2013)*[16] were adopted on

8 As the Court states in the opinion of the majority: 'Given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.'

9 See Marco Ventura, 'The Changing Civil Religion of Secular Europe', (2010) 41 *George Washington International Law Review* (4) 947–961.

10 *Association Les Témoins de Jehovah v. France*, App. No. 8916/05 (ECtHR, 30 June 2011).

11 Joined cases 46/87 and 227/88 *Hoechst* [1989] ECR 2859.

12 The Lisbon Treaty, which entered into force on 1 December 2009, accords the EU Charter the 'same legal value as the Treaties': Article 6(1) of the Treaty on European Union (TEU).

13 Article 51 of the EU Charter.

14 OJ L373 13 December 2004, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:373:0037:0043:en:PDF (accessed 12 October 2015).

15 Formerly Article 13 of the Treaty establishing the European Community.

16 See http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/137585.pdf (accessed 12 October 2015).

24 June 2013 by the EU Council of Foreign Affairs. The guidelines seek to promote this fundamental right in countries beyond EU borders. The *Guidelines* detail the EU's approach to the freedom of religion or belief which the EU will promote in its negotiations with other countries.

Article 19 of the TFEU (introduced by the Treaty of Amsterdam) allows the Council to pass legislation combating discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. It requires unanimity in the Council. It does not prohibit discrimination in itself, but acts as a legal mechanism for the adoption of legislation designed to combat discrimination, for example Directive 2000/78[17] and Directive 2000/43.[18]

Article 21 of the EU Charter states that: 'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age, or sexual orientation, shall be prohibited.'

Directive 2000/78 establishing a general framework for equal treatment in employment and occupation aimed at combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation[19] was adopted on the basis of Article 19 TFEU. It requires all member states to protect against discrimination on grounds of religion and belief in employment, occupation and vocational training, and applies to everybody in the private or public sector and public bodies. The Directive prohibits direct and indirect discrimination,[20] harassment,[21] instructions to discriminate[22] and victimization[23] based on religion or belief. These terms are not defined in the Directive itself, leaving it to the member states to do so.

Member states are required to transpose Directive 2000/78 into their domestic legal systems. They are free to extend the prohibition of discrimination on grounds of religion or belief beyond employment, occupation and vocational training.[24] When interpreting Directive 2000/78, the ECJ is required to have due regard to Strasbourg jurisprudence, the 1961 European Social Charter and the 1996 Revised European Social Charter.

The proposal for Council Directive 2008/426 on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation[25] was announced by the European Commission on 2 July 2008. As with Directive 2000/78, the proposal for Council Directive 2008/426 applies to everybody in the private or public sector and to public bodies. However, the scope of the proposal is much broader, covering social protection (including social security and health care), social

17 Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation aimed at combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation (OJ L303 2 December 2000).

18 Directive 2000/43/EC implementing the principle of equal treatment between persons of racial or ethnic origin (OJ L180 29 June 2000).

19 OJ L303 2 December 2000, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML (accessed 1 November 2015).

20 Article 2(2) Directive 2000/78.

21 Article 2(3) Directive 2000/78.

22 Article 2(4) Directive 2000/78.

23 Article 11 Directive 2000/78.

24 For example, the UK Equality Act 2010 prohibits discrimination on grounds of religion or belief in relation to housing and education.

25 See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0426:FIN:EN:HTML (accessed 12 October 2015).

advantages and education, as well as access to and supply of goods and services, such as housing and transport. The principle of equal treatment, as provided for in the proposal for Council Directive 2008/426, does not apply to differences in treatment based on religion or beliefs vis-à-vis access to educational institutions founded on a particular religion or belief. As with Directive 2000/78, member states may introduce or maintain more protective provisions than the minimum requirements provided for in the proposed Directive.

