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The Recognition of Religion within the Constitutional and Political Order of the European Union

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Abstract

This article analyses the recourse to religion as a source of law in the legal and political order of the European Union. It demonstrates that the legitimacy of religious input into law is recognised institutionally, symbolically and substantively. However, religious influence within the Union's public order must accommodate cultural and humanist influences that can serve to limit attempts to reflect religious teaching in law and which are particularly restrictive of the influence of "outsider" faiths whose demands cannot be routed through culture and those faiths with extensive political ambitions. Thus, the Union's approach is characterised by a complex and shifting balance between religious, cultural and humanist influences which is struck in a pluralist context that attempts to reconcile the differing balances between such influences in individual Member States with the need to maintain the open and sufficiently religiously neutral common European ethical framework necessary for the functioning of the Union as a polity.

Keywords: Religion, Secularism, Constitutional Law, European Union,
Fundamental Rights

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The Recognition of Religion within the Constitutional and Political Order of the European Union

1. Introduction

This article examines the use of religion as a basis of law within the constitutional order of the EU. Religion plays this role by virtue of its recognition as part of the Union's ethical inheritance, as a phenomenon which has a particular contribution to make to lawmaking and as part of a wider public morality which the Union and its Member States are entitled to legislate and to uphold. However, although religion is recognised as part of the Union's constitutional order, this order is characterised by a balance between religious, humanist and cultural elements all of which can both reinforce or restrict each other's influence. The Union has attached significant importance both to this notion of balance of conflicting influences and to that of respect for the ethical "inheritance" of Europe. This approach has permitted those religions with significant cultural roots in Europe and which are capable of reconciling themselves to humanist influences, to exercise greater influence over EU law than those faiths which lack such characteristics.

Religion's role as a basis of law in the EU legal order operates at three levels. The first section of the article analyses how the notion of an ethical inheritance characterised by a balance between religious, cultural and humanist influences has been recognised as a source of the Union's constitutional values. The next section examines how religious institutions have been recognised as playing a particularly important and privileged role in the lawmaking process. However, it also shows how this role has conformed to the notions of balance and inheritance by showing how the recognition of religions as part of Civil Society has been linked to their role

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at national level and has required them to relativise, and therefore partly secularise, their perspectives.

Finally, the article addresses the role played by religion in the substantive law of the Union. It demonstrates how religious perspectives have been recognised as a valid basis for EU legislation and for derogation by Member States from EU law duties on the basis of its status as part of a broader public morality which Member States and the Union may use to promote particular communal norms and visions of the nature of a community. Under the EU's legal order this public morality is pluralist and accommodates religion's role in national cultural identities in that it encompasses divergent Member State moralities as well as a common European element. The common European element both restricts and reflects the pluralism of EU public morality in that in addition to facilitating Member State moral decisions, it requires that such decisions respect certain values such as pluralism, the rule of law and the fundamental rights commitments of the Union. These fundamental rights principles provide a broad ethical framework which is marked by Europe's ethical inheritance and accommodates only those moral goals that are compatible with the notion of balance between religion and humanism and with certain common European cultural norms which have emerged from the balance between Christian and humanist influences which has characterised European history. Perspectives which are contrary to these norms are not recognised as valid elements of EU public morality. Thus, EU law protects, through its promotion of a particular public morality, the broad outlines of the settlement between religious and secular influences in Europe and the "way of life" it represents. Therefore, although the Union has adhered to strict formal neutrality in religious matters, faiths which lack cultural roots in Europe or which are incapable of reconciling themselves to the limitations on religious influence inherent in the notion of balance between religion and humanism will have a more limited influence over EU law and are implicitly characterised as contrary to the public morality of the Union.

2. Religion as a Source of the Union's Constitutional Values

European identity has been notably marked by both Christianity and humanism and there is no consensus in relation to the relationship between religion and the state at Member State level.¹ Indeed, as Roy has stated, secularism and Christianity each provide a competing pole around which European identity can be defined.² The tensions in this dual approach to religion and European identity became a major feature of the negotiations relating to the drafting of the Constitutional Treaty in 2003 and focused on the issue of whether the preamble to the Treaty would contain a specific reference to either God or Christianity as a source of the Union's constitutional values. The Catholic Church was particularly vocal on this issue. Pope John Paul II repeatedly called for the inclusion of "*a reference to the religious and in particular the Christian heritage of Europe.*"³ These requests were forcefully pursued by COMECE,⁴ the organisation representing the Catholic Bishops to the European Union. The Bishops argued that the Union's values and its Charter of Fundamental Rights in particular were:

"inspired by the Judaeo-Christian image of mankind"

and that:

"in order therefore to facilitate citizens' identification with the values of the European Union, and to acknowledge that public power is not absolute, the COMECE secretariat recommends that a future Constitutional Treaty of the European Union should recognise the openness and ultimate otherness associated with the name of God. An

¹ See J. Le Goff *The Birth of Europe* (Malden MA and Oxford UK, Blackwell 2005) 22 and J.T.S. Madeley, "European Liberal Democracy and the Principle of State Religious Neutrality" in J.T.S. Madeley and Z. Enyedi (eds.), *Church and State in Contemporary Europe: The Chimera of Neutrality* (London, Frank Cass Publishing, 2003).

² O. Roy *Secularism Confronts Islam* (translated by George Holoch) (New York, Columbia University Press, 2007).

³ Paragraph 114, "Post-Synodal Apostolic Exhortation *Ecclesia in Europa* of His Holiness Pope John Paul II to the Bishops, Men and Women in the Consecrated Life and All the Lay Faithful on Jesus Christ Alive in His Church the Source of Hope for Europe", 28 June 2003 quoted in *The Treaty Establishing a Constitution for Europe: Elements for an Evaluation*, COMECE, 11 March 2005, http://www.comece.org/upload/pdf/pub_const_treaty_050311_EN.pdf (last visited 2 March 2008).

⁴ COMECE stands for 'Commission des Episcopats de la Communauté Européenne'.

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inclusive reference to the transcendent provides a guarantee for the freedom of the human person.”⁵

The making of such a reference was actively opposed by secularist groups and states such as France with its strong separation of church and state.⁶ The initial draft proposed by the Constitutional Convention President Valéry Giscard-d’Estaing suggested the following formulation:

“Conscious that Europe is a continent that has brought forth civilisation; that its inhabitants, arriving in successive waves since the first ages of mankind, have gradually developed the values underlying humanism: equality of persons, freedom, respect for reason,

Drawing inspiration from the cultural, religious and humanist inheritance of Europe, which, nourished first by the civilisations of Greece and Rome, characterised by spiritual impulse always present in its heritage and later by the philosophical currents of the Enlightenment,”⁷

This reference to a “*spiritual impulse*” and the failure to refer explicitly to religion in general or to Christianity in particular was heavily criticised by religious groups and significant sections of the Convention which was tasked with drawing up the Treaty. The Catholic Church and several Member States argued that it was historically inaccurate to refer to the Enlightenment but not Christianity as a source of European values while a slew of amendments referring to either the Christian or Judaeo-Christian roots of such values were put down by Convention members.⁸ The representative of the Polish Government to the Convention argued that “*Religions and Christianity among them have been part and parcel of our continent’s history*”⁹ while a Hungarian representative argued that “*We Europeans know it very well that the Judeo-*

⁵ *The Future of Europe, Political Commitment, Values and Religion: Contribution of the COMECE Secretariat to the Debate on the Future of the European Union in the European Convention*, COMECE, Brussels, 21 May 2002.

⁶ See “God Missing from EU Constitution” BBC News, 6 February 2003, <http://news.bbc.co.uk/2/hi/europe/2734345.stm> (last visited 2 April 2008).

⁷ Draft Treaty Establishing a Constitution for Europe, OJ C 169, 18.7.2003, p. 1-150.

⁸ See for example Suggestion for amendment of title by Mr Brok on behalf of the EPP Convention Group co signed by Antonio Tajani, member, and Mr Martikonis, member, available at: http://european-convention.eu.int/Docs/Treaty/pdf/1000/1000_Pre%20Brok%20EN.pdf (accessed 2 April 2008). Other similar amendments are available at: <http://european-convention.eu.int/amendments.asp?content=1000&lang=EN> (last visited 2 April 2008).

⁹ See “Personal Remarks by Professor Danuta Hubner, Representative of the Government of Poland to the European Convention Plenary Session, 27-28 February 2003” available at: <http://european-convention.eu.int/docs/speeches/7171.pdf> (last visited 5 April 2008).

Christian culture is at the very foundation of our idea of a common Europe".¹⁰ On the other hand those whose views fell on the opposite side of Roy's dual characterisation of the role of religion in European identity argued as Socialist MEP Josep Borrell argued that:

"a lot of our values have been forged against the Church or the churches. If we are to celebrate historical heritages we should remember the whole story: with its religious wars, the massacres of the Crusades; the nights of Saint Bartholomew and the Inquisition's autos-da-fe; Galileo and the forced evangelisations; the pogroms and the turning of a blind eye to fascism.[...] when it comes to democracy, human rights and equality, God is a recent convert."¹¹

The final version of the Constitutional Treaty agreed by the Member States, amended the relevant section of the Preamble so that it read as follows:

"Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law."¹²

This formula was retained in the Lisbon Treaty¹³ and, irrespective of whether it is ultimately ratified, represents that consensus view of the Member States in relation to the role of religion in the Union's constitutional order. The Preamble characterises the constitutional values of the Union as deriving from a balance of religious, humanist and cultural influences. These three influences both reinforce, and are inconsistent with, each other. For instance, humanist influences can compliment religious influences due to the strong humanist tradition within Christianity which has also been reflected in European culture. On the other hand, the secularist elements of the humanist tradition, with its emphasis on human self-government, can also be restrictive of the influence which religious organisations, including Christian ones, may seek to assert over law and politics.

¹⁰ See "Speech Delivered by Jozsef Szajer, Hungary, at the European Convention, 27 February 2007, available at: <http://european-convention.eu.int/docs/speeches/9468.pdf> (last visited 5 April 2008).

¹¹ See "Contribution submitted by Mr Joseph Borrell Fontelles, member of the Convention: "Let's Leave God Out of This" Brussels, 22 January 2003, CONV 501/03 available at: <http://register.consilium.europa.eu/pdf/en/03/cv00/cv00501en03.pdf> (last visited 5 April 2008).

¹² Council of the European Union, Brussels, Consolidated versions of the Treaty on European Union and the Treaty on the functioning of the European Union, 15 April 2008, 6655/08.

¹³ *Ibid.* Preamble.

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This approach involves, in contrast to strictly secular public orders, the recognition of a religious element to the Union's constitutional values and public morality. On the other hand, the reference to religion is balanced by references to cultural and humanist influences, the latter of which have, as Taylor has argued,¹⁴ functioned so as to reduce the influence of religion over public life in Europe. Furthermore, these religious and humanist influences are recognised in their instrumental capacity as contributors to the emergence of values such as respect for individual rights, democracy, equality etc. Thus, the balance struck by the Union in this area grants humanist ideas significant influence by defining the various influences on the Union's public morality as valuable by virtue of their contribution to certain forms of human government. In contrast to religiously based constitutions such as the Irish Constitution which defines its ultimate notion of the good in explicitly religious terms,¹⁵ the Preamble to the Lisbon Treaty portrays democracy and respect for individual rights as the ultimate good to which Europe's cultural, religious and humanist influences have contributed. Thus, the role accorded to Europe's religious inheritance is substantially counterbalanced by ideas which owe much to humanist notions of human self-government.

As the text of the Preamble makes clear, this balance between religious and humanist influences is also influenced by cultural factors. The predominant contemporary view of culture is of a broad ethnographic or anthropological state of affairs which represents a broad "way of life" encompassing established patterns in relation to both values and beliefs and matters such as food, clothing or leisure activities.¹⁶ The invocation of cultural influences themselves and the notion of the importance of Europe's "*cultural, religious and humanist inheritance*" (emphasis added) imply that the fundamental constitutional norms of the Union are influenced by and therefore reinforce, a shared European way of life. Such an approach entails greater recognition of those forms of religion which have been historically predominant in

¹⁴ C. Taylor, *A Secular Age*, (Cambridge MA, Harvard University Press, 2007).

¹⁵ See Bunreacht na h-Éireann, Preamble.

¹⁶ See F. Inglis, *Culture* (Cambridge UK and Malden MA, USA Polity Press, 2004), 28-29 also C. Barker, "Culture" in *The SAGE Dictionary of Cultural Studies*, (London, Thousand Oaks, New Delhi Sage 2004) 45.

