IN PURSUIT OF PLURALISM: THE ECCLESIASTICAL POLICY OF THE EUROPEAN UNION

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In the last decade, the religious dimensions and significance of the European Union have been increasingly recognised. This paper sets out the role and regulation of religious associations within European law. Although it is often assumed that European competence does not touch on matters of religion, a jurisdictional separation of 'economics' and 'religion' has been increasingly hard to sustain. European law grants various privileges and exemptions to religious bodies. However, the dominant model to emerge is one of pluralism: distinctive substantive legal regimes applicable to religious bodies, and a distinctive participatory position within the governance of the European Union. However, the paper suggests that the pursuit of pluralism has not been entirely successful. National diversity in this field coupled with the sheer complexity of achieving a reasonable balance of competing interests conspire to make it remarkably elusive. What is needed is a greater recognition of the right of States to adjust European legal requirements to accommodate the legitimate needs of the religious bodies within their jurisdiction and a renewed commitment to producing workable solutions in dialogue with religious associations.

I. The European Union, religion and national diversity

At first sight, there are few connections between the European Union and religion. However, for the last few years, issues touching on religious belief, practice and organisation have been moving steadily up the European political agenda. The most recent example of this can be found in the deliberations of the Convention on the Future of the European Union, established by the European Council in the Laeken Declaration of 15 December 2001. This called for the Union to be brought closer to its citizens, and in order for citizens to have a voice in its deliberations on the future of Europe, established a Forum consisting of a 'structured network' of 'organisations representing civil society'. These included a substantial number of religious associations.[1] Notwithstanding that representation, the 'godless' nature of the first draft of the Constitution to emerge from the Convention received substantial media attention in the early months of 2003.[2]

The reason for this rise to prominence of religious associations lies broad-

[1] The Forum website contains a list of participant religious organisations in the category of 'other, civil society, NGOs and schools of thought': http://www.europa.eu.int/futurum/forum_convention/organresults_502_en.cfm

[2] See e.g. Joan Smith, 'The EU is utterly Godless—let's keep it that way', *Independent*, 23 January 2003.

ly in the gradual change from a merely economic to a social and political community. The key point in this transition was, of course, the Treaty on European Union 1992, with its symbolic renaming of the European Economic Community and introduction of a concept of European citizenship.[3] But the changes of Maastricht, and subsequently Amsterdam and Nice, were more than merely symbolic. For the legal system of the European Union is feeling its way hesitantly— and controversially—in the direction of a complete political community, and every complete political community has to find ways of regulating religion. It is thus no accident that it was a speech by Jacques Delors in 1992 which gave rise to the movement, 'A Soul for Europe', whose purpose is 'to involve religious communities in dialogue with European Institutions'.[4] This was eventually paralleled from the European side by the stream within the European Commission's Group of Policy Advisers charged with 'dialogue with religions, churches and humanisms',[5] established by Romano Prodi on taking up the Presidency of the European Commission in 1999, and most recently the 'Reflection Group on the Spiritual and Cultural Dimension of Europe' chaired by Krzysztov Michalski and convened by Romano Prodi on 29 January 2003.

There are already several topics of debate in the interface between the European Union and religion. First, there is a debate about the religious nature of the European Union itself, we might even say, the Union *as* a religious association. This is essentially a debate about political identity. Here, there seems to be a reasonable level of support for rather vague notions of spirituality and interfaith dialogue as a component of European identity.[6] Somewhat disturbingly for the relativistic consensus, the Polish delegation to the Convention on the Future of Europe proposed that the Christian character of Europe should be formally recognised.[7] This is not the place to go into the question of the sense (if at all) in which Europe is Christian. One should perhaps observe, though, that an approach to European identity which seeks to isolate the highest common factor is not likely to produce much with which any individual could identify.[8] It should also be noted that what looks like religious neutrality

[3] In force 1 November 1993. See now the post-Amsterdam consolidated version of 10 November 1997 in 1997/C 340/145-172. All article references in this paper are to the new numbering.

[4] See his 'Speech to the Churches' of 14 April 1992. *A Soul for Europe* is composed of six members: Commission of the Bishops' Conferences of the European Community, Church and Society Commission of the Conference of European Churches, Orthodox Liaison Office, Conference of European Rabbis, European Humanist Federation, Muslim Council for Co-operation in Europe.

[5] The section is headed by Dr Michael Weninger. See http://europa.eu.int/comm/dgs/policy_advisers/activities/dialogue_religions_humanisms/index_en.htm

[6] See e.g. Edy Korthals Altes, 'What is it? Why do we need it? Where do we find it?' in Thomas Jansen (ed.) *Reflections on European Identity*, European Commission Forward Studies Unit Working Paper 1999.

[7] See the discussion in the paper submitted to the Forum by Carlos del Ama and Emmanuel Paparella.

[8] See John Erik Fossum, 'The European Union: In Search of an Identity', *European Journal of Political Theory*, vol 2(3), 319.

from the inside may appear from a broader global perspective to be rooted in religiously-biased assumptions. European 'secularism' may itself be an expression of regionally specific post-Christian religiosity.[9] There is certainly an understandable temptation to see the continuing exclusion of Turkey in covert religious terms.[10] The challenge is to build a political order on the basis of a deep linguistic, cultural and religious diversity which includes, and is not transcended by, secular humanism.

The debate about political identity largely passes lawyers by. However, the recent controversy surrounding the preamble to the draft Constitution forms a clear connecting point. It is hard for a constitutional preamble to avoid drawing attention to the ultimate source from which it derives its political values. It is thus common, even in modern constitutions, to invoke God as the supreme authority in human affairs;[11] it is quite unusual, although not unknown, to acknowledge the political supremacy of Jesus Christ,[12] presumably for reasons of consensus-building. By contrast, the draft Constitution locates its values in a 'humanism' which 'draws inspiration from the cultural, religious and humanist inheritance of Europe'. Even the inclusion of the word 'religious'[13] had to be fought over, since the first published draft wanted to draw attention to the Greek and Roman roots of European civilisation, apparently in blithe disregard of that minor historical aberration known as Christendom. It is hard not to read all this as yet another expression of the peculiarly Western European myth of secular progress.

The third area of debate and activity touches on the external relations of the European Union, and in particular its activity globally in support of human rights. These include rights of religious liberty and non-discrimination. The institutions of the European Union have long been willing to

[9] The abandonment—or at any rate refinement—of the 'secularisation thesis' to be replaced by a thesis of European 'exceptionalism' by sociologists of religion is particularly associated with Peter Berger and David Martin. For an account of European religion which takes as its guiding idea the mutation of memory, see Grace Davie, *Religion in Modern Europe* (Oxford: OUP 2001).

[10] See e.g. Leyla Boulton, 'Turkey banks on reforms to boost chances', *Financial Times* 9 October 2002.

[11] E.g. Germany (1949): 'Conscious of their responsibility before God ...'; Canada (1982): 'Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law ...'; South Africa (1996); 'May God protect our people ... God bless South Africa'.

[12] Exceptionally, the Irish Constitution (1937) commences, 'In the name of the most Holy Trinity, from whom is all authority and to whom, as our final end, all actions both of men and states must be referred, We, the people of Eire, humbly acknowledging all our obligations to our Divine Lord Jesus Christ . . .' The relationship of the Sovereign to the Church of England in the United Kingdom could be argued to fulfil a similar role.