A *Corrigendum* to Directive 2004/58 on the right of citizens of the EU and their family members to move and reside freely within the territory of the member states[26] was adopted by virtue of Articles 18, 21, 46, 50 and 59 TFEU.[27] The Corrigendum sought to remedy the piecemeal approach to the right of free movement and residence by providing a single, all-encompassing legislative provision. Recital 31 of the Preamble to Corrigendum states that: 'Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as [. . .] religion or beliefs [. . .].'

The document, *Communication from the Commission to the Council, the Parliament, the European Economic and Social Committee and the Committee of the Regions on Non-Discrimination and Equal Opportunities for All: A Framework Strategy*[28] sets out the Commission's strategy for the positive and active promotion of non-discrimination and equal opportunities for all. The Commission's strategy includes ensuring effective legal protection against discrimination on grounds of religion or belief across the EU through the full transposition by all member states of the Community legislation in this field, notably Directives 2000/78 and Directive 2000/43, discussed above. Decision No 771/2006 of the European Parliament and of the Council, establishing the European Year of Equal Opportunities for All: Towards a Just Society,[29] sought to raise public awareness of the substantial Community *acquis* in the field of equality and non-discrimination.

So far, the ECJ has not engaged with religious disputes, particularly equality cases relating to religious dress. The Directives relating to non-discrimination are relevant, particularly in the employment context.[30] An early example is the ECJ decision on the *Steymann* case.[31] The Court had been asked to decide on whether a member of a religious community was entitled to a pension for his work. Facing the problem of assessing whether the question pertained to a purely religious matter or had an economic dimension, thus falling within the competence of the Court, the judges stated that Article 2 of the EEC Treaty must be interpreted as meaning that activities performed by members of a community based on religion or another form of philosophy as part of the commercial activities of that community constitute economic activities in so far as the services which the community provides to its members may be regarded as the indirect quid pro quo for genuine and effective work.

26 OJ 2004 L158 30 April 2004, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0038R(01):en:HTML (accessed 1 November 2015).

27 Formerly Articles 12, 18, 40, 44, and 52 TEC.

28 OJ C236 of 24 September 2005, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005DC0224:EN:HTML (accessed 12 October 2015).

29 OJ L146 of 31 May 2006, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006D0771:EN:HTML (accessed 1 November 2015).

30 See, for discrimination on grounds of race or ethnic origin: Directive 2000/43/EC of 29 June 2000, *OJ 180 L*, 19/7/2000, 22 (Race directive), for sex discrimination: Directive 2006/54/EC of 5 July 2006, *PJ 204 L*, 26.7.2006, 23 (Recast directive) and for discrimination on grounds of (amongst others) religion: Directive 2000/78/EC of 27 November 2000, *OJ 303 L*, 2/12/2000, 16 (Employment Equality Directive).

31 ECJ, *Udo Steymann v. Staatssecretaris van Justitie*, 1988.

The Key Differences between the Courts

There are a number of significant differences which, from a litigant's point of view, might tend to favor the ECJ over the ECtHR.

1. Exhaustion of Domestic Remedies

It is a requirement of the ECHR and the procedural rules of the ECtHR that any potential applicants exhaust their domestic remedies before they claim relief in the supra-national court. This means that many years can be taken up in domestic first instance and appellate courts before an application is filed in the ECtHR.[32] Referrals to the ECJ can be made at any time and declarations are generally given more speedily in respect of interpretative decisions on EU Directives.

2. Delay

The backlog of cases in the ECHR means that many years will elapse between the incident complained about and the determination of the ECtHR.[33] The caseload at the ECJ is growing but it does not have such a long backload of cases.

3. Margin of Appreciation

The ECtHR consistently defers to national legislators in relation to political, social, cultural and other considerations. Whist the ECJ openly acknowledges and applies the principle of subsidiarity, No such elasticity is afforded the ECJ in the enforcement of EU Directives.