Europe, which have left a greater mark on national cultures and which are therefore compatible with established European cultural norms. Indeed, the Union has been at pains to ensure that EU law does not undermine the cultural or institutional role of particular religions at Member State level, including, for instance the arrangement of leisure periods around particular religious patterns or the role of particular religions as sources of national identity.¹⁷ This approach achieved explicit recognition in Article 17(1) which states that:

“The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States”.¹⁸

The importance attached to culture and to the notion of inheritance can therefore be seen as granting certain forms of religion greater influence over the Union’s public morality than others. In particular, as Europe’s “*religious inheritance*” is overwhelmingly Christian, Christianity is likely to exercise a greater influence than other faiths over a public morality which draws on a mixture of Europe’s “*cultural, humanist and religious inheritance*”. This was the view of the Catholic Bishops who regarded the Preamble as “*implicitly referring to the centre of this [religious] tradition, which is Christianity.*”¹⁹ Indeed, the importance of balancing religious influences with those of the humanist tradition and cultural norms can be seen as implicitly categorising forms of religion which are anti-humanist or which contravene other European cultural values as contrary to European public morality.

This balancing of religious, humanist and cultural elements was criticised from both religious and secular perspectives. Although, as noted above, the Catholic Bishops

¹⁷ In relation to institutional issues see Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation Article 2(5) *OJ L 303, 2.12.2000*, in relation to leisure periods see Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, *OJ L299/9 18.11.2003*.

¹⁸ Article 17(1), Consolidated Version of the Treaty on the Functioning of the European Union, *OJ C 115/47* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF>.

¹⁹ The Treaty Establishing a Constitution for Europe: Elements for an Evaluation, COMECE, 11 March 2005, http://www.comece.org/upload/pdf/pub_const_treaty_050311_EN.pdf (last visited 5 May 2008).

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welcomed what they regarded as an implicit reference to Christianity, they nevertheless stated that:

“An explicit mentioning of God or Christianity would have been a strong signal supporting the identity of Europe. It is therefore regrettable that neither the European Convention nor the Intergovernmental Conference agreed to the inclusion of such a reference. As a matter of historical fact, it is Christianity and the Christian message that have built the ‘inheritance of Europe’ from which have developed the universal values of the inviolable and inalienable rights of the human person, democracy, equality and the rule of law.”²⁰

On the other hand, a group of secularist Convention members argued that:

“the wording of the Preamble was already stretching the tolerance of non-Christians to the limit [and that] religion has not always been an unqualified blessing for Europe.”²¹

The balance struck by the Preamble is, indeed, in some ways intellectually unsatisfying in that it is neither clearly secularist nor fully endorses the theory of the religious basis of European public morality. The academic debate has reflected this lack of clarity. On the one hand, some have argued that the Preamble’s failure to grant specific recognition to Christianity as the source of Europe’s common moral and political norms is unduly secularist and misleading. Weigel for instance argues that the Preamble presents a “*false and distorting*” view on the basis that “*Christianity is the story that has arguably had more to do with constituting Europe than anything else.*”²² The Treaty, he suggests, embodies a secular view of Europe which “*cannot identify with precision and accuracy, the sources of Europe’s commitments to human rights, democracy and the rule of law.*”²³ Weigel’s critique draws heavily on Weiler’s *Un’Europa Cristiana*²⁴ which is equally critical. Weiler argues that the failure to mention God or Christianity in the Preamble represented, according to Weiler, an “*EU-enforced laïcité*

²⁰ *Ibid.*

²¹ Convention Meeting of 5-6 June 2003, Reform of Institutions and Revisions of Parts I and IV of the Draft. Comments of members Borrell, Duhamel and Abitol.
<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+PRESS+BI-20030606-1+0+DOC+XML+V0//EN> (last visited 2 April 2008).

²² G. Weigel *The Cube and the Cathedral: Europe, America and Politics without God* (New York, Basic Books, 2005) 70.

²³ *Ibid.* 85.

²⁴ J.H.H. Weiler, *Un’Europa Cristiana: Un saggio esplorativo*, (Milan, BUR Saggi, 2003).

on *European public life*.”²⁵ The approach embodied in the Constitutional and Lisbon Treaties, he suggests, endorses the right to freedom from religion which he sees as partisan and less desirable than freedom of religion.

This approach has rightly been criticised for failing to take account of the full picture of the relationship between Christianity and liberalism which has often been characterised by conflict. As Cvijic and Zucca note, Weiler’s

“claim that the liberal ideal derives directly from Christian philosophy and that it is accordingly illogical that the Preamble of the European Constitution invokes humanist values but refuses to make a direct allusion to Christian values, fails to give due recognition to the full picture of the relationship between humanism and Christianity.”²⁶

Indeed, although Christian thought and Christian humanism in particular, played an influential and perhaps indispensable role in the development of principles such as individual autonomy and equality, such principles have also on occasion come into conflict with Christian teachings and in particular, the desire of many Christian Churches to have religious teachings in areas such as the family and sexuality, reflected in the law of the land. The Catholic Church has, in the past, explicitly rejected notions such as freedom of religion²⁷ and even today has endorsed the use of the criminal law to promote and enforce adherence to biblical standards of sexual behaviour. Although it has come to accept the legitimacy of the secular state and to actively embrace liberal democracy, such acceptance has, as Roy points out,²⁸ on occasion, been prompted by considerations of realpolitik rather than theological reform. Furthermore, Weigel’s complaint that the Preamble does not identify the source of Europe’s commitments to democracy and human rights not only appears to assume a congruent relationship between these principles and Christianity but also fails to take into account that such commitments can arise from multiple sources, or

²⁵ See discussion in A.J. Menendez, “Review of A Christian Europe”, *European Law Review*, 30, No. 1, February 2005, 133.

²⁶ S. Cvijic and L. Zucca, “Does the European Constitution need Christian Values?” *OJLS* Vol. 24, No. 4 (2004), 744.

²⁷ Propositions 15 and 78, *The Syllabus of Errors*, The Holy See, 8 December 1864 (H. Dezingher (ed.) *The Sources of Catholic Dogma*, (B. Herder Book Company 1957). See also the Papal Encyclical *Quanta Curat* 1864 in Carlen (ed.), *The Papal Encyclicals, Vol. I 1740-1878 at 382*.

²⁸ O. Roy *Secularism Confronts Islam* (translated by George Holloch) (New York, Columbia University Press, 2007), 21-22.

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as Dershowitz suggests, from historical experience of injustice and oppression rather than from religious worldviews.²⁹

On the other hand, secularist critiques have failed to note the degree to which religion (and, implicitly Christianity), is in fact recognised as part of European public morality and is accorded special treatment by EU law in other areas.³⁰ Thus, Menendez's defence of the Preamble on the basis that:

“defining constitutional ethics in Christian terms may obstruct the integration of those with other or no religious beliefs who face other barriers to full membership of our society”³¹

fails to give adequate recognition to the fact that by recognising Europe's religious and cultural “*inheritance*” as part of European public morality, the Treaty does in fact, recognise that Christian perspectives partly constitute the Union's constitutional ethics, albeit that such recognition is implicit and balanced by the simultaneous recognition of humanist influences.

The fact that neither those who see European identity as secular nor those who see it as Christian were satisfied by the approach adopted in Lisbon Treaty, underlines the fact that the Union has identified a balance between these two influences rather an outright preference for one or the other as characteristic of its public morality. The Preamble recognises religion and religious values as a part of the mix of influences which constitute the values which underpin the Union's constitutional order. In this way the EU's constitutional values reflect what MacCormick calls “*value pluralism*” under which conflicts between differing rights or approaches are seen as the norm and are resolved through balancing conflicting elements rather than through according priority to one over another in a hierarchical fashion.³² Thus, religion is not entirely excluded from a public role and the Union does not follow a strictly secular

²⁹ A. Dershowitz, *Rights from Wrongs: A Secular Theory of the Origins of Rights* (New York, Basic Books, 2004).

³⁰ n. 17 above.

³¹ See Menendez, above n. 25.

³² J. Bengoetxea, N. MacCormick and L. Moral Soriano, “Integration and Integrity in the Legal Reasoning of the European Court of Justice” in G. de Burca and J.H.H. Weiler (eds.) *The European Court of Justice*, (The Academy of European Law, European University Institute, Oxford, Oxford University Press, 2001), 64-65.

approach under which religious norms and ideas are by definition excluded from influence over public life. However, it is true that the recognition of religion is limited and, at least formally, denomination-neutral. Although the notion of inheritance and the influence of cultural matters do mean that forms of religion which were historically dominant in Europe are likely to exercise greater influence over the EU's public morality, the Union has pointedly refused to associate explicitly itself with a particular religion. Indeed the EU has repeatedly indicated its rhetorical commitment to the equality of religious and other forms of belief or philosophy, for example in relation to the privileges of religious bodies in the Framework Directive³³ or in the Declaration on the Status of Churches³⁴ both of which conferred equal recognition on other forms of belief or philosophy. It is this formal neutrality which religious groups, most notably the Catholic Church, have found objectionable.

Beyond the formal neutrality of its provisions, what is notable about the approach reflected in the Preamble to the Constitutional and Lisbon Treaties is that while religion is recognised and may therefore play some role in the determination of public policy, recognition is also granted to other influences such as humanism which may limit the realisation of the ambitions of religions in the political and legal arenas. Furthermore, both religious and humanist values are seen in the Preamble as instruments leading to the recognition of values such as equality and respect for individual rights which have, as some contributors to the debate surrounding the Preamble pointed out, had complex and sometimes antagonistic relationships to certain forms of religion, including Christianity. Thus while recognition is granted to religion such recognition is counterbalanced by humanist values which emphasise notions of human autonomy and self-government independent of any appeal to the divine.

³³ Article 4(2) of the Directive states: "*churches and other public or private organisations the ethos of which is based on religion or belief*" (Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation Article 2(5) *OJ L 303, 2.12.2000*).

³⁴ *Declaration on the status of churches and non-confessional organisations*, Declaration No.11 to the last act of the Treaty of Amsterdam, Official Journal C 340, 10/11/1997 P. 0133 provides that: "*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*"

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This notion of a public morality characterised by a partly-contested balance between religious, humanist and cultural influences is repeated in other areas of EU law. Religions which lack deep cultural roots in Europe or which are incapable of reconciling themselves to the accommodation of humanist influences, will struggle to achieve influence under such a public morality. Indeed, such religions can even be seen as contrary to the public morality espoused by the Union. Thus, the EU has a preference for those forms of religion which are compatible with the accommodation of the humanist and secular elements of European culture. Such compatibility is not an easy matter for all religions as the accommodation of humanist influences can require significant limitation of the influence of religion over law and political life. Such approaches have been criticised as a violation of the duty of neutrality towards religion. Modood argues that it is *“a contradiction to require both that the state be neutral about religion and that the state should require religions with public ambitions to give them up.”*³⁵ However, it is unclear how a polity which is committed to values such as individual autonomy and gender equality could possibly uphold such values while simultaneously refusing to limit the realisation of the desires of forms of religion which, for instance, desire to mould law and policy in line with patriarchal religious teachings in relation to sexuality and gender. Certain limitations on the political and legal ambitions of religion are an indispensable element of liberal democracy. The fact that they impinge to a greater degree on forms of religion which reject aspects of key liberal values does not mean that such limitations violate the religious neutrality of the polity in question. It is true that, had the EU chosen merely to affirm its commitment to democracy and individual rights and had remained silent on the sources of its commitments to such principles, the issue of religious neutrality need not have arisen. However, by choosing to open up the contentious issue of the source of its ethical commitments and recognising an instrumental role for religion in the determination of their content, the Union does implicitly associate itself with certain religious traditions.

³⁵ T. Modood, 'Anti-Essentialism, Multiculturalism and the 'Recognition' of Religious Groups' *Journal of Political Philosophy*, 6, (1998), 378 at 393.

This approach underlines that importance attached to the notion of balance between religious and humanist influences within the public morality of the Union. Preserving such balance means that approaches which involve a negation of any of the elements will be contrary to the Union's notions of public morality. This principle, which will be discussed in more detail below, can cut both ways. Just as an attempt to introduce Sharia as the basis of a legal system has been identified as unacceptable on grounds of its failure to respect the autonomy of the public sphere and individual autonomy in the private sphere,³⁶ approaches which are particularly restrictive of religion and which would involve significant restrictions of religious liberty such as restrictions on religious clothing in the workplace, may also be problematic in the light of the Union's commitments to religious freedom.³⁷

3. Recognition of the Role of Religion in Lawmaking

Religious influence over EU law is not restricted to acting a source of constitutional values. Religious perspectives have also been recognised as having a special and privileged role to play in lawmaking. This section analyses the approach adopted by the Union in this field and suggests that, in common with the role of religion in the constitutional values of the Union outlined above, the role granted to religious bodies in lawmaking is characterised by a balance between religious, humanist and cultural influences. It begins with an analysis of the informal links between religious bodies and EU institutions before considering the status granted to such bodies by the Treaty. It notes how religious perspectives have been recognised as a necessary and uniquely important element of lawmaking but concludes by showing how, on the other hand, the Union's recognition of the religious contribution to lawmaking in the context of Civil Society has the effect of relativising and, thereby partly secularising, religious perspectives.

³⁶ R. McCrea 'Limitations on Religion in a Liberal Democratic Polity: Christianity and Islam and the Partial Secularity of the European Union' *Yearbook of European Law*, 2008, 195.