[13] John Erik Fossum (op cit (note 8 above), fn 9) has commented on the fact that the word 'religious' in the English version of the Preamble to the Charter of Fundamental Rights appears in the French not as 'religieuse' but as the vaguer 'spirituelle', which he sees as evidence of a further unwillingness to recognise 'deep diversity'. By contrast, once 'religious' got into the draft Constitution it appears also as 'religieux' in the French.

press third countries—particularly those seeking eventual membership—to improve their practices in this respect.[14] In line with the development of international human rights, the focus has been primarily on individual liberty of conscience.

The final area of debate concerns the contribution of religious associations to the governance of Europe. This brings us close to the subject matter of this paper, and will be considered in depth later on. For now, it is simply worth noticing that the contribution of religious associations to the internal processes of a political community is just one aspect of a broader question about their public role and regulation. It is that broader aspect which has not yet been adequately addressed from a European perspective, a gap which this paper seeks to remedy.

Within the Member States of the European Union, the main underlying values in respect of religious associations expressed through their legal systems are familiar enough: religious liberty, religious equality, and religious community. But those three values conflict to some extent; they can be put together in various ways, and they need limiting to preserve other important values as well. So at the level of detail one finds significant diversity between the Member States.[15] The law of religious associations of any State can be understood as its often distinctive conception of the liberty and equality of religious communities. Whatever one's views about the best way of reconciling the values at play here, respect for the diversity of any reasonably stable constitutional settlement is at least pragmatically indicated by the often violent history of its emergence. So from the distinctive perspective of European law we can add a fourth value to our triad: that of national diversity.

The European Union, growing as it does out of, and on top of, the legal traditions of its Member States, is clearly committed to these four values of liberty, equality, community and diversity. Although unable to accede to the European Convention on Human Rights,[16] which includes freedoms of religion and association and a right to non-discrimination, it guarantees respect for analogous rights as a pre-condition for the legality of all its acts.[17] Its institutions are obligated to behave accordingly.[18] The Charter of Fundamental Rights solemnly proclaimed at Nice on 7

[14] TEU, art 11(1), and EC, art 177(2). The use of human rights clauses in bilateral trade and co-operation agreements is also common. See generally the Policy on human rights and democratisation of the External Relations Directorate General.
[15] For an overview, see G Robbers (ed.), *Law and State in the European Union*, 1st edn (Baden-Baden: Nomos, 1996) (2nd edn forthcoming, 2004). See also Silvio Ferrari and Anthony Bradney (eds.), *Islam and European Legal Systems* (Aldershot: Ashgate 2000).
[16] Opinion 2/94 on Accession by the Community to the European Court of Human Rights [1996] ECR I-1759. The ECHR is nonetheless recognised as having a special status within the European Union: TEU, art 6(2).
[17] Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125; Case 4/73 *Nold v Commission* [1974] ECR 491; Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727; and subsequent case law.
[18] Case 130/75 *Prais v Council* [1976] ECR 1589.

December 2000[19] includes references to all four values, with Article 22 containing a special guarantee for cultural, religious and linguistic diversity.[20] The Declaration on the Status of Churches and Non-confessional Organisations of 10 November 1997, appended to the Treaty of Amsterdam, states:

> 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.[21]

Article 51 of the draft Constitution repeats these words, adding a third paragraph:

> Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations.[22]

In fact, respect for national diversity is written into the structure of the Treaty on European Union itself. Article 6(3) states that the Union respects the national identities of its Member States, and Article 7 provides a complex procedure for responding to 'persistent and serious breaches' of fundamental rights principles, a test which effectively incorporates a substantial national margin of appreciation. The deference expressed in Articles 6(3) and 7 TEU is amply demonstrated by the self-restraint shown by both the Council and Commission when invited in Parliamentary Questions to comment on alleged breaches of religious liberty and equality by Member States, a self-restraint which should be contrasted with forthright denunciations of third countries accused of religious discrimination.[23] For once, political pressures conspire to ensure adherence to the formal rules.

Perhaps the most outstanding specific example of national diversity protected at European level is the Declaration on the Status of Mount Athos appended to the Accession Treaty of Greece,[24] and reaffirmed as part of

[19] 2000/C 364/01.
[20] See also Charter of Fundamental Rights, arts 10(1), 12(1) and 21(1).
[21] 1997/C 340/133.
[22] *Draft Treaty establishing a Constitution for Europe*, 18 July 2003, CONV 850/03, art 51(3). This article was not in the first draft of the Constitution. The text of the Amsterdam Declaration was only included after pressure from the Roman Catholic Church and others.
[23] Compare the answer given by the Council to the question asked by Graham Watson MEP on 3 August 2001 regarding religious liberty in France (2001/C 81/154) with the answer given to James Nicholson MEP on 16 October 2000 concerning religious minorities in India and Pakistan (2001/C 163/57). These answers are entirely typical of both the Council and the Commission.
[24] 28 May 1979 1979/L 291/186. The Declaration states: 'recognizing that the special status granted to Mount Athos, as guaranteed by article 105 of the Hellenic Constitution, is justified exclusively on grounds of a spiritual and religious nature, the Community will ensure that this status is taken into account in the application

the Schengen *acquis*.[25] To take another example, the status of Sunday as a weekly day of rest also lies at the disposal of Member States. This is evidenced both by the terms of the Preamble to Directive 94/33/EC on the protection of young people at work[26] and the successful annulment action brought by the United Kingdom against the Council of Ministers for its attempt to make Sunday the Europe-wide day of rest in the Working Time Directive.[27] There is thus an undeniable and ongoing commitment to national diversity in religious matters.

II. European jurisdiction in religious affairs

National diversity is diametrically opposed to harmonisation. The extent of harmonisation can vary from the mere setting of minimum standards or basic objectives (which still allows for much diversity) through to complete legal uniformity. But as a policy for religious associations, national diversity is only guaranteed to its fullest extent if all religious matters fall outside of the scope of European law. In other words, a policy of complete national diversity in religious regulation would express itself as a jurisdictional limit on European law. Of course, this is more than merely plausible. Vast tracts of European law, from the labelling of beer bottles to the amount of leg room in coaches, have no practical religious significance. It is hardly surprising that economics and religion are sometimes seen as mutually exclusive categories.

The development of the Sunday trading case law shows that after an initial expansion of the scope of Community law, the European Court of Justice effectively managed to preserve separate jurisdictions in this field.[28] In *Torfaen*[29] the court had held that restrictions on Sunday trading, although indistinctly applicable to both domestic and imported goods, could constitute a measure with equivalent effect to a quantitative restriction on the free movement of goods. The effect of this judgment was potentially to bring all socio-cultural legislation affecting trade in goods within the scope of Article 28 EC. After this had been reined in by the Court in *Keck and Mithouard*,[30] the later Sunday trading cases were much less expansive. Thus in *Semeraro*,[31] in which the Italian law restricted Sunday trade to small shops and consequently had a differential impact on the marketing of domestic and imported goods, the court held that there was no breach of Article 28. It stated:

and subsequent preparation of provisions of Community law, in particular in relation to customs franchise privileges, tax exemptions and the right of establishment'.