4. Political Considerations

Some critics have commented on a lack of clarity and inconsistency of decision making within the ECtHR. Others have pointed to the ideological and political underpinning of its case law. It straddles jurisprudence and politics and, as one commentator has indicated, it occasionally overreaches itself.[34] The ECJ, though not immune to political pressures, is not required to make sensitive value judgments of this type.

5. Parties

In the ECtHR, proceedings can only be brought against member states and the Government of that member state is the Respondent.

32 In the case of Nadia Eweida, she was refused permission openly to wear the cross in 2006, but did not obtain declaratory relief from the ECtHR until 2013.

33 At the end of 2011, the backlog of cases exceeded 152,000: http://www.bbc.co.uk/news/uk-politics-17762341 (accessed 12 October 2015). By December 2014, however, after the streamlining effects of ECHR Protocol 14 had taken effect, the case backlog had been reduced to 69,900: http://www.echr.coe.int/Documents/Facts_Figures_2014_ENG.pdf.

34 See the comments of Lord Hoffmann and of David Cameron.

Melting Pots of Ideologies

National courts are indebted to Strasbourg and Luxembourg for their distinct methodology and analysis, for the exposure of conceptual, cultural, terminological and linguistic misunderstandings amongst European lawyers, and for the development of substantive jurisprudence.[35]

In his concurring opinion for the Grand Chamber of the Court of Strasbourg in the 2011 appeal judgment on *Lautsi*, Justice Bonello warned:

> A court of human rights cannot allow itself to suffer from historical Alzheimer's. It has no right to disregard the cultural continuum of a nation's flow through time, nor to ignore what, over the centuries, has served to mould and define the profile of a people. No supranational court has any business substituting its own ethical mock-ups for those qualities that history has imprinted on the national identity.[36]

He clearly referred to the stance taken by the Chamber in its 2009 'anti-crucifix' ruling, and maybe in many other cases in which European Courts stood for transformative justice instead of acquiescing to what was deemed the untouchable identity of a given country.

Similarly, in the *Refah Partisi* decisions, the idea of the state's role 'as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs' encapsulates what is sometimes referred to as 'the European project':

> The Court has frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. It also considers that the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs . . . and that it requires the State to ensure mutual tolerance between opposing groups.[37]

The endeavour of the European courts was very much about reconciling principles with reality. Justice Tulkens' momentous dissenting opinion in *Leyla Şahin* affirmed this point:

> [T]the Court's review must be conducted *in concreto*, in principle by reference to three criteria: first, whether the interference, which must be capable of protecting the legitimate interest that has been put at risk, was appropriate; second, whether the measure that has been chosen is the measure that is the least restrictive of the right or freedom concerned; and, lastly, whether the measure was proportionate, a question which entails a balancing of the competing interests.[38]

35 The benefits also extend beyond the territorial borders of Europe. In the 2007 *Pillay* case, Justice Pius Langa for the South African Constitutional Court referred to the application of the margin of appreciation to faith-based cases in Strasbourg, in his discussion of the autonomy of school boards in determining uniform codes impinging on religious rights. Constitutional Court of South Africa, *MEC for Education: Kwazulu-Natal and Others v. Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007), at para 80.

36 *Lautsi v. Italy*, App. No. 30814/09 (ECtHR Grand Chamber, 18 March 2011), concurring opinion of Judge Gonello § 1.1.

37 *Refah Partisi v. Turkey*, App. Nos. 41340/98, 41342/98, 41343/98 (ECtHR Grand Chamber, 13 February 2003), § 91.

38 *Leyla Şahin*, dissenting opinion of Judge Tulkens § 2.