³⁷ See for example Directive 2000/78 which requires that reasonable adjustments be made in order to facilitate religious employees in the workplace. See also section 5.2 below.

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Recognition that churches and religious organisations are, by virtue of their religious nature and perspective, valid contributors to policy formation and law-making implies, at least in theory, that religious perspectives may form part of law and public policy. This is an approach which deviates from secular notions of the state. For instance, theorists such as Rawls and Habermas have argued that the justification of law or policy on religious grounds is inconsistent with a liberal constitutional order. Rawls suggests that

“the self-understanding of the constitutional state has developed within the framework of a contractualist tradition that relies on ‘natural’ reason, in other words solely public arguments to which supposedly all persons have equal access. The assumption of a common human reason forms the basis of justification for a secular state that no longer depends on religious legitimation.”³⁸

Similarly, Habermas advocates that state officials (including politicians) must “*justify their political statements independently of their religious convictions or world views*”³⁹ and that

“Majority rule turns into oppression if the majority deploys religious arguments in the process of political opinion and will formation and refuses to offer those publicly accessible justifications which the losing minority be it secular or of a different faith, is able to follow.”⁴⁰

However, in line with its rejection of purely secular notions of Europe’s constitutional ethics, the EU does recognise the validity, importance and particular nature of the contribution of religious bodies to lawmaking and would therefore seem, at least in theory, to accept the notion that the law may, at least in part, be based on religious arguments. Religious bodies have had informal links to European Institutions for many years.⁴¹ The Catholic Church (COMECE), the Protestant Churches (KEK-CEC) and Jewish, Muslim, Orthodox and Humanist groups all have full time representation in Brussels.⁴² These informal links to European institutions

³⁸ J. Habermas, “Religion in the Public Sphere” *European Journal of Philosophy*, 14:1 1-25 (2006), 4 referring to J. Rawls, *Political Liberalism*, New York, Columbia University Press, 1993.

³⁹ *Ibid.* 9.

⁴⁰ *Ibid.* 12.

⁴¹ See T. Jansen, “Europe and Religions: the Dialogue between the European Commission and Churches or Religious Communities”, *Social Compass* 47(1), 2000, 103-112.

⁴² M. Rynkowski “Remarks on Art. I-52 of the Constitutional Treaty: new Aspects of the European Ecclesiastical Law? *German Law Journal* Vol. 6 No. 11, 1 November 2005.

were largely developed at the behest of religious groups themselves,⁴³ however, the European Commission in particular has come to see such links as potential contributors to the attainment of its broader political goals. Links between religious bodies and the Union were placed on a more formal basis in 1992 when Commission President Jacques Delors established a programme called “*A Soul for Europe*” whose aim was described by the Commission as “*giving a spiritual and ethical dimension to the European Union*”.⁴⁴ The facilitation of religious contributions to policy making was not merely a result of a desire to accommodate religious perspectives within EU law and policy but was also seen as an opportunity to use religious organisations to develop the European Civil Society which was regarded as necessary to sustain European integration. Commission President Delors made this point explicitly in an address to the “*Soul for Europe*” initiative in which he stated that:

“We won't succeed with Europe solely on the basis of legal expertise or economic know-how. [...] If in the next ten years we have not managed to give a soul to Europe, to give it spirituality and meaning, the game will be up”⁴⁵

thus explicitly linking the participation of religious bodies in European public life and the accommodation of religious perspectives in the EU's activities, to the sustainability of the Union as a political project. Subsequently, the Bureau of European Policy Advisors (BEPA),⁴⁶ which reported to the Commission President, became responsible for what was described at “*Dialogue with Religions, Churches, Humanisms*.”⁴⁷ This process of dialogue consisted mainly of a series of seminars and discussion groups on the role of religious bodies in the Union.⁴⁸ The fact the EU

⁴³ n.41 above.

⁴⁴ See European Commission, Archives of GOPA, Dialogue with Religions, Churches and Humanisms –Issues: A Soul for Europe. http://www.ec.europa.eu/dgs/policy_advisers/archives/activities/dialogue_religions_humanisms/index_en.htm (last visited 6 May 2008).

⁴⁵ Quoted in H. Alfeyev ‘Christian Witness to Uniting Europe: A View from a Representative of the Russian Orthodox Church’ *The Ecumenical Review*, January 2003. See also European Commission, Archives of GOPA, Dialogue with Religions, Churches and Humanisms –Issues: A Soul for Europe. http://www.ec.europa.eu/dgs/policy_advisers/archives/activities/dialogue_religions_humanisms/index_en.htm (last visited 7 May 2008).

⁴⁶ This organisation was previously known as the Forward Studies Unit and the Group of Policy Advisors.

⁴⁷ Rynkowski, n. 42 above.

⁴⁸ See Bureau of European Policy Advisors, http://ec.europa.eu/dgs/policy_advisers/index_en.htm (last visited 18 May 2008).

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institutions reached out to religious bodies in this way underlines the degree to which the Union has recognised religious bodies as playing a particularly important role in policy making. The contributions of other elements of Civil Society have not been sought out or recognised in this way.

The specific recognition of “*churches*” in the context of this “*Dialogue with Religions, Churches, Humanisms*” also provides some indication of the influence of cultural and historical factors. Although the term has been applied to certain newer religious movements such as Scientology, churches are a Christian concept which is generally still taken to refer to the organisational structure or branches of the Christian religion. Christian religious structures also fall within the term “*religions*” so the singling out of churches can be seen as indicative of the prominent role European institutions expected the religious institutions of traditionally dominant Christian churches to play in this dialogue. Indeed, the importance of cultural matters in the Union’s approach to religion and in particular its desire to respect the public role of traditionally dominant Christian denominations at Member State level is seen elsewhere in EU law. The 1998 *Declaration on the Status of Churches*⁴⁹ appended to the Amsterdam Treaty also signified a formalisation of the Union’s relationship to religious bodies in that it stated that the Union “*respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States*” thus recognising the status of such bodies at national level in a formal way. Indeed, this deference towards the cultural role of religion in Member States has also been reflected in the Union’s substantive legislation, most notably in relation to employment law and religiously managed healthcare and educational institutions.⁵⁰

The Commission White Paper on Governance of 2001 also indicated the openness of the Union to the recognition of the role of religious perspectives in policy making by recognising the “*particular contribution*” of “*churches and religious communities*” to policy making.⁵¹ Thus, not only did the Commission recognise religious bodies as

⁴⁹ n.34 above.

⁵⁰ n. 17 above.

⁵¹ European Governance: A White Paper COM (2001) 428 final, Brussels 25.7.2001.

particularly important elements of Civil Society, it also recognised the particular nature of their contribution. Such recognition indicates a view that religious bodies have particular qualifications or that they bring perspectives to lawmaking which other institutions are not capable of providing to the same degree. The combination of the recognition of both the importance and the particular nature of religious contributions by the Commission underlines the notion of religious bodies as particularly important and privileged players in the articulation of Europe's public morality by Civil Society. Thus, the Union appears to recognise to some degree the historic role of churches and religions as moral guardians with a special authority on moral matters. Of course, morality is not the sole preserve of religious bodies, however the Union's explicit references to churches along with its identification of the "*particular contribution*" of religious bodies in this regard would appear to defer to the historic role played in Western societies by religions in relation to notions of morality.⁵²

This identification of religious perspectives as necessary and particularly important elements of lawmaking was reflected in the Constitutional and Lisbon Treaties which explicitly recognised this "*particular contribution*" by according (following a strenuous campaign on the part of the Catholic Church)⁵³ a privileged consultative status to religious groups. While Article 11(2) of the Lisbon Treaty commits the Union to maintaining an "*an open, transparent and regular dialogue with representative associations and Civil Society*"⁵⁴ Article 17 singles out religious bodies and specifically undertakes to maintain a dialogue with them. The Article, which also incorporates the 1998 Declaration on the Status of Churches, reads:

“1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.

2. The Union equally respects the status under national law of philosophical and non-confessional organisations.

⁵² J. Casanova *Public Religions in the Modern World* (University of Chicago Press, Chicago and London, 1994).

⁵³ See "The Future of Europe: Political Commitment, Values and Religion: Contribution of the COMECE Secretariat to the Debate on the Future of the European Union in the European Convention" COMECE, Brussels, 21 May 2002.

⁵⁴ n. 18 above, Article 11(2).

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3. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations."⁵⁵

The granting of this special status was strenuously opposed by secularist organisations which characterised the Article as "*incompatible with secularism*" as challenging "*the principle of separation of church and state*"⁵⁶ and as granting religion "*a privileged status in European public policy making*".⁵⁷ Although the dialogue is open to all religions, the combination in the same Article of the recognition of the national status of churches with the recognition of the special importance of religious contributions to policy making, links the recognition accorded to and role played by, religious bodies at EU level with the national status of such bodies as the identity and contribution of such bodies will be influenced by their role in the lives of particular Member States.

The Union does therefore seem to accord religious perspectives a particular degree of recognition and facilitation in policymaking. Religious bodies are recognised as elements of Civil Society with which the Union will maintain a dialogue. However, such bodies are seen as making a "*specific contribution*" and as representing a particularly important part of Civil Society which is accorded specific and explicit recognition. By recognising the specificity of the contribution of religious bodies to law making, the Union implicitly identifies religious perspectives as a legitimate and necessary element of policy formation. Furthermore, the recognition of the right of religious bodies to be consulted by lawmaking institutions in a separate article from that dedicated to Civil Society in general, characterises this religious contribution to lawmaking as particularly important.

Nevertheless, in line with the Union's approach in other areas, this facilitation of religious influence in lawmaking is balanced by other influences which draw on the humanist and secular influences within European public morality. First, Article 17 itself also recognises the equal status of "*philosophical and non-confessional*

⁵⁵ *Ibid.* Article 17.

⁵⁶ See "Catholics Join European NGOs in Coalition in Appeal to Convention Not to Give Religion Unfair Influence in Constitutional Treaty" *U.S. Newswire*, 22 May 2003, <http://www.forf.org/news/2003/cje.html> (last visited 15 March 2008).

⁵⁷ *Ibid.*

organisations". One of the most prominent of these is the International Humanist and Ethical Union which has been part of the dialogue with European institutions and which has a vigorously secular outlook. Furthermore the fact that, even in an article dedicated to the facilitation of religions, the Union felt constrained to provide equal recognition to non-confessional groups, indicates that, although religion is recognised within the legal and political arenas, such perspectives will not necessarily be predominant. Indeed, the importance of religious bodies is seen in line with humanist approaches, as deriving, to a significant degree, from their human dimensions and the attachment of individuals to religious organisations. This approach is echoed in the Commission's documents in relation to the dialogue with "*Religions Churches and Humanisms*" which stresses the status of religious bodies as part of Civil Society and which justifies dialogue with such bodies on the grounds that:

"They are representatives of European citizens. In this respect, Community law protects the churches and religious communities, as they would any other partner in Civil Society".⁵⁸

Thus, while the historical and cultural role of religions in Europe as moral guardians means that the "*specific contribution*" of churches and religious communities is recognised by the Union, and while this contribution is seen as representing a particularly important perspective, the right of such bodies to play a part in the lawmaking process is seen as deriving from their historic role as moral guardians and from their status as representative organisations, rather than from the inherent truth of their message or the importance of ensuring compliance with divine mandates. Indeed it is simply inconceivable that EU legislation would explicitly base itself on revelation or seek to justify itself on the basis of its compatibility with a religious text. EU legislation is not justified in theological terms and one does not, for example find biblical justifications in the preambles of Directives and Regulations which instead rely on what might be termed generally accessible justifications. Even

⁵⁸ See: "Commission Document on Dialogue with Religions, Churches and Humanisms: Introduction to the legal aspects of the relations between the European Union and the communities of faith and conviction." Group of Policy Advisers, available at: http://ec.europa.dgs/policy_advisers/archives/activities/dialogue_religions_humanisms/legal_e.htm (accessed 5 April 2008).

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legislation such as the Preamble to the Framework Directive, a piece of legislation which touches on religious issues to a significant degree, justifies the measures contained therein on the basis of non-religious goals such as their contribution to the *“attainment of a high level of employment and social protection, raising the standard of living and quality of life, economic and social cohesion and solidarity.”*⁵⁹ Indeed, the statements of the Commission, the rulings of the European Court of Human Rights and EU Enlargement policy have all indicated that a failure to maintain limits on religious influence over the political and legal domains is incompatible with membership of the Union.⁶⁰ In fact, the Union’s approach in relation to the role of religion in lawmaking can be seen as reflecting the notion of balance between religious worldviews and humanist perspectives which stress human autonomy and reject use of the idea of law as subordinate to, or merely a means to promote, divine authority on earth.