[25] 2000/L 239/87.

[26] 1994/L 216/12 at 13.

[27] C-84/94 *United Kingdom v Council* [1996] ECR I-5755

[28] See generally Imelda Maher, 'A Traders' Charter? Free Movement of Goods and the Sunday Dilemma' in G Wilson and R Rogowski (eds.) *Challenges to European Legal Scholarship* (London: Blackstone, 1996).

[29] Case 145/88 *Torfaen Borough Council v B & Q plc* [1989] ECR 3851.

[30] C-267 and C-268/91 *Criminal Proceedings against Keck and Mithouard* [1993] ECR I-6097.

[31] C-418/93 *Semeraro Casa Uno Srl v Sindaco del Comune di Erbusco* [1996] ECR I-2975

> there is no evidence that the aim of the rules at issue is to regulate trade in goods between Member States or that, viewed as a whole, they could lead to unequal treatment between national products and imported products as regards access to the market.[32]

By focusing primarily on the purpose of the legislation, rather than its impact in fact, the court managed to preserve a separation between economic regulation within the jurisdiction of the EU institutions, and socio-cultural legislation (in this case with a religious dimension) which is not.

The Sunday trading cases do not stand alone. There are other well known cases in which the religious dimension has been present, at least in the background, and in which the court has managed to preserve the discretion of national authorities. In *SPUC v Grogan* the European Court of Justice showed an understandable unwillingness to grapple with the religious and ethical issues surrounding abortion, holding instead that restrictions on the provision of information by student associations about abortion services provided outside Ireland did not fall within Article 49 EC.[33] Similarly *Van Duyn v Home Office* allowed considerable discretion to Member States to restrict the entry of members of associations considered undesirable as a matter of public policy under Article 39.[34] One can read both these cases as further examples of the court's commitment to the idea that religious diversity and regulation should fall outside the scope of European law.

It would be very convenient if economic and religious activity could be kept indefinitely in watertight compartments, but of course, they cannot. A clear example of the occasional intertwining of religious and economic aspects is provided by *Steymann*.[35] Steymann was a German plumber who lived in a Bhagwan community in the Netherlands. The question was whether he had a right to a residence permit, which turned on whether he was engaged in economic activity for the purposes of Article 2 EC. He was not paid as such, but was supported materially by the religious community. In turn, he maintained washing machines and other equipment which were open to the public as a fund-raising activity. The tests set out by Darmon AG and the Court to determine the scope of Article 2 differed. According to the Advocate-General, 'professional or trade activity may be regarded as economic . . . if it constitutes the necessary quid pro quo for the remuneration which that person receives, in whatever form, from that community.'[36] The court largely adopted that test but added the

[32] Ibid, at para. 24.
[33] C-159/90 *SPUC v Grogan* [1991] ECR 4685. Protocol No. 17 to the Treaty on European Union 1992 also sought to preserve the Irish position on abortion. OJ C 191, 94.
[34] Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337. But note the restrictions imposed on public policy regimes of prior authorisation for direct foreign investments in C-54/99 *Association Eglise scientology de Paris v Prime Minister* [2000] ECR I-1335.
[35] Case 196/87 *Steymann v Staatssecretaris van Justitie* [1988] ECR 6159.
[36] Opinion of Darmon AG at para 16.

requirement that the activity must be 'part of the commercial activities of that community.'[37] This is in practice a highly significant difference, because on the Advocate-General's broad definition any form of communal living involving a division of functions could be construed as economic. On either definition religious associations which have any sort of commercial relations with the outside world clearly engage in activity bringing them within the scope of Community competence.

In the light of such overlaps between the economic and the religious—or more precisely in the light of those situations in which a matter within the scope of EU competence has a religious dimension—the call for a jurisdictional division of labour ceases to be a guarantee of national diversity. The scope of the religious is constrained by an ever-expanding notion of the economic, and depending on the values at play this can be potentially oppressive. If this type of jurisdictional division is to work at all, definition must proceed by way of mutual reference. The religious is not economic *and the economic is not religious*. So the fact that something is undeniably a religious activity (living in a Bhagwan community, for example) ought to count towards its not being treated as economic for the purposes of European law. But this does not happen. Although some of the examples cited above indicate that the court may covertly be allowing the religious dimension to constrain the scope of the economic, the tendency is for the category of 'economic' (or whatever other category results in European jurisdiction) to receive an autonomous definition.[38] This is simply an instance of the more general constitutional point that a failure to identify the competence of Member States has prevented the European Court of Justice from functioning properly as a constitutional court, overseeing the division of jurisdiction between the 'federation' and the States with an even hand.

A general failure to take account of the religious dimension is not always problematic. Regulation 3911/92 on the export of cultural goods includes religious artefacts,[39] and Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State includes those found in the inventories of ecclesiastical institutions.[40] The Common Customs Tariff dealing with objects containing precious metals covers both secular and religious items of jewellery.[41] No one suggests that there should be any difference of treatment here, and it would not matter whether the religious dimension had even been considered. European law applies unproblematically.

But the religious dimension is not always irrelevant. Take, for example,

[37] Judgment of the Court at para. 14.
[38] See Case 196/87 *Steymann v Staatssecretaris van Justitie* [1988] ECR 6159 at para 9 of the judgment. On the facts, of course, this happened to work in the favour of the religious association.
[39] 1992/L 395/1
[40] 1993/L 74/74.
[41] 1999/L 278/1 at 508.

the debate about the extent to which churches are subject to the requirements of public procurement law. The Annexe to Directive 71/305/EEC concerning the co-ordination of procedures for the award of public works contracts only expressly mentions the Belgian church,[42] but in response to a question in the European Parliament about the impact on Danish organ builders of the requirement imposed on the Danish church to engage in compulsory competitive tendering, the Commissioner had no doubt that the Danish church fulfilled the requirements to count as a public body and that the recent disestablishment of the Swedish national church had (correctly) been accompanied by a change in the relevant Swedish legislation. The only relevant questions were where the money comes from and who controls expenditure.[43] The idea that it might not be appropriate for a religious association to be subject to public procurement regimes is not addressed. The 'religious' risks being squeezed out by an ever-expanding conception of the 'economic'.

