

**Freedom of Religion in the European Court of Human Rights: Reconciling Ideas of
'Diversity' with the Court's Conception of 'Religion'**

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Dear Editor,

Europe has had a long standing and difficult relationship with religion for many centuries, many times being the source of conflict and war, and 'has witnessed one after another fierce religious struggle.'¹ And although there are no longer the kind of 'violent conflicts that once had their origins in religious enmity'² which took place in the sixteenth and seventeenth centuries, contemporary Europe's relationship remains complicated, albeit taking on a different hue and colour. The questions raised, being fuelled by the ongoing debate over religion's place in European integration, cultural and religious diversity, and what it 'means' to be European,³ are often left to the European Court of Human Rights to answer.⁴

With the context of all the religious (and otherwise) wars that have shaped Europe and the European 'project' in to what it is today, it would be incomplete to simply say that 'religion' has played an integral part in this formation of modern Europe, without pointing out *which* religion, in specific. 'Europe is suffused with Christianity, or at least memories of its past influence'⁵ and this 'Christian heritage is essential to the civilizational identity of Europe'⁶, therefore to vaguely credit all 'religion' for the cultural, political, and legal imprint that Christianity has left on Europe would be an intellectual disservice because the 'history of Europe and Christianity are inextricably entwined'⁷- no one aspect of either can be explained

¹ Mark Weston Janis, 'The Shadow of Westphalia: Majoritarian Religions and Strasbourg Law' (2015) 4 Oxford Journal of Law and Religion 75; Peter Cumper & Tom Lewis, 'Introduction: Freedom of Religion and Belief-The Contemporary Context' in Cumper & Lewis (eds), *Religion, Rights and Secular Society: European Perspectives* (Edward Elgar Publishing 2012).

² Cumper and Lewis (n 1).

³ *ibid*; Leustean and Madely state that 'a number of the most controversial issues associated with the ongoing project of European integration have indeed involved deep disagreement about the role of religion in politics and public life.', see Lucian Leustean & John Madely, 'Religion, Politics and Law in the European Union: An Introduction' (2009) 37(1) *Religion, State and Society* 3.

⁴ Peter Danchin, 'Islam in the Secular Nomos of the European Court of Human Rights' (2011) 32 *Michigan Journal of International Law* 663, 744.

⁵ Andrew Higgins, 'A More Secular Europe, Divided by the Cross' *The New York Times* (Bratislava, 17 June 2013).

⁶ (n 4) 689.

⁷ Camil Ungureanu, 'Europe and Religion: An Ambivalent Nexus' in Lorenzo Zucca & Camil Ungureanu (eds), *Law, State and Religion in the New Europe: Debates and Dilemmas* (Cambridge University Press 2012).

without an explanation of the other as well. But on a continent as religiously diverse as Europe, that claims to be committed to the idea of religious and cultural equality,⁸ having a historical hegemony of one predominant religion which informs much of its present understandings of law, culture, and society, is bound to create some tension- is equality truly possible when our conception of equality is heavily influenced by a particular theological and philosophical strain of knowledge?

With Europe having played a pivotal role in our (admittedly, entirely colonised) conceptualisation of modernity and its inextricable facets in the form of democracy, the nation-state, human rights, and civilisation,⁹ an examination of the right as it exists in Europe today is critical for our understanding of what the right to freedom of religion is presently. Indeed, it becomes a necessary tool to predict where this right will go from here as well. This becomes even more important when we realise that the forum which has generated the most substantive jurisprudence on religion and its adherents' place in society (ie the European Court of Human Rights) is also one of the more heavily criticised ones.¹⁰

This should lead us to the inevitable question then as to how this tension between Europe's Judeo-Christian past and its current diversity can be resolved, in the context of one of the aspirations of modern and liberal Europe- to not discriminate when it comes to religion.

It has been argued also that the ratification of the European Convention of Human Rights¹¹, of which Article 9 protects freedom of thought, conscience, and religion, was a 'notable but incomplete step towards resolution'¹² of this tension. With this context, I then suggest that resolution of this tension can only come about if the European Court of Human Rights adopts a more critical approach to the concept of 'religion' as found in Article 9 of the ECHR because the Court's conception of 'religion' in legal terms is limited to the idea of 'belief',¹³ which very specifically privileges liberal Protestant Christianity over other overtly

⁸ Lourdes Peroni, 'On Religious and Cultural Equality in European Human Rights Convention Law' (2014) 32 *Netherlands Quarterly of Human Rights* 231.

⁹ A philosophical discussion of the meaning of these terms is beyond the scope of this letter. However, it must be pointed out that this statement is based on certain inherently problematic assumptions that conflate 'democracy, the nation-state, human rights, and civilisation' as being intrinsically 'European' or 'Western'.

¹⁰ According to Fokas, '[o]ver the past 20 years the European Court of Human Rights has evolved into a conspicuous, often contentious, force in the multilevel battles over the place of religion in the European public sphere.', see Effie Fokas, 'Directions in Religious Pluralism in Europe: Mobilizations in the Shadow of European Court of Human Rights Religious Freedom Jurisprudence' (2015) 4 *Oxford Journal of Law and Religion* 54.

¹¹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

¹² Aaron Petty, 'Religion, Conscience, and Belief in the European Court of Human Rights' (2016) 48 *George Washington International Law Review* 807.

¹³ *ibid.*

communitarian religions which visibly and obviously ‘manifest’ themselves, eg, Islam and Sikhism, (and even to some extent Catholicism and Orthodox Christianity). Therefore, there is always going to be an inherent bias in favour of (liberal Protestant) Christianity in how the Court understands what religion is and what its ‘manifestation’ means to different adherents.

It has been suggested that any examination of religion within the law should not be to discover ‘how the term religion *is* used, whether in the world at large or in the legal community, but to know how the term religion *should* be used, in the interpretation, the application, and the justification of a fundamental freedom.’¹⁴ However, I must disagree with this idea as without examining how the term religion itself *is* used, it is impossible to suggest how it *should* be used. And whilst it is important to acknowledge and appreciate that at no point does the Court explicitly favour a liberal Protestant version of Christianity (as to do so would completely negate the purpose of the ECHR¹⁵ and Article 14¹⁶ within it) it is worth noting that the way the Court interprets Article 9 and tries to reconcile it with the simultaneous and diametrically opposing claims of states and their religiously diverse citizens, betrays that it is informed by a Judeo-Christian understanding of religion, thereby essentially furthering the tension between what the liberal human-rights objective of protection of freedom of religion is and the conceptual and practical implementation (or lack thereof) of it.

Is mise le meas,

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¹⁴ Timothy Macklem, ‘Reason and Religion’ in Peter Oliver et al (eds), *Faith in Law: Essays in Legal Theory* (Hart Publishing 2000).

¹⁵ As stated in the preamble, ‘... [c]onsidering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms;

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend....’

¹⁶ ECHR, art 14.