Furthermore, the Union also balances this religious influence and relativises religious perspectives by providing such recognition in the context of Civil Society. The manner in which the dialogue with religious bodies has operated demonstrates that the Union has refused to associate itself explicitly with particular religious viewpoints and has instead operated a process in which differing religious, and even non-religious, perspectives have been accorded equal recognition. As noted above, Article 17 specifically recognises the equal status of *“philosophical and non-confessional organisations”*, thus recognising the legitimacy of non-religious world views. Not only have avowedly secularist and atheist groups taken part in the dialogue, new religious movements, which have received little protection in other areas of EU law, have also been permitted to participate. Rynkowski notes that members of what he calls *“sects”*: *“are present during meetings, even those concerning combating the illegal activities of sects”*⁶¹ He argues that their presence is *“inappropriate”* and that the Commission *“is a hostage of political correctness”*.⁶² Whatever the merits of these

⁵⁹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303/16 2.12.2000, Paragraph 11.

⁶⁰ n.36 above.

⁶¹ n. 42 above.

⁶² *Ibid.*

arguments (and neither reasons supporting the inappropriateness of their presence nor indeed a method of distinguishing “sects” from bona fide religions, are provided), the denomination-neutral approach adopted by the Commission highlights both the conspicuous reluctance of the Union to grant recognition to, or associate itself officially with, any individual religious denomination and the commitment to balancing religious and humanist perspectives seen in the Union’s public morality.

Thus, the Union does recognise and privilege religious bodies as particularly important articulators of, and contributors to, European public morality and on this basis, acknowledges them as important contributors to law and policy making. However, the fact that such recognition is provided within the context of Civil Society (albeit with privileged status therein), requires that religious bodies exercise the rights attached to such recognition in the context of a process which relativises their claims. Furthermore, by participating in a process in which religious bodies are required to persuade lawmakers and to articulate their religious contribution in a forum which equally recognises different religious, or anti-religious perspectives, religious bodies implicitly accept that legitimacy of secular political institutions along with the reality that the ultimate decision in relation to matters of law lies with such institutions. Indeed, as the justifications provided by Commission President Delors for the original dialogue with religious groups made clear, the Union’s engagement with religious groups has been partly related to efforts to create a European public sphere and to enhance the legitimacy and sustainability of the political institutions of the Union.⁶³ Thus, the Union’s approach to the facilitation of religious contributions to lawmaking can be seen as balancing religious and humanist influences by recognising religion as one influence amongst many in the process of law making. Engagement in such a process requires religious groups to acknowledge the legitimacy of other religious and non-religious worldviews. Such acceptance is not an easy matter for all religions. As Habermas points out:

⁶³ See “The New Crusade; Fighting for God in a Secular Europe, Conservative Christians, the Vatican and Islamic Militants”, *Newsweek*, 1 November 2004.
http://www.religiousconsultation.org/News_Tracker/the_new_crusade_fighting_for_God_in_a_secular_Europe.htm (last visited 18 June 2008).

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“missionary doctrines such as Christianity or Islam are intrinsically intolerant of other beliefs. Love of your neighbour includes active care for his or her salvation. And because, -as Thomas Aquinas, among others, argued -eternal salvation has absolute priority over all goods, care for the salvation of others does not per se exclude the application of force to convert someone to the right faith or to protect them against heresy.”⁶⁴

The recognition of such groups within the context of Civil Society is therefore based on certain prerequisites, thus:

“The liberal state expects that the religious consciousness of the faithful will become modernised by way of cognitive adaptation to the individualistic and egalitarian nature of the laws of the secular community”⁶⁵

Thus recognition of religious communities in this way can be seen as encouraging a process where each religious body “locks the moral and legal principles of secular society onto its own ethos”⁶⁶ and where religious bodies in general “have to make the civic principle of equal inclusion their own.”⁶⁷ As Habermas acknowledges, such a process means “accepting mutually exclusive validity claims”⁶⁸ which requires a neutralisation of the “practical impact of the cognitive dissonance”⁶⁹ this produces.

Indeed, it is notable how recognition of religion in the context of a pluralist Civil Society linked to secular political institutions has pushed religious bodies to phrase their contributions in precisely the kind of generally accessible reasons required by theorists such as Rawls and which appeal to views of “the good life” which are not necessarily religious. For instance COMECE justified its calls for the recognition of the specific contribution of Churches and religious organisations on the basis that churches:

“are committed to serve society -inter alia, in the fields of education, culture, media and social work - and they play an important role in

⁶⁴ J. Habermas “Intolerance and Discrimination” I.CON, Volume 1, Number 1, 2003, pp2-12, 7.

⁶⁵ *Ibid.* 6.

⁶⁶ *Ibid.* 8.

⁶⁷ *Ibid.* 10.

⁶⁸ *Ibid.* 12.

⁶⁹ *Ibid.*

promoting mutual respect, participation, citizenship, dialogue and reconciliation between the peoples of Europe, East and West”⁷⁰

Their campaign in favour of the making of a reference to Christianity in the Preamble was justified on similarly generally accessible grounds, with the Bishops stressing Christianity’s role in developing human rights and democracy and suggesting that such a reference “*would have been a strong signal supporting the identity of Europe*”.⁷¹ Similarly, Pope John II also declared that the Church was committed to “*fully respecting the secular nature of the institutions*”⁷² of the Union thus acknowledging the legitimacy and contribution of secular political institutions.

The Church’s invocation of European identity not only underlines the instrumental polity building aspects of the process, it also demonstrates, along with the reliance on the facilitative role of religion in relation to religiously neutral civic activities and values, how in engaging in the lawmaking process at EU level, religious bodies have internalised what Habermas termed “*civic principles*” and “*the moral and legal principles of secular society.*” Thus, while religion is recognised by the Union, this recognition of religious influence is balanced by the nature of the forum in which such recognition is granted which requires religions to relativise their claims and accept the legitimacy of other worldviews.

The Union’s Treaty commitment to engagement with Civil Society show that it recognises that its law and policy making must be informed by diverse perspectives and views of the good life from across Europe. Thus, Civil Society plays a role in forming a European public morality which informs the Union’s lawmaking. Religion, as noted above, has been recognised by the Union as a particularly important contributor to this public morality. This public morality enables certain religious traditions to exercise greater influence than others. The explicit recognition of the

⁷⁰ *The Future of Europe, Political Commitment, Values and Religion: Contribution of the COMECE Secretariat to the Debate on the Future of the European Union in the European Convention*, COMECE, Brussels, 21 May 2002.

http://www.comece.org/upload/pdf/secsr_conv1_020521_en.pdf (last visited 18 June 2008).

⁷¹ *The Treaty Establishing a Constitution for Europe: Elements for an Evaluation*, COMECE, 11 March 2005, http://www.comece.org/upload/pdf/pub_const_treaty_050311_EN.pdf (last visited 18 June 2008).

⁷² Paragraph 114, Post-Synodal Apostolic Exhortation *Ecclesia In Europa* Of His Holiness Pope John Paul II To The Bishops Men And Women In The Consecrated Life And All The Lay Faithful On Jesus Christ Alive In His Church The Source Of Hope For Europe, 28 June 2003.

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status and role of national churches in Article 17 encourages the according of greater weight to the contributions of religions which are culturally and institutionally entrenched at national level. Furthermore, as was the case in relation to the influence of religion in relation to the constitutional values of the Union set out in the Preamble to the Lisbon Treaty, the recognition of religion's role in lawmaking in the context of Civil Society renders those forms of religion which can reconcile themselves to the notion of balance between humanist and religious influences and to the European cultural norms, more able to exercise influence than religions which lack such characteristics and which are, for instance, anti-humanist in nature or which cannot acknowledge the legitimacy of secular political institutions. Thus, the cultural influence and long (though still contested) tradition of humanism within the historically dominant Christian churches render them more able to exert influence within the structures established by the Union to engage with religious perspectives than outsider religions such as Islam which have had less cultural impact on Europe or which may have more antagonistic attitudes to humanist principles.

4. The Pluralist Public Morality of EU Law

The recognition of religious perspectives within EU law is not restricted to institutional and symbolic roles. In contrast to libertarian views of the relationship between law and morality which stress the idea of morality as a largely private matter and see the promotion of communal moral standards by the law as legitimate only when necessary to prevent harm to others,⁷³ EU law does permit the promotion of certain communal, moral or cultural norms through law, provided that such promotion can be reconciled with the balance between religious, humanist and cultural elements that underpin the Union's public morality and, in particular, its commitments to individual autonomy and equality which are reflected in the Charter of Fundamental Rights. Thus, the right of Member States to promote a

⁷³ E. P. Foley, *Liberty for All: Reclaiming Individual Privacy in a New Era of Public Morality*, (New Haven, CT, Yale University Press, 2006).

particular way of life or view of the good life through law is, within certain boundaries, recognised by EU law. Indeed, as is shown below, the Union has repeatedly and explicitly recognised that notions of “morality”, “ordre public” and “public policy” as valid grounds for legislation.⁷⁴ Given its explicit recognition as part of the Union’s constitutional values in the Lisbon Treaty and in the light of its heavy influence over national cultures and views of morality, religion plays an important part of these notions of public policy and morality. Thus, while the public morality is not explicitly or exclusively religious, as Davies notes, in relation to issues such as sexual morality, bio-ethics, gambling, or alcohol consumption, people’s views:

“do derive directly or indirectly –via modern secular philosophies that have been influenced by religion – from religious values that pervade societies.”⁷⁵

Thus, he argues that morality clauses in trade law both “*have a clear and traditional link with conventional interpretations of major religions*”⁷⁶ and facilitate the recognition of such religious perspectives in trade agreements. The same is true of the morality clauses in EU law which enable Member States, notwithstanding their EU law duties, to promote particular communal cultural or religious norms. For instance, in assessing the compatibility with EU law of Member State restrictions on gambling in the *Schindler* case, the Court of Justice stated that it was “*not possible to disregard the moral, religious or cultural aspects of lotteries, like other types of gambling in Member States*”⁷⁷ which were held to grant the Member State in question a “*degree of latitude*” entitling it to restrict gambling notwithstanding the EU law duty to respect the freedom to provide services.⁷⁸ The Treaty also makes room for Member States to derogate from EU legal duties in order to promote certain communal cultural, religious or moral norms. Articles 30 and 55 recognise “*public morality*”⁷⁹ and “*public*

⁷⁴ See below.

⁷⁵ G. Davies “Morality Clauses and Decision Making in Situations of Scientific Uncertainty: the Case of GMOs”, *World Trade Review* (2007), 6:2, 249-263.

⁷⁶ *Ibid.*

⁷⁷ *Her Majesty’s Customs and Excise v Schindler* Case C-275/92 ECR [1994] I-01039. paragraph 60.

⁷⁸ *Ibid.* para. 61.

⁷⁹ Article 30 provides that: “*The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial*

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*policy*⁸⁰ as legitimate grounds for the derogation from the duty of Member States to permit the free movement of goods and services.

Not only is religion recognised, as a basis for derogation from EU law duties, it is also a valid element of EU legislation itself. Community legislation repeatedly refers to notions of ordre public or morality. In *Netherlands v Council*⁸¹ Advocate General Jacobs cited several examples of the recognition of notions of morality in EU legislation noting that:

“The Community Trade Mark Regulation⁸² and the Trade Marks Directive⁸³ both provide for the refusal of registration or invalidity of a mark which is contrary to public policy or to accepted principles of morality (contraire à l'ordre public ou aux bonnes mœurs).⁸⁴ The Community Plant Variety Rights Regulation⁸⁵ provides that there is an impediment to the designation of a variety denomination where it is liable to give offence in one of the Member States or is contrary to public policy (est susceptible de contrevenir aux bonnes mœurs dans un des États membres ou est contraire à l'ordre public).⁸⁶ Directive 98/71 on the legal protection of designs⁸⁷ provides that a design right shall not subsist in a design which is contrary to public policy or to accepted principles of morality (contraire à l'ordre public ou à la moralité publique).⁸⁸ The amended proposal for a European Parliament and Council Directive approximating the legal arrangements for the protection of inventions by utility model⁸⁹ provides that utility models shall not be granted in respect of inventions the exploitation of which would be contrary to public policy or morality (contraire à l'ordre public ou aux bonnes mœurs).”⁹⁰

property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.”, Consolidated Version of the Treaty Establishing the European Community OJ C321, Article 30.

⁸⁰ Consolidated Version of the Treaty Establishing the European Community OJ C321, Article 55.

⁸¹ *Netherlands v Council* Case C-377/98 [2001] ECR I-7079.

⁸² Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, OJ 1994 L 11, p. 1.

⁸³ First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, OJ 1989 L 40, p. 1.

⁸⁴ Article 7(1)(f) of the Regulation and Article 3(1)(f) of the Directive. It may be noted that in his Opinion delivered on 23 January 2001 in Case C-299/99 *Philips Electronics*, at paragraph 18, Advocate General Ruiz-Jarabo Colomer gave as an example of a trade mark registration of which would be barred because it was contrary to public policy the mark Babykiller for a pharmaceutical abortifacient.

⁸⁵ OJ 1994 L 227, p. 1

⁸⁶ Article 63(3)(e).

⁸⁷ Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998, OJ 1998 L 289, p. 28.

⁸⁸ Article 8.