Not only is the definition of 'economic activity' for the purposes of Article 2 EC broad enough to encompass some activities of religious associations, but the introduction of a concept of European citizenship potentially widens European Union jurisdiction still further. Although the rights attached to the status of European Union citizenship in Part II of the Treaty of Rome (as amended) are limited to 'the rights conferred by this Treaty',[44] the court in *Martinez Sala*[45] subsequently 'exploded the linkages'[46] with the substance of European law, to apply the principle of non-discrimination on grounds of nationality in Article 12 EC on the basis of citizenship alone. Martinez Sala was a Spanish woman resident in Germany who had applied for a (non-contributory) child allowance. The German authorities had required her to produce a residence permit, which a German parent would not have had to produce. She had worked in Germany in the past, but she was not at the relevant time a worker or employee. The court held that this did not matter. It was enough that as a European citizen she had been discriminated against on grounds of her nationality. The potential impact of this is entirely unclear, but it could be large. Article 13 empowers the Council to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. While the wording differs from that of Article 12 slightly,[47] it is not hard to construct an equivalent argument as regards other grounds of discrimination as well. Of course, one still

[42] See Commission Decision 92/456/EEC concerning the updating of Annex I to Council Directive 71/305/EEC, 1992/L 257/33.
[43] Written Question E-1583/01 by Anne Jensen (ELDR) to the Commission, 2001/C 340/240.
[44] EC Treaty, art 17(2). New rights specifically attached to citizenship are limited to freedom of movement, voting rights at municipal and European elections, diplomatic protection in third countries, and a right of petition.
[45] C-85/96 *Maria Martinez Sala v Freistaat Bayern* [1998] ECR I-2691.
[46] Siofra O'Leary, 'Putting Flesh on the Bones of EU Citizenship', (1999) 24 EL Rev 68.
[47] The reach of non-discrimination is expressed as 'within the limits of the powers conferred by [this Treaty] upon the Community' rather than 'within the scope of application of this Treaty'.

needs to come within the scope of European law *ratione materiae*. In other words, one still has to show that a 'European right' is at issue. But given the increasing competence of the European Union in the field of economic activity, education, training and employment, given a willingness to engage in expansive definitions of the same, and given that there is hardly an aspect of the law of religious associations which does not raise questions of religious discrimination (not to speak of sex or sexual orientation), this could be seen as *carte blanche* for European regulation in those fields.[48]

In short, the easy solution to the problem of regulating religious associations, that is, the idea that one can leave it up to national legal systems acting wholly outside the competence of the European institutions, is already mistaken, and it is likely to become increasingly untrue as the European Union deepens politically and legally.

III. The privileges and exemptions of religious associations

There is a strand within continental jurisprudence which refuses to accept that civil liberties can be threatened by general laws.[49] A general law is one which has some rational purpose not intrinsically connected with the activity it burdens. The problem is that the obligations created by the general law may be excessively burdensome in the light of the distinctive features of some regulated activities. It is the hallmark of a mature fundamental rights jurisprudence that it recognises the need to assess the proportionality of individual instances of regulation, rather than simply the justifiability-in-principle of laws. The mere fact that restrictions on rights are found in general laws is thus not conclusive.

The theory of general laws is particularly dangerous in the European context, since in spite of the formal commitments noted at the start of this paper, the values which operate within the scope of European law tend to be narrowly focused on the creation of a social market.[50] Recent developments have stressed non-discrimination in an individualist sense. If European law is to regulate religious associations fairly, it must also take seriously its professed commitment to the claims of religious liberty and community as well. This means recognising the possibility that rationally-based laws which serve the economic interest may be excessively burden-

[48] The background to Article 13 EC and the difficulties surrounding its future impact are well explored in Mark Bell, *Anti-Discrimination Law and the European Union* (Oxford: OUP 2002). Mark Bell identifies a tension between a limited 'market integration' model of social policy and a more ambitious 'social citizenship' model. On either account there will be overlaps of the religious and the economic; obviously, the latter model contains more potential for conflict.

[49] See Robert Alexy (tr. Julian Rivers), *A Theory of Constitutional Rights* (Oxford: OUP 2002), pp 206-210.

[50] See e.g. the critiques in Jason Coppel and Aidan O'Neill, 'The European Court of Justice: taking rights seriously?' (1992) 12 Legal Studies 227; Gráinne de Búrca, 'The Language of Rights and European Integration' in Shaw and More (eds.), *New Dynamics of European Integration* (Oxford: Clarendon Press, 1995).

some on religious associations. It leads to a strategy of privilege and exemption.

Religious associations are privileged by European law when they receive special protection in circumstances where they are vulnerable in the single market. Thus advertising is not permitted to disrupt the public service broadcasting of a religious service.[51] Member States may choose not to register as trade marks symbols with special significance, in particular religious symbols.[52] Into the category of privilege as protection we can also include several provisions which permit the combatting of the dissemination of religious hate speech, such as can be found in the list of legitimate state restrictions on Information Society services.[53]

However, the more interesting form of special treatment is by exemption. Religious associations may in principle fall within the scope of European law and be subject to Community obligations, but Member States are given the freedom to exempt them from its requirements. Admittedly, religious associations are not the only bodies treated in this way; the class of exempted persons and activities may be quite wide. But at times it is also quite narrowly focused on the religious.

An early, broad and straightforward example of this (in the light of traditional attitudes to priesthood, or its equivalent) is provided by Directive 76/207/EEC on equal treatment of men and women in employment, Article 2(2) of which states:

> This Directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor.

Other exceptions can be found scattered across the range of European law. For example, mobile churches are exempt from vehicle harmonisation requirements under Directive 2001/85/EC along with other vehicles intended solely for use when stationary, such as mobile libraries and hospitality units.[54] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society provides that Member States may make exceptions to reproduction and communication rights for 'use during religious celebrations'.[55] And Article 13 of the Sixth VAT Directive contains a series of public interest exemptions, including certain 'supplies of staff by religious or philosophical institu-

[51] Directive 89/552/EEC (amended by Directive 97/36/EC), art 11(5), 1997/L 202/60.
[52] Directive 89/104/EEC (First Trade Marks Directive), art 3(2)(b), 1989/L 40/1.
[53] See e.g. Directive 2000/31/EC on e-commerce, 2000/L 178/1, art 3(4)(a)(i)–(iii).
[54] 2002/L 42/1, Annexe 1, paragraph 1.3.2.
[55] 2001/L 167/10, article 5(3)(g).

tions for medical, welfare, child protection and educational purposes with a view to spiritual welfare.'[56] The current campaign by the Church of England to achieve reduced rate VAT on conservation and restoration work would require a further similar amendment to the Directive.[57]

There are various justifications for exempting religious associations in respect of economically relevant activity. They are generally non-profit-making, they fulfil valuable public functions on slender resources, they act as trustees for a cultural heritage, both physical and moral, and above all they may have an internal ethic at odds with that of the majority of society. But a general strategy of exemption also raises problems. First, it can be over-inclusive. For example, the complete removal of religious ministers from the scope of European employment law may be justified in some respects, but not in others.[58] Exemption—as a general strategy—tends to make the exempted domain entirely law-free. From a European perspective, the national legal system can be trusted to fill the gaps, but to the extent that European law aspires, in some areas at least, to provide complete regulation, and certainly as the European Union expands into a fully-fledged normative system concerned with the social and cultural well-being of all its citizens, the creation of a 'law-free' domain is inappropriate.

Furthermore, the way in which religious associations have been privileged or exempted by European law hitherto is politically problematic. It usually takes the form of an *option* for Member States, so religious associations which feel threatened by proposed regulation have to campaign twice over—once at European level to gain the potential exemption, and again at national level to get the Member State to make use of it. It is hardly desirable to make minorities fight twice over for their rights. There may be ways in which, from a European perspective, national laws *ought* to be accommodating religious associations, in which case European law should be granting them rights or removing them from its scope, not simply creating possibilities.

Almost inevitably then, there is pressure for relatively detailed modifications of what are otherwise justifiable schemes of European regulation for religious associations acting within the scope of European law, which take account of their distinctive religious ethos, but which do not deny the Rule of Law by removing them entirely from legislative oversight. In short, what seems to be needed is a commitment to legal pluralism.