National Autonomy

How much discretion will the ECJ leave to the national authorities to implement and apply the non-discrimination provisions of the equality directives in this sensitive area? A strict interpretation could entail far-reaching obligations to accommodate religion in the workplace that may not be acceptable to all member states. The Dutch interpretation of non-discrimination law, for instance, which does not allow for a refusal to employ a Muslim woman as a public school teacher because she wishes to wear a headscarf in class, would appear unacceptable for France.[39] Although EU directives may leave the forms and methods chosen to the discretion of the member states, the stated objective is binding. This suggests that a generally uniform outcome of discrimination claims across Europe should be achieved, at least as far as minimum standards are concerned. In the area of sex discrimination this seems to be the case. The ECJ's case law has provided detailed rules and principles that govern the interpretation and transposition of the directives in all member states. They ensure that the levels of protection against discrimination to be derived from EU law are similar between countries.[40]

The ECtHR leaves national governments a wide margin of appreciation to regulate relationships between state and religion. The ECtHR has shown itself particularly deferential in its case law concerning headscarf bans in public education. In the landmark case *Şahin v. Turkey* it has elaborated its approach. This case concerned a university student who objected to the dress regulations of a Turkish state university. The regulations contained a ban on all religious attire being worn in the university. The ECtHR held the ban to be compatible with the rights enshrined in the ECHR. In its decision the ECtHR kept its distance and emphasized the margin of appreciation to be left to the states party to the Convention: 'Where questions concerning the relationship between State and religions are concerned, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance.'[41]

The ECtHR accorded particular importance to the lack of a common view among contracting states which are party to the Convention concerning the regulation of wearing religious symbols in public education. Consequently the Turkish government was given a significant margin of appreciation to decide whether it is indeed necessary in the Turkish context to prohibit wearing religious symbols in teaching institutions. The ECtHR accepted the arguments put forward by the government, especially those that referred to the specific Turkish history of secularism, and the strong political significance of wearing a headscarf in Turkey connected with the growing influence of extremist political movements in that country. As a result Turkey was allowed to prohibit not just teachers, but also adult students from wearing religious symbols in educational institutions. Even in France, well-known for its strict *laïcité*, the legal ban introduced in 2004 extends only to primary and secondary education, not to universities.[42]

39 See generally Titia Loenen, 'Accommodation of Religion and Sex Equality in the Workplace under the EU Equality Directives: A Double Bind for the European Court of Justice' in Katayoun Alidadi, Marie-Claire Foblets, and Jogchum Vrielink, eds, *A Test of Faith* (Ashgate 2012), Chapter 5; and Blandine Chelini-Pont and Nassima Ferchiche, 'Religion and the Secular State in France', in Javier Martínez-Torrón and W. Cole Durham, Jr., General Reporters, *Religion and the Secular State: National Reports* (Universidad Complutense Madrid 2015), 315–317.

40 For an overview of sex discrimination case law see for example Evelyn Ellis, *EU Anti-Discrimination Law* (Oxford University Press 2005).

41 *Leila Şahin* § 109.

42 Mention might be made here of France's 2010 'anti-burqa law' which prohibited face coverings in public (not specifically restricted to those worn by Muslim women, though this was the group obviously most affected by the law). The ban was challenged at the ECtHR by a Muslim woman. In *S.A.S. v. France*, App. No. 43835/11

A similarly deferential approach would be politically attractive for the ECJ as well. As has been pointed out by Bell, the EU often tries to avoid getting involved in moral controversies. He refers to the transnational (non)recognition of same sex partnerships as an example. In this context the ECJ has taken pains to stay away from imposing a specific position. As Bell remarks: 'This is perhaps best described as a form of "moral subsidiarity," which regards issues of cultural or moral sensitivity as best left to national discretion.'[43]