⁸⁹ OJ 2000 C 248E, p. 56.

⁹⁰ Article 4(a).

Thus, “*public morality*” and therefore religion, is well recognised as a permissible basis for legal and policy choices in Community law and as a permissible basis for Member States to derogate from the EU law duties. Individual autonomy is an important principle in the EU legal order and the Union requires that the accommodation of religious influence over law, and the promotion of communal moral standards which this may involve, not be such as to unduly curtail such autonomy.⁹¹ Nevertheless, as the acceptance of restrictions on gambling in *Schindler* on the basis of its particular “*moral, religious or cultural aspects*” shows, the Court accepts that EU law does, in certain circumstances, permit such moral notions to be invoked to restrict the autonomy of individuals to engage in activities regarded as damaging or sinful for cultural or religious reasons in order to allow Member States to promote their own collective vision of the good life and morality. Thus, although the Union has consistently required that the autonomy of public sphere institutions to legislate for that which contravenes religious morality be respected,⁹² it does permit some restriction of individual autonomy in the private sphere on religious grounds.

EU public morality is also inherently pluralist in that it encompasses both a shared European, and differing national, ethical frameworks. This pluralism is further reflected in the Union’s acceptance that most ethical choices are to be taken at national level and upheld as part of EU law provided they are compatible within the broad parameters of an independent European public morality.⁹³ These aspects of EU public morality were seen in the *Schindler* case where the Court of Justice recognised that particular national religious and cultural notions of morality in relation to gambling were a valid basis for the restriction of the freedom to provide gambling services.⁹⁴ This focus on the recognition within EU law of the individual public moralities of the Member States and the consequent prioritisation of Member State

⁹¹ n.36 above

⁹² *Ibid.*

⁹³ For a discussion of constitutional pluralism and the development of heterarchic rather than hierarchical interaction of legal orders see N. Walker, “The Idea of Constitutional Pluralism” EUI Working Papers, Law 2002/1 <http://cadmus.iue.it/dspace/bitstream/1814/179/1/law02-1.pdf> (last visited 31 July 2008).

⁹⁴ n. 78 above.

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ethical choices is shown even more markedly in cases such as *Grogan*⁹⁵ and *Jany*.⁹⁶ In these cases the Court of Justice was faced with differing Member State regulation of the morally and religiously sensitive issues of abortion and prostitution. In *Grogan* the Court was faced with a situation where the combination of the differing moral judgments of Ireland and other Member States in relation to abortion and the EU law principle of free movement of services, threatened to undermine the ability of the Irish authorities to give effect to that moral judgment in a domestic context. In this case student groups facing prosecution for distributing information in relation to abortion services abroad in violation of the Irish Constitution's protection of the life of the unborn, argued that such restrictions violated the freedom to provide services under EU law. The Court found that the lack of commercial links between the student organisations and the abortion providers in question precluded the invocation of Community law. Nevertheless, its judgment threw significant light on the pluralistic nature of public morality within EU law. The Society for the Protection of Unborn Children ("SPUC") had argued that abortion should not be recognised as a service under EU law on grounds of what they saw as its grossly immoral nature. The Court's decision on this point was as follows:

"Whatever the merits of those arguments on the moral plane, they cannot influence the answer to the national court's first question. It is not for the Court to substitute its assessment for that of the legislature in those Member States where the activities in question are practised legally."⁹⁷

The Court therefore explicitly refused to come to a "one size fits all" conclusion in relation to the morality of abortion in EU law and stated that it would not second guess the decision of the legislatures of Member State which had decided that abortion was legally acceptable. On the other hand, although its decision in relation to the lack of commercial links meant that the Court did not address the issue of the curtailment of the freedom to provide services on the basis of the differing moral choice of the Irish authorities, this issue was dealt with by Advocate General Van Gerven in his opinion. Having concluded that the provision of information in

⁹⁵ Case C-159/90 *SPUC v. Grogan* [1991] ECR I-4685.

⁹⁶ Case C-268/99 *Jany and Others v. Staatssecretaris van Justitie* [2001] ECR I-8615.

⁹⁷ n. 95 above, paragraphs 19 and 20.

relation to abortion services in other Member States was covered by the principle of free movement of services, he held that restriction of such information was permissible on the basis that Ireland's anti-abortion laws represented "*a policy choice of a moral and philosophical nature the assessment of which is a matter for the Member States and in respect of which they are entitled to invoke the ground of public policy.*"⁹⁸ As this moral choice in relation to abortion was, in the view of the Member State, "*a genuinely and sufficiently serious threat public policy affecting one of the fundamental interests of society*"⁹⁹ and in the light of "*the area of discretion within the limits imposed by the Treaty*"¹⁰⁰ which Community law provided the national authorities, Advocate General Van Gerven was prepared to uphold the restriction in question as a proportionate derogation from the free movement of services on grounds of public policy.¹⁰¹

Thus, in deciding what would qualify as a service for the purposes of EU law, the Court indicated that it would respect the moral pluralism of the Union by refusing to second guess the decision of those Member States for whom abortion was acceptable. On the other hand, in relation to the impact the decision of certain Member States to tolerate abortion and its consequent recognition as a service under Community law, could have on the enforcement within Ireland of anti-abortion laws, EU law, according to Advocate General Van Gerven, was equally willing to recognise a public morality derogation by the Irish authorities from freedom of movement of services in order to uphold Ireland's different moral conclusions in relation to this issue.

A similar commitment to the value of pluralism and a consequent desire to enable the notion of public morality within Community law to accommodate differing moral perspectives of Member States, was seen in *Jany* where the Court assessed whether prostitution could be categorised as a service under Community law and again based its affirmative decision on the basis that:

⁹⁸ n. 95 above, Opinion of Advocate General Van Gerven, para. 26.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.* para. 29.

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“So far as concerns [sic] the question of the immorality of that activity, raised by the referring court, it must be borne in mind that, as the Court has already held, it is not for the Court to substitute its own assessment for that of the legislatures of the Member States where an allegedly immoral activity is practised legally”.¹⁰²

The approach of the Court in *Grogan* and *Jany* underlines the importance of pluralism in the public morality of the EU. In both cases the Court stressed that the primary forum within which the ethical choices which influence the content of the public morality recognised and operationalised within EU law, is the individual Member States which are permitted to come to differing moral conclusions in relation to issues and to have these differing conclusions reflected in EU law. The deference to Member State ethical and cultural choices inherent in this endorsement of pluralism was further noted by the French *Conseil constitutionnel* in its 2004 decision in relation to the constitutionality of the Constitutional Treaty where, in discussing the compatibility of the French approach to secularism with EU human rights norms, in it noted the “considerable leeway” granted to Member States “to define the most appropriate measures, taking into account their national traditions”.¹⁰³

However, the commitment to pluralism cuts both ways. Just as EU law is required to respect the principle of pluralism by accommodating divergent Member State moral choices, the moral choices of Member States themselves must respect the moral pluralism inherent in the notion of free movement guaranteed by Community law. Free movement rights enable individuals to place themselves under differing ethical regimes and therefore permit them to carry out activities which may be prohibited for reasons of public morality in their home country. EU law requires that Member State laws which reflect particular moral choices must be compatible with the right of individuals to choose, by means of free movement rights, to be bound by the moral choices of other Member States. Such a right can contribute significantly to individual autonomy by enabling, for example, those who wish to provide or use the services of prostitutes, to do so in another Member State despite the prohibition on doing so in their own country. The right to move across European borders is a

¹⁰² n. 96 above, para. 56.

¹⁰³ Decision n° 2004-505 DC of November 19th 2004, The Treaty establishing a Constitution for Europe <http://www.conseil-constitutionnel.fr/decision/2004/2004505/eng.htm>, paragraph 18.

fundamental right under EU law whose violation is particularly likely to be characterised as disproportionate. The requirement of respect for the moral pluralism engendered by free movement rights can therefore be said to be a feature of the European element of the EU's public morality. Thus, the plural nature of EU public morality which finds its expression in the reflection of Member State moral choices in EU law is itself restricted by the requirement of respect for the moral pluralism inherent in the free movement rights guaranteed by the Union.

This requirement that Member State public morality take account of this right of individuals to access different ethical regimes in other Member States was seen in Advocate General Van Gerven's opinion in *Grogan* where, as noted above, he suggested that, while measures restricting abortion information were acceptable within EU law:

“a ban on pregnant women going abroad or a rule under which they would be subjected to unsolicited examinations upon their return from abroad” (...) would be disproportionate [and] would excessively impede the freedom to provide services.”¹⁰⁴

Similarly, in *R. v Human Fertilisation and Embryology Authority, ex parte Blood*,¹⁰⁵ the UK Court of Appeal found, in a judgment which explicitly referred to the opinion in *Grogan*, that, in principle, EU law gives the right to receive medical treatment in another Member State and that moral choices in national law must take account of this right. In this case, a widow who was prevented from using her husband's sperm for the purposes of artificial insemination due to a requirement in British legislation that he have given his written consent for its use, sought the right to bring the sperm to Belgium which had no such requirement. The Court of Appeal held that the medical treatment in question was insemination with her husband's sperm rather than insemination in general and consequently a refusal to permit the export of his sperm amounted to an interference with her EU law rights.¹⁰⁶ The judgment noted that, as the Court of Justice had held in *Schindler*, Member States had “a sufficient degree of latitude to determine the moral or religious or ethical values which it regards as

¹⁰⁴ n. 98 above, para. 29.

¹⁰⁵ [1997] 2 All ER 687.

¹⁰⁶ *Ibid.* 698-700.

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appropriate in its territory".¹⁰⁷ Thus, provided that the interference in question was proportionate and justified by "some imperative requirement in the public interest" EU law could "not be relied upon as preventing [the British authorities] from imposing any restriction on the export of sperm".¹⁰⁸ However, the UK's Human Fertilisation and Embryology Authority, which had taken the decision to refuse had a degree of discretion under the relevant legislation and, in coming to its decision, it was obliged to "balance Mrs Blood's cross border rights as a Community citizen" against the United Kingdom's ethical decision to "attach great importance to consent, the quality of that consent and the certainty of it".¹⁰⁹ Although the Court of Appeal was clear that it was "not possible to say, even taking into account E.C. law that the authority are bound to come to a decision in Mrs Blood's favour" the failure to take her Community law rights into account and to "provide reasons which meet the standards set by European law"¹¹⁰ led to the quashing of the decision to prevent export.¹¹¹ Accordingly, the Court of Appeal recognised that the right of EU citizens to travel between Member States in order to be bound by the differing ethical choices of another Member State must be taken into account in relation to the implementation of British public morality based policies. The United Kingdom authorities were therefore required to respect the pluralism inherent in the Single Market by countenancing the removal of sperm from the UK in order that it be used according to Belgian norms for purposes which the British authorities had held to be illegal on moral grounds.

This notion of respect for the moral pluralism inherent in the notion of free movement and access for individuals to the differing ethical regimes of the Member States is also seen in cases such as *Jany* where, as noted above, the Court held that as the status of prostitution was legal under Dutch law this prevented the invocation of public morality as a reason to refuse the registration of Polish prostitutes as "self-employed" for the purposes of the Pre-Accession Agreement. Issues of discrimination on grounds of nationality were obviously also an important factor in the decision,

¹⁰⁷ *Ibid.* 700.

¹⁰⁸ *Ibid.* 701.

¹⁰⁹ *Ibid.* 702.

¹¹⁰ *Ibid.* 703.

¹¹¹ *Ibid.*

nevertheless, by ensuring that non-nationals could not be subjected to more rigorous standards than those imposed on nationals, the ruling also underlines the right of individuals under EU law to access, by means of free movement, the opportunity to be bound by the ethical decisions of another Member State.

The judgment in *Blood*, where the issue of moving between ethical frameworks was complicated by the impact on domestic moral choices of the issue of the export of sperm, made it clear that the right to access services in another Member State may not always override the right of individual Member States to enforce collective moral preferences. Nevertheless, Advocate General Van Gerven's statement in *Grogan* that attempts to prevent pregnant women from travelling to other Member States to have abortions would be unacceptable under EU law despite what he recognised as the grave importance of the moral principle which such a ban would be seeking to uphold,¹¹² indicates that the right to move between Member States is taken extremely seriously by EU law and represents a real limitation on the ability of Member States to legislate so as to enforce particular moral, religious or cultural norms. Thus, the reflection by a particular Member State of communal religious norms in its legislation is required by EU law to take account of the overall pluralism inherent in the European project which has opened up ethical horizons beyond the nation state to individual Europeans, thereby limiting the degree to which the such communal moral norms can be imposed on individuals who, in Hirschman's terms¹¹³ have the right of exit in addition to the voice with which domestic democratic structures provide them.

¹¹² n. 98 above.

¹¹³ A.O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States*, (Cambridge, MA: Harvard University Press, 1970).