[56] Directive 77/388/EEC 1977/L 145/1.
[57] See Written Question E-1976/98 by Graham Mather to the Commission, 1999/C 31/109. The latest Commission review of reduced VAT rates (22 October 2001) notes but does not comment on the request (at para. 47).
[58] In the absence of any Europe-wide definition of 'employment', this is a result of domestic law conceptions. See also Written Question E-1482/01 by Glyn Ford to the Commission, 2001/C 364 E/136. 'Worker' is defined in European law more widely than 'employee' in domestic law, and as the *Steymann* case (note 35 above) indicates, clergy may be 'workers' for some purposes.

IV. Substantive Pluralism

For the purposes of this paper, legal pluralism can be divided into substantive and participatory aspects. Substantive pluralism refers to those situations in which the legal rules governing the activities of religious associations differ according to the nature of the association. In turn it can be divided into public and private aspects, depending on whether one is concerned with the fulfilment of public functions by bodies with a religious ethos, or whether one is concerned with the regulation of internal practices. Participatory pluralism refers to the involvement of religious associations in governance. Substantive pluralism will be considered first.

Within the Member States of the European Union, various public functions may be fulfilled by religious bodies. One can think of examples within family law (regulation of marriage and the care of children), education (schools and colleges), healthcare (confessional hospitals and hospices) and other social services. There are few specifically European Union public functions, largely because the Union lacks its own executive branch, with perhaps the exception of the distribution of development aid to third countries. This makes use of NGOs, which can have their own priorities and purposes, including religious ones.[59] They may be church-based, so long as they satisfy the criteria for the receipt of European funds, which include non-discrimination on grounds of religion in the granting of aid.[60] In addition, some instances of national-level pluralistic approaches to public functions are reflected in European law. Two examples to cite here come from marriage and tax law respectively. The decisions of ecclesiasti-

[59] The European Office for Emergency Humanitarian Aid (ECHO) has over 200 non-governmental partners, including many church-based ones. See http://europa.eu.int/comm/echo/partners/index_fr.htm.

[60] Criteria for acceptance as a partner are set out in Regulation 1257/1996, 1996/L 163/1. Article 7 provides:

> 1. Non-governmental organizations eligible for Community financing for the implementation of operations under this Regulation must meet the following criteria:
> (a) be non-profit-making autonomous organizations in a Member State of the Community under the laws in force in that Member State;
> (b) have their main headquarters in a Member State of the Community or in the third countries in receipt of Community aid. This headquarters must be the effective decision-making centre for all operations financed under this Regulation. Exceptionally, the headquarters may be in a third donor country.
> 2. When determining a non-governmental organization's suitability for Community funding, account shall be taken of the following factors:
> (a) its administrative and financial management capacities;
> (b) its technical and logistical capacity in relation to the planned operation;
> (c) its experience in the field of humanitarian aid;
> (d) the results of previous operations carried out by the organization concerned, and in particular those financed by the Community;
> (e) its readiness to take part, if need be, in the coordination system set up for a humanitarian operation;
> (f) its ability and readiness to work with humanitarian agencies and the basic communities in the third countries concerned;
> (g) its impartiality in the implementation of humanitarian aid;
> (h) where appropriate, its previous experience in the third country involved in the humanitarian operation concerned.

cal courts in matrimonial cases under Concordats concluded between Italy, Spain and Portugal and the Holy See are recognised throughout the Union.[61] Some European states collect tax on behalf of churches and religious communities. This is reflected in exemptions from data protection restrictions where national officials hold data on religious affiliation for tax-raising and other public purposes.[62] Furthermore, debts incurred by churches and religious communities with tax-raising powers are low-risk weighted (that is, they are given the same status as local governments) for the purposes of calculating the solvency ratios of credit institutions.[63]

However, the more interesting examples concern aspects of European law in which modifications have been made to take account of the concerns of religious associations in their internal activities. Here we can note two brief examples: data protection and wine labelling; and two extended examples: meat health and safety, and employment law.

1. Data Protection

Article 8 of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data[64] prohibits the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, and the processing of data concerning health or sex life. Paragraph 2(d) creates an exception for processing carried out in the course of its legitimate activities with appropriate guarantees by a foundation, association or any other non-profit-seeking body with a political, philosophical, religious or trade union aim and on condition that the processing relates solely to the members of the body or to persons who have regular contact with it in connection with its purposes and that the data are not disclosed to a third party without the consent of the data subjects.

Such bodies are not totally exempt from the obligations of data protection, but are permitted to process certain categories of sensitive personal data for their own purposes and under appropriate safeguards for the rights and freedoms of data subjects. This modified regime (which receives no further detailed implementation at United Kingdom national level)[65] is typical of legal pluralism.

2. Wine Labelling

Regulation 3201/90 lays down detailed rules for the description and presentation of wines and grape musts.[66] Article 10 permits recommendations to the consumer concerning the acceptability of the wine for religious purposes. Paragraph 2 continues, 'Recommendations concerning the accept-

[61] See Regulation 1347/2000, 2000/L 160/19, art 40.
[62] Directive 95/46/EC, art 8(1)(2d).
[63] Directive 89/967/EEC (amended by Directive 98/33/EC), art 2(1)(b).
[64] 1995/L 281/31.
[65] Similar wording is used for implementation within the United Kingdom under the Data Protection Act 1998, s 4(3), and Sch 3.
[66] 1990/L 309/1.

ability of a wine for religious purposes may be indicated only if the wine, whether imported or not, may be offered or delivered for direct human consumption in accordance with the provisions of Regulation (EEC) No 822/87, and has been produced in accordance with the special rules laid down by the religious authorities concerned, and those authorities have given their written approval as to such indication. Such recommendations may be indicated only in trade with the religious authorities concerned, except for the terms Kosher wine, Passover kosher wine, Kosher wine for Passover and their translations, which may appear without this restriction if the conditions of the first subparagraph are fulfilled.'

What is interesting about this example is the inclusion of systems of authorisation by religious bodies into the system of European regulation. Civil effect is given to religious acts, albeit within a very narrow scope ('trade with the religious authorities concerned').

3. Meat Health and Safety

Ritual slaughter only became an issue for European policy on the introduction of animal welfare legislation requiring stunning before slaughter in 1974. Article 4 of Directive 74/577/EEC exempted national provisions relating to special methods of slaughter required for particular religious rites. This apparently straightforward exception came under increasing pressure as the internal market developed and the animal welfare lobby grew in strength. In the first half of the 1980s the Commission took the view that the exception was necessary to protect the fundamental rights and freedoms of religious minorities, but that how ritual slaughter was regulated, and indeed whether it was permitted at all, was a matter of public policy to be determined by each Member State. In short, ritual slaughter was exempt and subject to a policy of national diversity.

Even in the 1980s, this view was not strictly correct. Already by 1975, the regularly updated Directive 64/433/EEC on health problems affecting intra-Community trade in fresh meat contained a general prohibition on the post-slaughter inflation of organs, with an exception for ritual purposes, provided that the organ subsequently be removed from Community trade. Directive 83/90/EEC, which amended and consolidated the original Directive, added the requirement that 'evisceration must be carried out immediately and completed not later than 45 minutes after stunning *or, in the case of ritual slaughter, half an hour after bleeding*'.