Though politically understandable, such an approach might leave vulnerable minority groups with less human rights protection than majority groups. The German experience may provide an example of how this may turn out. As mentioned before, in Germany the *Bundesverfassungsgericht* was confronted with the question of whether it was constitutional for a public school to prohibit a Muslim teacher from wearing a headscarf in the class room. The Court held that this issue should be decided through the democratic process and that any restriction would have to be based on a formal act of the legislatures of the German states. Subsequently several states adopted such legislation restricting the right to manifest religion through certain forms of dress. These restrictions will predominantly affect members of minority religions such as Muslims. Several German states even introduced legislation which more or less explicitly bars Muslim religious symbols, leaving the wearing of Christian attire untouched. In fact, in some states this was for the explicit purpose of allowing nuns or monks to teach in public schools while wearing their habit. The difference in treatment was sometimes justified by the argument that Christian symbols are to be perceived as religiously neutral as they have become part of the Western cultural tradition. As such the legislation was presented as not privileging one religion over another, but as just protecting a neutral educational setting. So far, such regulations have not been struck down by German courts as incompatible with equality and non-discrimination.[44]

A deferential approach by the ECJ could lead to widely diverging outcomes when transposing the equality directives in this area: they may come to mean entirely different things in different countries. This is perhaps all the more problematic as some of the issues clearly engage potential sex discrimination, an area where the ECJ traditionally has been strict in not allowing widely diverging practices between states. One wonders whether a relaxation of the standards regarding non-discrimination on grounds of gender in one area could lead to a relaxation in other areas as well.

(ECtHR Grand Chamber, 1 July 2014), the Court found no violation of the ECHR in this law, largely due to what the Court termed 'respect for the minimum set of values of an open democratic society', specifically the minimum requirements for 'living together'. By 'raising a veil concealing the face' an individual could violate the 'right of others to live in a space of socialisation which made living together easier'.

43 Mark Bell, *Anti-Discrimination Law and the European Union* (Oxford University Press 2002), 120.

44 For an overview of the German developments see Ute Sachsofsky, 'Religion and Equality in Germany: The Headscarf Debate from a Constitutional Perspective', in Dagmar Schiek and Victoria Chege, eds, *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (Routledge/Cavendish 2009), 353–370. In early 2015 the German Federal Constitutional Court issued a 'new teacher headscarf case' in which it held that a general prohibition against teachers wearing headscarves in public schools is unconstitutional under Article 4 (1) and (2) of the German Basic Law. 'The Court emphasized the "margin of appreciation" the [ECtHR] has awarded the national states in this area. Nonetheless, a fascinating open question now is this: How will Headscarf II interact with recent decisions of the ECtHR?' Claudia Haupt, 'The "New" German Teacher Headscarf Decision', *The International Journal of Constitutional Law Blog*, 17 March 2015, http://www.iconnectblog.com/2015/03/the-new-german-teacher-headscarf-decision (accessed 12 October 2015).

Only time will tell how the ECJ will deal with this situation. Will it impose a uniform standard on all member states in such controversial cases or leave them wide discretion? On the one hand the directives would seem to call for the former. Although member states may choose the means to implement the non-discrimination standards laid down in the equality directives, they are required to achieve an equal outcome that guarantees the same level of protection against discrimination on grounds of religion, sex and race. Yet, it is hard to conceive of a substantively uniform level of protection that would be politically acceptable in all EU countries. Approaches in the UK and France, to name but two, are worlds apart. In this context a 'light touch' approach focusing only on broad principle may be inevitable; although this would strip the anti-discrimination directive of much of its meaning.

Some Concluding Observations

To date, the ECtHR has concentrated largely on religious liberty and far less on anti-discrimination norms as such. Where a breach of a substantive right is established the ECtHR rarely proceeds to an examination of the alternative plea that there has been a violation of Article 14 and, in consequence, the jurisprudence addressing the stand-alone anti-discrimination provision of the ECHR is not well developed. Conversely, the ECJ, in addition to enforcing the EU Charter, is responsible for securing compliance with EU Equality Directives in fact-specific decisions where anti-discrimination will be to the fore. The real question for the future is whether the ECJ in Luxembourg will be robust in its interpretation of the Directives, and their enforcement throughout EU member states, or whether it will allow some degree of 'moral subsidiarity' to gain currency and become the unpredictable equivalent of the 'margin of appreciation' as invoked in Strasbourg.