5. Limitations on Public Morality within EU Law

However, to suggest that this pluralism is such as to exclude any independent moral judgment of Member State public morality derogations at the European level is mistaken. EU public morality is both national *and* European, and the requirements of this independent, European element of EU public morality can be such as to provide limitations on the reflection of Member State moral choices. Becoming and remaining a Member State of the European Union involves moral commitments to certain notions of the good beyond respect for pluralism. These notions have been linked by the Union to respect for fundamental rights and democracy. At least as a matter of politics, this duty applies to Member States even when they act outside of the Union's areas of competence. The 1993 Copenhagen Criteria explicitly established respect for fundamental rights as an explicit criterion for membership of the Union.¹¹⁴ The Nice and Lisbon Treaties also stated that the Member States :

“their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law”¹¹⁵

and laid down respect for such principles as an ongoing duty of membership through Article 7 which envisaged the removal of voting rights from Member States which is in “*serious and persistent breach*” of this obligation.¹¹⁶ Furthermore, the adoption of the Charter of Fundamental Rights has committed both the Union and the Member States to upholding, within the sphere of operation of EU law, a certain view of the good, albeit one which preserves a significant degree of latitude for Member States. This view does, however, encompass certain principles such as privacy and equality which embody notions of the good which would preclude attempts to enshrine in law certain moral or religious notions inconsistent with such principles.

¹¹⁴ European Council in Copenhagen, 21-22 June 1993, Conclusions of the Presidency, SN 180/1/93 REV 1. Available at http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/ec/72921.pdf (last visited 20 June 2008).

¹¹⁵ n.12 above, Preamble to the Consolidated Treaty on European Union. See also the Preamble to the Treaty on the functioning on the European Union. (also n.12 above).

¹¹⁶ Article 7 TEU as amended (see n. 12 above).

These duties have been used as a basis to restrict the ability of Applicant States and Member States to use their legal systems to reflect religious and moral perspectives in a way which is inconsistent with notions of equality and individual autonomy, even in areas which lie outside of the scope of the Treaties. Romania and Turkey were required by the Union not to criminalise homosexuality and adultery respectively as conditions of membership,¹¹⁷ while in 2005 Poland's newly elected conservative government was warned by the Commission that it risked losing voting rights in EU institutions if it failed to respect gay rights.¹¹⁸

These obligations are not merely political and the European element of EU public morality can act as a legal limitation on the accommodation of Member State moral choices in EU law. Contrary to some readings of the judgments in *Grogan* and *Jany*,¹¹⁹ the Court's conclusion that "*arguments on the moral plane cannot influence the answer*" in relation to the status of abortion of prostitution as a service does not mean that EU law is merely a passive reflector of Member State public moralities. In addition to the political and legal commitments to fundamental rights, EU legislation includes numerous morality clauses such as those noted by Advocate General Jacobs above in *Netherlands v Council*. Not all of these clauses deal with the issue of Member State derogations on morality grounds but also refer to the notion of public morality within EU law, independent of the status of such notions at Member State level. Advocate General Ruiz-Jarabo Colomer gave an example of the operation of the notion of morality within Community law in the *Phillips Electronics*¹²⁰ case where he suggested by way of example that the registration of an abortifacient under the trade mark "*Babykiller*" would be barred under Community law on the grounds that to do so would be contrary to public policy.¹²¹

¹¹⁷ n. 36 above.

¹¹⁸ *Ibid.*

¹¹⁹ D.R. Phelan 'The Right to Life of the Unborn v the Promotion of Trade in Services', (1992) 55 MLR 670.

¹²⁰ Case C-299/99 *Koninklijke Philips Electronics NV v Remington Consumer Products Ltd.* ECR [2002] I-05475.

Opinion of Advocate General Ruiz-Jarabo Colomer.

¹²¹ *Ibid.* para. 18

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In relation to derogations from EU law on the basis of Member State moral choices, the Court has repeatedly made it clear that “*concept of public policy cannot be unilaterally decided by each Member State without being subject to control by the institutions of the Community.*”¹²² Thus, rather than demonstrating that EU law merely reflects and does not independently assess the moral nature of such derogations, cases such as *Grogan* merely show that such assessments take very seriously the need to respect the inherent pluralism of the EU’s public morality and also therefore, the autonomy of Member States in moral matters. This reading of *Grogan* is supported by the fact that the jurisprudence of the Court has made it clear that it will assess Member State moral choices for compliance with the Community moral norms which make up a European element of the Union’s public morality and may intervene when such moral choices are divergent to too great a degree from these Community moral norms. This Community morality, as will be shown below, is rather thin but does, in addition to the principle of pluralism discussed above, encompass to the notion of balance between religious, cultural and humanist elements reflected in requirements of respect for the idea of the individual as an autonomous and equal actor and for certain communal European norms, all of which are assessed in relation to the broad notion of the good reflected in the Union’s commitments to fundamental rights.

5.1. Consistency with a Common Ethical Template

The case law of the Court of Justice has also appeared to suggest that Member State derogations from EU norms on grounds of public morality will be accepted only where they in some way echo, or are congruent with, an independent set of EU moral norms. The limitation on Member State moral choices imposed in this regard requires that the moral choice in question fall within the broad definition of the good seen in the fundamental principles of EU law (most notably in relation to fundamental rights).

¹²² See *Bouchereau* [1977] ECR [1999] paragraphs 33 and 34.

In *Omega Spielhallen*¹²³ the Court explicitly looked to find echoes in the Union's legal order for the moral value which the German authorities relied upon in order to prohibit a game which was alleged to contravene public morality. Here, the provider of a game which was alleged to allow players to simulate killing by shooting lasers at one another challenged the action of the German authorities who had prohibited the game on the grounds that it "*was contrary to fundamental values prevailing in public opinion*",¹²⁴ in particular the respect for human dignity required by the German Constitution. The Applicant alleged that the prohibition in question violated the freedom to provide services guaranteed by the EC Treaty. The German authorities argued that their actions were protected by the public policy and public morality exceptions recognised by EU law.

In assessing the German derogation, the Court recognised that Member States had a margin of discretion in relation to the concept of public policy and that the restrictive measures in question did not need "*to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected.*"¹²⁵ Nevertheless, the Court explicitly assessed whether the fundamental value invoked by the Member State was also reflected in the autonomous values of the Community legal order. In paragraphs 34 and 35 it held that:

"the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law. There can therefore be no doubt that the objective of protecting human dignity is compatible with Community law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right.

Since both the Community and its Member-States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law,"¹²⁶

¹²³ Case C-36/02 *Omega* [2004] ECR I-9609.

¹²⁴ *Ibid.* para. 7.

¹²⁵ *Ibid.* para. 37.

¹²⁶ *Ibid.* para. 34 and 35.

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The conclusion that human dignity was a general principle of EU law was based on the analysis of Advocate General Stix-Hackl who noted in her opinion that “*a variety of religious, philosophical and ideological reasoning could be given as the basis of this analysis*”¹²⁷ before noting the recognition of the right in various international Human Rights treaties,¹²⁸ Member State constitutions,¹²⁹ Directives and Regulations¹³⁰ and decisions of the Court of Justice.¹³¹ In other words, the accommodation within EU law of the German public morality exception in respect of the dignity of the human being, was dependent on the recognition of a similar moral value by the Community legal order, which, as the Court noted in paragraph 33 and in cases such as *Hauer*¹³² draws on, but is independent of, the common constitutional traditions of the Member States. This is in line with Advocate General Stix-Hackl’s conclusion that the assessment of Member State derogations on grounds of public morality includes review of “*appropriateness*” in addition to proportionality.¹³³

The notion of assessing the “*appropriateness*” of such derogations would seem to imply that national moral judgments are to be assessed for their compatibility with an independent set of standards within EU law. Indeed in the case of *Netherlands v Council*¹³⁴ which involved a challenge, inter alia, on public morality grounds, to the 1998 Biotechnology Directive, Advocate General Jacobs implied that the scope of common EU morality may evolve and come to cover an increasingly broad range of areas, arguing, in relation to Member State morality derogations in the area of biotechnology that:

“the discretion of a Member State to determine the scope of the concept of public morality in accordance with its own scale of values, so defined by the Court more than 20 years ago, should perhaps now be read with some caution. In this area, as in many others, common standards evolve over the years. It may be that the ethical dimension

¹²⁷ *Ibid.* Opinion of Advocate-General Stix-Hackl, paragraph 78.

¹²⁸ *Ibid.* para. 82.

¹²⁹ *Ibid.* para. 83.

¹³⁰ *Ibid.* para. 87.

¹³¹ *Ibid.* paras. 88, 89 and 90.

¹³² Judgment of 13/12/1979, *Hauer v. Land Rheinland-Pfalz* (Rec.1979,p.3727).

¹³³ n. 127 above, para. 103.

¹³⁴ *Netherlands v Council* Case C-377/98 [2001] ECR I-7079.

of some of the basic issues within the scope of the Directive is now more appropriately regarded as governed by common standards.”¹³⁵

The progressive embrace by the Union of shared fundamental values as an element of its identity and legal order may therefore be increasing the degree to which the that legal order reflects and upholds an independent framework of moral values. This potentially limits the pluralism of the EU’s public morality in that the emergence of common standards, on Advocate General Jacobs’ analysis, results in the restriction of the discretion of Member States to pursue approaches which differ from such standards.

The development of the fundamental rights obligations of the Union have had a notable impact in this regard. In the *ERT*¹³⁶ case it was held that all Member State derogations from EU law duties (therefore including those based on public morality) are subject to compliance with the common commitment of all Members States of the Union to comply with fundamental rights obligations. Furthermore, given their fundamental status in the ethical and legal order of the Union, the fundamental rights recognised by EU law must have a major impact on the content of EU public morality as well as on the limitations imposed on the reflection of the particular public moralities of individual states within the Union’s legal order. This analysis is further underlined by the fact that in *Omega*, the inquiry into the legitimacy of a derogation from the freedom to provide services on the basis of the need to protect human dignity was regarded by both the Court and Advocate General as conclusively resolved (although issues of proportionality remained outstanding) by the identification of this principle as one of the general principles of law protected by the Community legal order.¹³⁷ In other words, once the protection of human dignity had been categorised as part of the general principles of law through which fundamental rights are protected within EU law, a derogation based thereon was in principle acceptable and no further identification of the source or broader significance of the relevant principle was required.

¹³⁵ *Ibid.* Opinion of Advocate General Jacobs, para. 102.

¹³⁶ *ERT* Case C-260/89 ECR [1991] I-02925.

¹³⁷ n. 126 above.

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The reflection of Member State moral choices in the public morality of the EU is therefore dependent on the compatibility of such moral choices with the Union's fundamental rights obligations and general principles of law, which are now given expression in the Union's Charter of Fundamental Rights which acts to "reaffirm" the fundamental rights resulting from the common constitutional traditions of the Member States. As Foley has suggested, all constitutions depend on a failure to definitively resolve certain fraught issues and contain unwritten, tacit "*abeyances*" which enable such constitutions to survive by fulfilling the need for "*protective obscurity*" around certain issues.¹³⁸ In line with this approach and in common with the Lisbon Treaty, the Charter of Fundamental Rights does not explicitly identify itself with any particular religious worldview. Neither does it claim that the rights it contains derive from any particular religious tradition or divine authority. This, as Weiler notes,¹³⁹ is in contrast to the constitutions of several EU Member States which, specifically invoke either God or the Christian Trinity or which recognise a particular religion as underpinning their constitutional order.¹⁴⁰ However, the Charter does invoke Europe's "*spiritual and moral heritage*"¹⁴¹ and undertakes to respect:

"the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States"¹⁴²

Thus, the rights contained in the Charter are seen as emerging from a particular religious and moral heritage which, as noted above, has been heavily marked by Christian and humanist influences. The interpretation of these rights is, therefore, likely to reflect and accommodate established European ways of life and to prove less challenging to the ambitions and public role of culturally entrenched religions or religions which can reconcile themselves to humanist influences than to religions which lack such characteristics. Indeed, the influence of humanist principles is clearly seen in the Preamble to the Charter which speaks of "*universal values of human*

¹³⁸ M. Foley, *The Silence of Constitutions*, (London, Routledge, 1989) 81.

¹³⁹ n. 24 above.

¹⁴⁰ J.T.S. Madeley, "European Liberal Democracy and the Principle of State Religious Neutrality" in J.T.S. Madeley and Z. Enyedi (eds.), *Church and State in Contemporary Europe: The Chimera of Neutrality* (London, Frank Cass Publishing, 2003).

¹⁴¹ n. 12 above, Preamble to the Treaty on the Functioning of the European Union.