This all raised some rather tricky questions of European law. For example, could a Member State which only permitted ritual slaughter in designated slaughterhouses for local consumption restrict the import and export of halal or kosher meat? This was precisely the question raised in 1989 when it was announced that a firm planned to open a large-scale halal meat processing plant in Gembloux, Belgium. Certainly the Commission did not know the answer, because at one point it took the view that (assuming compliance with all other Community health measures) the meat should be marketable in other Member States, but shortly

afterwards stated that an import ban would only be impossible in the 'Community without internal frontiers planned for 1992'.

All this became hypothetical in 1993 with the repeal of Directive 74/577/EEC and its replacement with Directive 93/119/EEC, which is the current law. As the Preamble states, part of the background to this was the accession of the European Community in 1988 to the European Convention for the Protection of Animals for Slaughter 1979. Although exempting ritual slaughter from the requirements to stun beforehand, the Directive is significant in two respects. First, ritual slaughter is clearly brought within the scope of European law; secondly it adopts a strikingly pluralistic solution to the question of monitoring compliance:

> . . . in the Member States, the religious authority on whose behalf slaughter is carried out shall be competent for the application and monitoring of the special provisions which apply to slaughter according to religious rites. As regards the said provisions, that authority shall operate under the responsibility of the official veterinarian . . .

In the United Kingdom, this Directive is implemented in the Welfare of Animals (Slaughter or Killing) Regulations 1995, regulations 21, 22 and Schedule 12 of which govern slaughter by a religious method.[67] Part IV of the Schedule establishes a system of dual certification and licensing, in that religious certification is added to the standard scheme under Schedule 1 to the Regulations. In the case of Jewish slaughter, the Schedule creates a rabbinical commission specifically for the purpose of licensing *shochetim*. Although clearly pluralistic in creating a special regime for religious slaughter, English law does not go as far as the Directive in handing responsibility for monitoring compliance over to the religious authorities.

A line of cases, the most pertinent of which in actual subject-matter is the *Hedley Lomas* case, makes it clear that Member States cannot take unilateral action to penalise another Member State which it considers to be failing in obligations to ensure compliance with European law, at least in the absence of clear evidence. As the European Court of Justice pointed out, Member States have to trust each other to carry out inspections. So the impact of Directive 93/119/EEC is clear. Member States must also trust religious associations within other Member States which have been charged with ensuring compliance. Such religious organisations are carrying out European functions with Europe-wide effect.

4. Employment

[67] The Welfare of Animals (Slaughter or Killing) Regulations 1995, SI 1995/731 (amended by the Welfare of Animals (Slaughter or Killing) (Amendment) Regulations 1999, SI 1999/400, the Welfare of Animals (Slaughter or Killing) (Amendment) (England) Regulations 2000, SI 2000/3352, and the Welfare of Animals (Slaughter or Killing) (Amendment) (England) Regulations 2001, SI 2001/3830).

European employment law demonstrates a range of approaches to accommodating the diversity of employment practices. The blanket exemption in the equal treatment of men and women has already been noted. A more nuanced approach can be seen in the Working Time Directive, Article 17 of which permits Member States to derogate from some of the Directive's requirements, so long as they have due regard for the safety and health of workers, in the case of workers officiating in religious ceremonies in churches and religious communities.[68]

However, the principal example of a pluralistic strategy as regards religious associations is Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. This renders unlawful direct and indirect discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation.[69] As originally proposed by the Commission,[70] the Directive contained a general justification for genuine occupational qualifications and a further extremely narrow justification in Article 4(2):

> Member States may provide that, in the case of public or private organisations which pursue directly and essentially the aim of ideological guidance in the field of religion or belief with respect to education, information and the expression of opinions, and for the particular occupational activities within those organisations which are directly and essentially related to that aim, a difference of treatment based on a relevant characteristic related to religion or belief shall not constitute discrimination where, by reason of the nature of these activities, the characteristic constitutes a genuine occupational qualification.

This was curious, because it appeared narrower than the general exception already contained in Article 4(1). Nevertheless, the Economic and Social Committee supported the limited nature of this 'exception', and indeed would have preferred the Directive to be as extensive as the Race Directive[71] which also covers social protection, including social security and health care, social advantages, education, and access to and supply of goods and services which are available to the public, including housing. The Committee of the Regions also wanted to expand the scope of the Directive to cover discrimination in the conferring of benefits on an employee's partner, whether heterosexual or homosexual, and to include an obligation on employers to monitor the composition of their workforce. The European Parliament passed a whole raft of amendments, including an (ultimately unsuccessful) attempt to broaden the scope to cover voluntary and unpaid work as well. However, it also wanted to see

[68] Directive 93/104/EC concerning certain aspects of the organization of working time, 1993/L 307/18.
[69] For a critical discussion, see Simon Calvert and Colin Hart, 'EU Employment Law and Religious Organisations' (2002) 148 Law & Justice 4.
[70] 2000 OJ C 177 pp. 42–46.
[71] Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

the 'religious exception' widened from 'ideological guidance' to cover social work too. The sting in the tail was the express provision that religious associations could only differentiate on religious grounds, not any others.

This led the Commission to reformulate Article 4(2) as follows:

> Notwithstanding paragraph 1, the Member States may provide that in the case of public or private organisations based on religion or belief, and for the particular occupational activities within those organisations which are directly and essentially related to religion or belief, a difference in treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or the context in which they are carried out, a person's religion or belief constitutes a genuine occupational requirement. This difference of treatment may not, however, give rise to any discrimination on the other grounds referred to in Article 13 of the EC Treaty.

It was still not clear why this paragraph was necessary, particularly in the light of the opening words. However, much more problematic now was the reference to Article 13 of the EC Treaty, which of course includes sex as a suspect criterion. Was an exclusively male priesthood about to become contrary to European law?

Article 4(2) had caused widespread concern across the European Union, as is amply demonstrated in the mangled text that finally emerged onto the statute book:

> Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.
>
> Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

The last paragraph might be considered adequate in itself, were it not for the weasel-word 'thus', which turns what would otherwise be a rule into a description of a rule. This strategy of legislating by implication is reasonable enough in the preamble (see, for example, paragraph 5, which states baldly that the Directive does not prejudice freedom of association); it is hardly appropriate in the law itself. In fact, what we find in Article 4 is several distinct normative statements, and it is an open question whether they express the same norm.

In short, the Equal Treatment Directive is flawed both from a formal perspective, in failing to clarify adequately the circumstances in which differential treatment or differential consequences are justified, and from a substantive perspective in failing to implement the relevant underlying principles in this area. This is based ultimately on a failure to understand the nature and limits of equality rights.

Implementation within the United Kingdom was accompanied by widescale consultation and lobbying. The end result has been a set of regulations which achieve much greater clarity than the Directive, and which for the most part achieve a reasonably balanced pluralistic response to the problem. The Employment Equality (Religion or Belief) Regulations 2003[72] outlaw direct and indirect discrimination in employment and vocational training on the grounds of religion or belief. They cover not just employment in the narrow sense, but contract workers and office-holders as well, thus bringing clergy within their scope.[73] Regulation 7 sets out two types of exception: a general exception where 'being of a particular religion or belief is a genuine and determining occupational requirement' and 'it is proportionate to apply that requirement in the particular case'; and a specific exception where an employer has 'an ethos based on religion or belief, and, having regard to that ethos and to the nature of the employment or the context in which it is carried out' 'being of a particular religion or belief is a genuine occupational requirement for the job' and 'it is proportionate to apply that requirement in the particular case.' The specific exception is supposedly slightly broader in that it does not require being of a particular religion or belief to be a 'determining' characteristic of the job. It simply has to be a 'genuine requirement'. But the Explanatory Memorandum suggests that the employer must still show that the religion or belief is a *requirement*, and not just one of many relevant factors.[74] So the distinction is hard to grasp.

Regulation 7 of the Equal Treatment (Sexual Orientation) Regulations

[72] Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660, in force 2 December 2003.
[73] See the Explanatory Memorandum, paragraph 10. Unusually—but in my view correctly—the Memorandum assumes that ministers of religion generally are office-holders. Only if the appointment of a minister is accompanied by a lack of intention to create legal relations will the job be outside the scope of the Regulations.
[74] See paragraph 24.

2003[75] has a very similar structure, with a general exception on the same terms as for the Employment Equality (Religion or Belief) Regulations 2003 and a specific exception, this time for 'organised religion'. However, the requirement related to sexual orientation does not have to be proportionate, simply 'so as to comply with the doctrines of the religion' or 'because of the nature of the employment and the context in which it is carried out, so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers'. It would seem to follow that an organisation which has an ethos based on religion or belief, but which is not itself an organised religion, may not discriminate on grounds of sexual orientation. However, the practical identity between the general and the specific exceptions in the Employment Equality (Religion or Belief) Regulations 2003 would imply that the general exception in the Equal Treatment (Sexual Orientation) Regulations 2003 is just as wide. Where there is a genuine, determining and proportionate occupational requirement that a person be of a particular sexual orientation, the organisation may lawfully insist on it. In any case, it is not clear that an organisation requiring (as part of its ethos) complete celibacy or chastity (i.e. sexual activity within lawfully recognised marriage alone) is discriminating on grounds of sexual orientation anyway.[76]

The relatively detailed and prescriptive approach of the Equal Treatment Directive should be contrasted with Article 3(2) of Directive 2002/14/EC establishing a general framework for informing and consulting employees.[77] This provides that:

> In conformity with the principles and objectives of this Directive, Member States may lay down particular provisions applicable to undertakings or establishments which pursue directly and essentially political, professional organisational, religious, charitable, educational, scientific or artistic aims, as well as aims involving information and the expression of opinions, on condition that, at the date of entry into force of this Directive, provisions of that nature already exist in national legislation.

One wonders whether this is evidence of burnt fingers in the Commission!

V. Participatory Pluralism

As already indicated, debate about the role of religious associations in the European Union has focused largely on procedural aspects, what could broadly be considered the contribution of religious associations to governance. This is commonly justified by appeal to their special expertise or

[75] Equal Treatment (Sexual Orientation) Regulations 2003, SI 2003/1661, in force 1 December 2003.
[76] This depends on whom you compare an active homosexual applicant with. The Equal Treatment (Sexual Orientation) Regulations 2003, reg 3(2), simply states that 'a comparison . . . with . . . another person . . . must be such that the relevant circumstances in the one case are the same, or not materially different, in the other'. Of course, that begs all the questions.
[77] 2002 OJ L 80, pp 29–34.

particular views on ethical and social matters which for various reasons are not being reflected in existing democratic processes, or more generally on the grounds that their involvement can enhance the legitimacy of European institutions. Once one accepts that pluralistic solutions to problems of religious regulation are appropriate at times, the significance of procedural participation is increased. A role for these associations is indicated not simply because of their contribution to good governance generally, but also because at times their legal interests are particularly at stake, and a difficult judgment needs to be made as to how to balance the underlying values giving rise to the need for regulation with the values of religious liberty and community.

The first formal recognition of the involvement of civil society organisations in governance can be found in Declaration no. 23 appended to the Maastricht Treaty, which emphasises the importance of co-operation between the European Community and charitable associations and foundations as institutions responsible for welfare establishments and services. A further important milestone can be found in the 1997 Commission Communication on 'Promoting the Role of Voluntary Organisations and Foundations in Europe'.[78] This was based on a comparative survey of the voluntary sector in the United Kingdom, France, Germany and Italy conducted by Johns Hopkins University, Baltimore. Of course, the focus was slightly different from religious associations, in that it deliberately excluded religious congregations in the narrow sense (along with political parties and trades unions). At the same time, it recognised that many voluntary organisations have a religious motivation. Voluntary organisations were found to be engaged in broadly four areas: service delivery, advocacy, mutual aid, and resource and co-ordination. Their immense economic, social and political importance was stressed. The Communication concluded with a number of recommendations at all levels. At European level these included systematic dialogue and partnership, higher profile and recognition, training programmes for officials of voluntary organisations, assistance in finding European partners and networking, and easier access to sources of finance.[79]

In 1999, the Economic and Social Committee published an opinion on 'the role and contribution of civil society organisations in the building of Europe'.[80] This was a valuable tidying-up exercise, which attempted to give more precision to the increasing number of rather unfocused calls for greater involvement of 'civil society' in European affairs. While eschewing a simple definition, it identified five groups of 'players' among civil society organisations: labour-market players, organisations representing social and economic players, NGOs committed to a common cause: environ-

[78] COM/97/0241. See also 'Building a stronger partnership', COM(2000) 11.
[79] In 1997, a new budget line (B3-4101) had already been created to promote co-operation with NGOs and other voluntary sector organisations and to strengthen their capacity to engage in civil dialogue at European level. See also Written Question E-1193/01 by Robert Goebbels to the Commission, 2001/C 364 E/56.
[80] 1999/C 329/10.

mental, human rights, consumer, education, welfare etc., CBOs (community-based organisations, i.e. grassroots member-oriented groups), and religious communities. This statement has subsequently been adopted in Commission proposals affecting 'civil society'. Significantly, the Economic and Social Committee cast itself as the obvious forum within which these groups could be represented. It argued that people have multiple identities, and legitimacy requires a range of participatory structures. If the European Parliament expresses the identity of Europeans as 'national citizens', then the Committee represents them as members of civil society organisations. However, it saw the development of this role in terms of increased co-operation with the other European institutions, and greater contacts with organisations (through hearings, round tables and expert contributions) rather than through revised membership of the Committee itself. Nevertheless, the new Article 257 EC set out in the Treaty of Nice replaces the words 'various categories of economic and social activity', with 'various economic and social components of organised civil society'.