¹⁴² Preamble, Charter of Fundamental Rights of the European Union, 2007/C 303/01, 14.12.2007.

dignity, freedom, equality and solidarity"¹⁴³ and of the Union's commitment to place "*the individual at the heart of its activities*".¹⁴⁴ The importance of individual human as an equal and autonomous agent is also recognised in Articles 3, 5, 6, 7, 11 and 21 which protect the rights to bodily integrity, liberty of the person, freedom from slavery, privacy, freedom of expression equality.¹⁴⁵ On the other hand, the Charter also recognises religion and religious freedom as another "good" while the Preamble and Article 17 of the Lisbon Treaty specifically endorse the notion of at least some religious influence over law. Furthermore, the national cultures and identities which the Charter undertakes to respect may themselves involve the promotion of religiously influenced communal moral standards. Thus, the notion of the good with which Member State moral choices must be compatible is rather broad and offers significant scope for the maintenance of the pluralism of EU public morality. The Court of Justice has not identified any overarching worldview within which its general principles and defence of human rights are based and thus has not required the Member State public moralities fall in line with any such worldview. The ethical template which is laid down in the Charter does reflect the influence of the Christian and humanist traditions in Europe to some degree but is at the same time relatively broad and flexible and therefore gives Member States significant leeway to pursue their particular collective moral goals.

5.2. The Importance of Balance

Despite the relatively broad and flexible nature of the ethical template set out in the Charter, there are aspects of the Union's approach, beyond which Member State autonomy in moral and religious matters can potentially be restricted to a significant degree. Indeed, the very pluralism that is the source of Member State autonomy in moral matters itself operates so as to restrict this autonomy. EU public morality is characterised by a commitment to balancing what are seen as the potentially

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

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conflicting “goods” of Europe’s religious, humanist and cultural inheritance. EU law requires that Member States respect this element of European public morality and that, in seeking to promote their own versions of public morality, they respect this notion of balance and do not accord absolute priority to any single element. The notion of balance between conflicting goods has been a central concern of the jurisprudence of the Court of Justice. In contrast to the almost absolutist approach adopted by US constitutional law, for example in relation to freedom of speech, EU law has tended to seek to balance conflicting rights. As noted above, MacCormick and others have noted how when faced with clashes of two “goods”¹⁴⁶ the Court has not sought to establish a “*hierarchical structure among these values*” but has instead its decisions “*are a matter of weighing and balancing*”.¹⁴⁷

The Court has followed the same approach in relation to fundamental rights. In *Promusicae* the Court of Justice assessed the implementation of EU copyright legislation by Spain in the light of a request by an organisation representing the owners of intellectual property rights to an internet provider to disclose the identities of internet users who had violated such rights using filesharing software. It held that:

“the Member States must, when transposing the directives mentioned above, take care to rely on an interpretation of the directives which allows fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with other general principles of Community law such as the principle of proportionality.”¹⁴⁸ (emphasis added).

¹⁴⁶ J. Bengoetxea, N. MacCormick and L. Moral Soriano, “Integration and Integrity in the Legal Reasoning of the European Court of Justice” in G. de Burca and J.H.H. Weiler (eds.) *The European Court of Justice*, The Academy of European Law, European University Institute, Oxford University Press, Oxford, 2001. In this instance the authors were discussing the clash between the goals of market freedoms and environmental protection.

¹⁴⁷ *Ibid.* 65.

¹⁴⁸ Case C-275/06 *Promusicae v Telefónica de España SAU*, Judgment of the Court (Grand Chamber) of 29 January 2008, para. 68.

Thus, faced with a clash between the “goods” of privacy and property rights, the Court did not assign priority to one over the other but required that the Member State in question strike a “*fair balance*” between them.

McCormick et al. note that an approach centred on balancing reflects a “*value pluralism*” where “*values and principles cannot be reduced to a single value or coherent set of values, nor should conflicts between reasons be interpreted as a sign of imperfection, but rather as the normal state for human beings.*”¹⁴⁹ The Court’s focus on notions of balance reflects the value pluralism of EU public morality in that it does not require uniform moral outcomes in each Member State but permits differing national conclusions in relation to moral issues provided that such conclusions respect the concept of “*fair balance*”. This concept grants Member States a considerable degree of latitude and thereby may grant a degree of what Foley would term “*protective obscurity*” to the EU legal order. On this view, EU law does not seek perfection or pursue a single outcome of the reconciliation of conflicting rights but embraces the notion of pragmatic reconciliation of rights rather than more doctrinaire according of priority to one set of rights over another. On the other hand this balance-centred approach does not give Member States an entirely free hand in that it also implies that certain approaches which, for example fail to give any or adequate weight to principles identified as “goods” by the Community legal order will fall foul of EU law.

Given that, religion, the protection of national culture and identity and the rights to individual autonomy and equality (which can be threatened by the imposition of communal religious or cultural standards) have been identified as “goods” by Community law, Member States must ensure that the moral choices they make which impinge on these goods do not fail to respect the duty of maintaining balance between them. This commitment to a balance between religious, cultural and humanist influences is seen in EU anti-discrimination legislation which, attempts to balance the institutional rights of religious bodies and the cultural role of religious institutions in many Member States with the right of individuals to privacy and

¹⁴⁹ n. 146 above, 64.

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equal treatment.¹⁵⁰ A concern that a failure to maintain such a balance between these elements could invite the intervention of EU law was seen in relation to the concerns in France that the incorporation of the Charter of Fundamental Rights into the Constitutional Treaty might, due to its commitments to religious freedom, compromise the France's strictly secular approach to the wearing of religious clothing in schools. This was referred to by the *Conseil constitutionnel* in its decision on the Constitutional Treaty¹⁵¹ in which it held that the French approach to this issue was not imperilled by the Treaty. It came to this conclusion on the basis that the French approach was in fact characterised by a degree of balance between the competing goods of religion, the secular identity of the French state and the protection of individual rights inherent in this secularist approach. The *Conseil* held that the relevant French laws had "*reconcile[d] the principle of freedom of religion and that of secularism*"¹⁵² and that given that the Court of Human Rights had given individual states "*considerable leeway to define the most appropriate measures, taking into account their national traditions*",¹⁵³ the French approach was not endangered by the Constitutional Treaty's recognition of the Charter of Fundamental Rights. Thus, the *Conseil* did not simply conclude that Member States had the sufficient cultural autonomy to define an approach to these issues without European interference but rather held that the French approach, in the light of both the considerable autonomy retained by Member States in this area *and* the fact that it balanced the relevant rights, would not trigger European intervention.

¹⁵⁰ See Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation Article 2(5) *OJ L 303, 2.12.2000*.

¹⁵¹ Decision n° 2004-505 DC of November 19th 2004, The Treaty establishing a Constitution for Europe available at: <http://www.conseil-constitutionnel.fr/decision/2004/2004505/eng.htm> (last visited 20 June 2008).

¹⁵² *Ibid.* para. 18.

¹⁵³ *Ibid.*

5.3. Fair Balance and the Autonomy and Equality of the Individual

Although an approach which leaves it to Member States to strike a fair balance between rights does grant significant leeway to national authorities, the notion of what is “fair” is influenced by certain fundamental shared European norms which restrict Member State autonomy in this area. Legislation, on the part of either the Union or its Member States, which seeks to promote notions of public morality, is required to respect certain key principles such as coherence, proportionality and non-discrimination which is centred on the strong tradition of individual liberty within Western liberal thought. Thus, while a margin of discretion in relation to public policy is provided by the willingness of the Courts to permit public policy derogations to be assessed “*in accordance with [a Member State’s] own scale of values and in the form selected by it,*”¹⁵⁴ the Court has repeatedly affirmed that, as Advocate General Van Gerven stated in *Grogan* this margin of discretion is subject to “*the limits set by Community law*” which includes a proportionality test requiring that the derogation:

“be justified by some imperative requirement in the general interest, (...) be suitable for securing the attainment of the objects which it pursues and (...) must not go beyond what is necessary to attain that objective.”¹⁵⁵

Member State morality based derogations which are held by the Court to interfere in a disproportionate way with Community law rights will, therefore, not be accepted in EU law. Advocate General Van Gerven, for example, suggested in *Grogan* that a ban on pregnant women travelling or mandatory pregnancy tests on women on departure from or return to Ireland would fail this test.¹⁵⁶

The Court has also been clear that derogations on grounds of the need to promote public morality must also respect the principle of non-discrimination between nationals and citizens of other Member States. In both *Jany*¹⁵⁷ and *Adoui and*

¹⁵⁴ Case 121/85 *Conegate Limited v. HM Customs and Excise* ECR [1986] 01007.

¹⁵⁵ As summarised in *Blood*, n. 105 above, 700.

¹⁵⁶ n. 98 above, para. 29.

¹⁵⁷ Case C-268/99 *Jany and Others v. Staatssecretaris van Justitie* [2001] ECR I-8615.

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*Cornouaille*¹⁵⁸ the Court refused to accept attempts to curtail, on grounds of public morality, the Community law rights of non-national prostitutes to work in Member States on the basis that:

“Although Community law does not impose on Member States a uniform scale of values as regards the assessment of conduct which may be considered to be contrary to public policy, conduct may not be considered to be of a sufficiently serious nature to justify restrictions on entry to, or residence within, the territory of a Member State of a national of another Member State where the former Member State does not adopt, with respect to the same conduct on the part of its own nationals, repressive measures or other genuine and effective measures intended to combat such conduct”¹⁵⁹

As discussed above, this principle is also linked to the moral pluralism inherent in the European project which confers on those individuals with the abilities, resources and skills to do so, the right to choose, by exercising freedom of movement, to be bound by the ethical choices of different Member States. In addition, it is connected to the broader requirement that Member State derogations be coherent and internally consistent in order to achieve acceptance within EU law. This was seen most notably in the *Conegate*¹⁶⁰ case where a challenge was brought to the refusal of the British authorities to permit the import of certain pornographic items on the basis that domestic law permitted their domestic manufacture and sale (subject to a ban on sending them through the post). The Court upheld the challenge on the basis that:

“A Member State may not rely on grounds of public morality in order to prohibit the importation of goods from other Member States when its legislation contains no prohibition on the manufacture or marketing of the same goods on its territory”¹⁶¹

It further stated that:

“It must at least be possible to conclude from the applicable rules, taken as a whole that their purpose is, in substance, to prohibit the manufacture and marketing of those products”¹⁶²

¹⁵⁸ Joined Cases 115 and 116/81 *Adoui and Cornouaille v. Belgian State* ECR [1982] 01665.

¹⁵⁹ *Ibid.* para. 60.

¹⁶⁰ n. 154 above.

¹⁶¹ *Ibid.* para. 16.

¹⁶² *Ibid.* para. 17.

The decision in *Conegate* clearly has much in common with the approach adopted in *Jany* and *Adoui and Cornouaille* which precluded the imposition of stricter moral standards on outsiders than a Member State's own nationals. However, as the above paragraph shows, it also underlines a second aspect of the approach of EU law to public morality in that the Court also made it clear that Member State derogations on grounds of public morality would also be assessed for their internal coherence and that measures which fail to indicate the requisite degree of coherence would not be accepted in EU law. The importance attached by the Court to the coherence of Member State morality derogations reflects Fuller's notion of the "internal morality" of law which requires that laws be sufficiently general, intelligible and free of contradictions.¹⁶³ As MacCormick and others have pointed out, the notion of coherence has been an important element in the jurisprudence of the Court of Justice and derives from "the idea crucial to the rule of law that the different parts of the whole legal order should hang together and make sense as a whole,"¹⁶⁴ or, at the very least, should not actively contradict each other. Such ideas are central to the principle of the rule of law which the Union has explicitly embraced as part of the Copenhagen Criteria setting out the prerequisites of membership¹⁶⁵ and as one of the EU's fundamental constitutional values which finds expression in general terms in the Preamble to the Charter of Fundamental Rights¹⁶⁶ as well as more concrete expression in the prohibition of retroactive or extra legal punishment in Article 49.1.¹⁶⁷

These requirements establish a broad framework which is centred on individual liberty. The Union's approach implicitly distinguishes between law and morality,

¹⁶³ L. Fuller *The Morality of Law* (New Haven, Yale University Press, 1969).

¹⁶⁴ J. Bengoetxea, N. MacCormick and L. Moral Soriano, "Integration and Integrity in the Legal Reasoning of the European Court of Justice" in G. de Burca and J.H.H. Weiler (eds.) *The European Court of Justice*, The Academy of European Law, European University Institute, Oxford University Press, Oxford, 2001, 47.

¹⁶⁵ The Copenhagen Criteria provide that: "Membership requires that candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and, protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union" "See: European Council in Copenhagen, 21-22 June 1993, Conclusions of the Presidency, SN 180/1/93 REV 1. Available at http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/ec/72921.pdf (last visited 20 June 2008).

¹⁶⁶ Preamble, Charter of Fundamental Rights of the European Union, 2007/C 303/01, 14.12.2007.

¹⁶⁷ Article 49.1, Charter of Fundamental Rights of the European Union, 2007/C 303/01, 14.12.2007.

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regards individual freedom to act as the default position and requires that all curtailments of such freedom be coherent and as narrowly tailored as possible. These notions of the centrality of individual autonomy and the view of morality as a largely private matter whose enforcement by law must be limited and specifically justified have a long history in Western liberal thought but have been less influential in other contexts, most notably in largely Muslim societies.¹⁶⁸ Combined with the emphasis placed on non-discrimination in *Jany, Conegate and Adoui*, the requirements of coherence and proportionality underline the importance placed by the EU legal order of the individual as an equal and autonomous actor whose ability to take decisions and plan his or her own life must be respected. Thus, the promotion of public morality by law takes place in a context which places significant emphasis on individual liberty against which the promotion of communal moral standards must be balanced and which may therefore prove less challenging for religions which have reconciled themselves to the emphasis placed on human autonomy within Western societies.

5.4. Public Morality and Perspectives Contrary to Common European

Norms

The importance attached to individual autonomy by EU law can be seen as merely indicative of a wider point, namely, that certain norms, which for cultural and historical reasons have come to be widely shared in Europe influence the kind of moral goals which can validly be pursued by legislative means under EU law. As both Advocate General Jacobs' point in relation to the restriction of Member State autonomy in moral matters through the emergence of common European standards,¹⁶⁹ and the notion of assessing the "appropriateness" of the moral goal

¹⁶⁸ See T. Gabriel "Is Islam against the West?" in R. Geaves, T. Gabriel, Y. Haddad and J. Idleman Smith (eds.) *Islam and the West Post 9/11* (Aldershot, Hants, England, Ashgate, 2004) at 15). See also See also P. Norris and R. Inglehart *Sacred and Secular: Religion and Politics Worldwide* Cambridge University Press, Cambridge, 2004.

¹⁶⁹ n. 135 above.

pursued by the Member State in question in *Omega*,¹⁷⁰ suggest, certain moral goals which run counter to the notion of the good reflected in the Charter which, as noted above, is broad but nevertheless influenced by common European inheritance of Christian, humanist and cultural influences, are seen as illegitimate and unacceptable within EU law, even if balanced against other countervailing influences.

To take an example, the emergence of a common European norm of gender equality may operate so as to reduce the ability of Member States to make differing moral choices in this area. For instance, Article 41.2 of the Irish constitution provides that

- “1. In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.
2. The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.”¹⁷¹

This article could be seen as representing a deeply held religiously influenced moral notion in relation to the upholding of differences between the sexes and the role of women and mothers in family life. Should the Irish authorities introduce legislation which discouraged mothers of young children from taking paid employment, such measures would fall foul of the principle of gender equality in the workplace enshrined in EU law. Even if the Irish government were to demonstrate that the measure in question was very limited and attempted to balance the rights of individuals to equal treatment against the religious and moral imperative to maintain traditional gender roles, it is difficult to imagine that such a choice could be categorised as, to use the language of Advocate General Stix-Hackl in *Omega*, “appropriate” by the Court in the light of the emphasis placed by Community law on gender equality in the workplace and the principle of equal treatment in general. Indeed, in *Kreil* the Court was willing to interfere with an explicit constitutional mandate in the extremely sensitive area of military policy when the policy in question violated the norm of gender equality.¹⁷² On the other hand, where common

¹⁷⁰ n. 127 above.

¹⁷¹ Bunreacht na h-Éireann (The Constitution of Ireland), Articles 41.2.1 and 41.2.2.

¹⁷² Case C-285/98 *Kreil v. Germany* [2000] ECR I-69.

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standards have not yet emerged to the same degree, as for example is the case in relation to sexual orientation discrimination, compromises on the principle of equal treatment on the basis of respect for religious and cultural norms have been accepted by EU law, most notably in relation to the Framework Directive which has explicitly permitted discrimination in employment on grounds of sexual orientation in organisations which have a religious ethos on the ground that the limited exemptions achieved a balance between the rights of religious bodies and those of individuals.¹⁷³

Notions of religious morality which deviate from established European cultural norms are, of course, more likely to come into conflict with “*common standards*.” Thus, notions of European public morality are, to a degree linked to the promotion of a common European way of life or ways of life which are respectful of the balance between largely Christian religious and humanist influences which characterise European history, in addition to cultural norms, in relation, for instance, to gender equality which have emerged from this history. Therefore, common European norms around the mixing of the genders may prevent the recognition on public morality grounds of a Member State law which sought to enforce in the workplace Islamic notions of the separation of the genders. Similarly, it is interesting to consider how the Court of Justice would react to notions of morality deriving from religions such as Scientology which have little cultural purchase in Europe. A law passed by a Member State at the instigation of Scientologists which for instance, banned the practice of psychiatry (towards which the Church of Scientology is very hostile) and placed the kind of restrictions on the advertising of psychiatric services which Ireland had placed on abortion services in *Grogan* would present the Court of Justice with the prospect of recognising as part of European public morality a moral stance rejected by the overwhelming majority of Europeans.

Were such laws passed by the Union’s own legislature there is, I would suggest, little likelihood that they would survive review by the Court. However, the pluralism of the EU’s public morality means that when Member States seek to make such choices,

¹⁷³ *R. (Amicus and others) v. The Secretary of State for Trade and Industry* [2004] EWHC 860.

difficulties arise. The Union's commitment to certain values means that it must place some limits on what can be accepted as part of the public morality recognised by EU law. Notions of proportionality, coherence and a duty to respect rights to move between countries do provide some such limits. However, the judgment in *Omega* and the importance placed by the Union on compliance with fundamental rights, particularly in the *ERT* judgment, means that certain religious and moral viewpoints which contradict the balance between religion and humanism inherent in the Union's public morality (seen particularly in its fundamental rights instruments) may simply not be capable of being accommodated by European public morality or, therefore, EU law. Indeed, such an approach is arguably implicit in Articles 6 and 7 TEU which require Member States to uphold human rights and democracy on pain of loss of voting rights in the Council and thereby stress the notion of EU membership as involving a commitment to a certain shared European notion of the good.

Therefore, if the Union is to be a "Community of Values" and its commitments to fundamental rights and shared norms are to have any meaning, certain moral or religious goals which deviate from established European cultural norms or common standards will not be capable of being accommodated within EU public morality and will be held to be contrary to European public morality even before issues of balance or coherence arise. On this view, particular historical and cultural experiences such as Europe's collective guilt in relation to the holocaust or its long experience of Christianity and humanism will influence the Union's view of what can "count" as valid religious or cultural aims in the striking of a balance between religious cultural and humanist influences. From such a viewpoint, when the Court of Justice, as it did in *Omega*, investigates the appropriateness of a moral choice which a Member State is seeking to have recognised within EU law, or when the special contribution of religious bodies to policy formation is being sought by EU institutions, all forms of religious morality may for cultural, historic, moral or other reasons, not "count" in striking a fair balance between religious influences and humanist influenced notions of individual autonomy. Rather, as in *Promusicae*, the Court will assess the balance, only in relation to forms of religion whose influence *can* be balanced against humanist influences or established European cultural norms. Approaches which, like

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radical Islam, are radically opposed to key influences such as humanism or which by, promoting racist ideas, clash with the legacy of key cultural and historical experiences such as the holocaust simply will not be recognised for the purposes of such balancing exercises.

Therefore, perhaps unsurprisingly, the reflection of religion in EU law by means of the recognition of public morality, is likely to favour those forms of religion which can reconcile themselves to the balance between religious and humanist influences which has emerged from European history and which characterises much of European culture. As Taylor and Le Goff have pointed out, humanism's success in Europe occurred partly because of the humanistic elements of Europe's historically dominant religion, Christian religions. Many have suggested that many of the fundamental values of the Union such as democracy equality and individual autonomy have roots in Christianity.¹⁷⁴ Thus, it is not unreasonable to conclude therefore that given its enormous cultural influence and its links to humanism, Christianity may exercise a greater influence over European public morality (and thereby EU law) than other faiths. Nevertheless, the humanist influences over European culture which gave rise to the secularisation of Europe, have, despite the religious roots they may have had, have served to limit religious influence over law and politics. This has been particularly true in relation to what Casanova termed "lifeworld" issues of family, sexuality and the beginning and end of life in relation to which mainstream Christian denominations have continued to attempt to influence law so that it conforms to their moral teachings. Thus, even if liberal notions such as autonomy and equality can be seen as the offspring of Christianity, they represent rather rebellious offspring which, as adults, have come to clash with their "parents" in the legal and political arenas. The Union's commitment to balancing religious and humanist influences therefore restricts all religions, including those with deep roots in national and European culture.

¹⁷⁴ See for example G. Weigel *The Cube and the Cathedral: Europe, America and Politics without God* (New York, Basic Books, 2005).

6. Conclusion

The notions of pluralism, balance and inheritance are key features of the recognition of religion as a basis of law in the EU constitutional order. The legitimacy of religious input into law is recognised at a symbolic level through the recognition of religion as an element of the Union's constitutional values, at an institutional level in the recognition of religious bodies in the lawmaking process and in substantive law through the recognition of religion as part of a public morality which the Union and Member States may legislate to protect.

However, in all three areas in which religion is recognised it must share its role as an element of public morality with cultural and humanist influences which are similarly recognised. Although these elements can reinforce each other (as in the case of the Christian influence on Member State cultures) they can also be in conflict (as when humanism's stress on individual autonomy clashes with religious desires to promote communal morality). Thus, the overall public morality through which religion influences EU law is characterised by a balance between these religious, cultural and humanist elements. These features are seen in relation to religion's institutional position where the recognition of the special importance and contribution of religious institutions to lawmaking is balanced by the secularising effect of providing such recognition in the context of a pluralist civil society.

In relation to substantive EU law, religion exercises influence by means of morality clauses which allow both the Union and its Member States to promote communal moral standards by means of law. This EU public morality is pluralist in that it recognises that the primary forum within which ethical choices are made is still the individual Member State and therefore permits the recognition of differing national religious, cultural and moral viewpoints within EU law. However, membership of the Union also involves certain moral commitments and a degree of common agreement around fundamental political and legal values. Thus, an autonomous EU public morality also restricts the degree to which the particular moral choices of individual Member States can be reflected in EU law. These restrictions require that

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the ethical choices of Member States do not deviate from the common European element of EU public morality requires that such choices respect requirements of proportionality, coherence and respect for free movement rights as well as reflecting the notion of fair balance between religious, cultural and humanist influences inherent in the Union's fundamental rights commitments and public morality.

Such an approach to public morality has much in common with MacCormick's notion of the Union as characterised by a legal pluralism characterised by the interaction of legal systems.¹⁷⁵ Indeed, the analogy can extend to other areas of EU law such as freedom of movement where one could argue that, just as EU law requires that national regulatory decisions take into account the principle of free movement of goods, similarly it requires that national ethical choices take into account the moral commitments of EU membership embodied by the Union's public morality and fundamental rights commitments. This is seen in the judgments in *Promusicae* and *Omega* which indicated that what is required is that Member States take account of the various "goods" and elements of public morality recognised by EU law in coming to their ethical decisions.

Although the Union has adhered to a relatively strict formal neutrality in its dealings with religions, these "goods" and the notion of what constitutes a fair balance between competing rights are both, of course, influenced by European culture and history. Indeed, the importance of Europe's ethical and religious "*inheritance*" in the determination of the content of the public morality of the EU has been explicitly acknowledged in the Treaties. Combined with deference towards Member State cultural and moral autonomy and the promotion of the notion of balance between religious and humanist influences, the notion of respect for an ethical inheritance permits culturally entrenched Christian religions and those faiths which can reconcile themselves to limitation on religious influence which respect for Europe's humanist tradition entails, to exercise greater influence over EU law. Nevertheless, the Union recognises the complexity of the relationship between liberal democracy

¹⁷⁵ N. MacCormick, "The Maastricht Urteil: Sovereignty Now" (1995) 1 *European Law Journal* 259, 264-5.

and religion in general and provides limits to the public ambitions of all faiths, even those with strong humanist traditions and deep cultural roots in Europe. Thus the notion of balance can be seen as attempting to reconcile religion's important role in communal identity with protection of individual identity rights, including the right not to be forced to adhere to particular religiously-inspired communal moral norms which derive in part from the humanist elements of the Union's public order.

The Union's public morality therefore upholds the broad outlines of the balance between religion and secular humanist balance in Europe and the cultural values and way of life to which this balance gives rise. Its approach is not religiously neutral and exhibits a preference for culturally-entrenched faiths which play strong roles in communal cultural identities in Europe and which can reconcile themselves to the notion of balance between humanist and religious influences. Those religions which do not exercise significant cultural influence in a Member State, which are opposed to certain shared European cultural norms or which are anti-humanist are largely excluded from influence and are, at least implicitly, identified as in some ways contrary to the Union's public morality and notion of the good. On the other hand, religions such as mainstream Christian churches which have deep cultural roots and which have a strong humanist tradition may find that they exercise a far greater influence over European public morality than other faiths. Nevertheless, although the strong humanist elements of European public morality, and the secular influences which they gave rise to, may owe something to Christian humanism, they also provide powerful limitations on the influence which all religions, including Christianity can exercise over the law. Thus, the Union's approach is characterised by a complex and shifting balance between religious, cultural and humanist influences. This balance is struck in a pluralist context which attempts to reconcile the differing balances between such influences in individual Member States with the need to maintain the open and sufficiently religiously neutral common European ethical framework necessary for the functioning of the Union as a polity.

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