This brings us to the Commission's recent White Paper on Governance.[81] This wide-ranging document also recognised the important role of civil society and the particular contribution of churches and religious communities. It called for a 'structured channel for feedback, criticism and protest' and recommended a code of conduct for consultation which would identify responsibilities, improve accountability, enhance dialogue and contribute to the openness of organised civil society. Those final words are interesting, because they indicate a desire on the part of the Commission to subject civil society actors to the same principles of good governance as itself. The commitment to consultation has since then already been developed by the creation of the CONECCS database[82] and the consultation document, 'Towards a reinforced culture of consultation and dialogue'.[83] The CONNECS database contains information both about formal consultative bodies, and also about civil society organisations operating at a European level. There are as yet no formal consultative bodies with religious dimension, but a dozen or so organisations are listed on the other self-nominated database.[84]

[81] COM(2001) 428, 2001/C 287/01.
[82] http://www.europa.eu.int/comm/civil_society/coneccs/index.htm
[83] COM(2002) 277 final (5 June 2002).
[84] These include the Catholic European Study and Information Centre; Centre Europeen Juif D'information; Church and Society Commission of the Commission of European Churches; Churches' Commission for Migrants in Europe; Comite Europeen Pour L'enseignement Catholique; European Humanist Federation; Europaeischer Kartellverband Christlicher Studentenverbaende; Federation of Catholic Family Associations in Europe; Federation of European Catholic Universities; International Association of Christian Counselling and Charitable Prison and Rehabilitation Ministries; International Catholic Migration Commission; International Federation of Catholic Parochial Youth Movements; Jeunesse Etudiante Catholique Internationale - Coordination Internationale - Mouvement Internationale D'etudiantes Catholiques.

Among the religious civil society organisations responding to the developments of the last few years, the Church and Society Commission of the Conference of European Churches has been particularly active.[85] Although broadly supportive, in a series of responses and submissions a number of concerns emerge. At a general level, there is a concern that recent developments should be sufficiently firmly anchored in European law, perhaps by constitutional (or treaty) recognition. These include a recognition of the religious and spiritual heritage of Europe, the distinctive role of churches and religious communities and the principle of national diversity in church-state relations. More specifically, the need for different laws for non-profit organisations is stressed, but at the same time there is a concern about over-detailed regulation at a European level. The fact that there is no simple solution to the role of religious associations in decision-taking structures is noted—in particular it is pointed out that a reconstitution of the Economic and Social Committee would not by itself be adequate. Instead, in a recent submission to the Group of Policy Advisors of the European Commission, the following three-pronged approach is suggested:

— a pre-legislative consultation procedure
— structured dialogue of seminars, working sessions and occasional high-level meetings
— liaison office in the Secretariat-General of the Commission.

Finally, concern is expressed about the independence and potential co-option of religious associations by European institutions.

Thus, as Article 51(3) of the draft Constitution affirms, there is clearly a movement towards greater participation by religious associations in governance, but the end-point of this development is far from clear.

VI. Conclusion: subsidiarity, regulation or proportionate diversity?

If the European Union were simply an economic entity, keeping religion and economics separate with occasional exceptions for religious associations experiencing hardship as a result of increased regulation would at least be a plausible strategy. Religious regulation might seem a classic candidate for the operation of the principle of subsidiarity: something in almost all cases better done at national level. But subsidiarity cannot solve all the problems here. To start with, the doctrine does not apply within the scope of the Community's exclusive competence (however broadly or narrowly that is defined),[86] and as we have seen, the religious dimension can emerge even in the most central areas of European Union policy. Even outside the scope of the Community's exclusive competence it is not clear

[85] Many of the CEC responses have been drafted in consultation with COMECE (Commission of (RC) Bishops' Conferences in the EU), APRODEV (Association of World Council of Churches-related Development Agencies in Europe), CCME (Churches' Commission for Migrants in Europe) and Eurodiaconia.
[86] Article 5 EC. On the extent of 'exclusive competence', compare the views of A G Toth and J Steiner as set out in Craig and De Burca, *European Union Law* (3rd edn), pp 133-134.

that framework directives and other forms of 'softer' law-making[87] necessarily leave Member States with the discretion they need in this area.

Legal pluralism takes as its starting point the recognition that liberty is collective as well as individual, and that it requires legal structuring.[88] It cannot simply be left to a domain outside law. Furthermore, the legal structuring necessary for the pursuit of collective liberty cannot be achieved by the traditional techniques of private law alone. Religious associations fulfil public functions as well and rightly have a voice in processes of good governance. As this paper has suggested, legal pluralism is increasingly recognised as the appropriate European policy towards religious associations. This pluralism is a double pluralism: there is a diversity of national regimes to start with, and on top of that, a recognition that European law must be different for religious associations.

At the same time, there is a deep uncertainty about how to achieve pluralism. On one hand, one can conceive of a model of increasing European regulation. The work of accommodating religious associations could be done at European level, with detailed regimes requiring the input of religious associations. But for all the debate about dialogue and consultation, the relationship with religious associations remains informal. If this model is to work, participation in governance by religious associations at a European level has to be much more formal than it currently is. Furthermore, the debacle over the Equal Treatment Directive indicates just how tricky and controversial the right level of accommodation is. It might well herald a return to a more cautious policy.

One might therefore think that the correct basic approach was that reflected in the European Court of Justice's reasoning in its more expansive phase of the Sunday trading litigation. Member States could lay down regulations in accord with 'national or regional socio-cultural characteristics' so long as the 'restrictive effects on Community trade which result therefrom do not exceed the effects intrinsic to rules of that kind'.[89] There has to be some trade-off between the values of the internal market and the traditions of Member States. If the European Union is to honour its commitment to religious liberty, equality, community and diversity, it should be recognised as a *general principle* that in implementing and enforcing European law Member States are free to take proportionate account of the distinctive needs and traditions of religious associations, without needing any express authorisation in the relevant legislation. Failure to accommodate appropriately at this level may put the state in question in

[87] On this application of subsidiarity, see the Protocol on the Application of the Principles of Subsidiarity and Proportionality attached to the Treaty of Amsterdam, especially paragraph 7.

[88] See my essays, 'From Toleration to Pluralism: Religious Liberty and Religious Establishment under the UK Human Rights Act 1998' in Rex Ahdar (ed) *Law and Religion* (Aldershot: Ashgate, 2000), pp 133-161; and 'Religious Liberty as a Collective Right' in Andrew Lewis and Richard O'Dair (eds) *Law and Religion* (Oxford University Press, 2001), pp 227-246.

[89] See Case 145/88 *Torfaen Borough Council v B & Q plc* [1989] ECR 3851.

breach of its obligations under the European Convention on Human Rights.

However, one has to move beyond the mere recognition of an abstract right to accommodate religious associations acting within the scope of European law. The problem with the test set out by the Court in the Sunday trading cases was that it was too general to give any practical guidance.[90] Furthermore, states may be wary of appearing to fail to implement Directives adequately. Where possible, then, European law should itself identify the range of possible solutions Member States could legitimately adopt. A reasonable pluralism of legal regulation will only be achieved through an ongoing commitment to a three-way dialogue between institutions of the European Union, Member States and representatives of religious associations. This dialogue must take place not only in the light of a general commitment to ensuring that the logic of economics does not stifle the values of religious liberty, equality and community, but also in recognition of the need to produce clear and workable solutions in which those values are both expressions of an underlying political orientation and also grounded in the realities of legal regulation.

[90] This is amply evidenced by the sequence of references which followed *Torfaen*, seeking further clarification. See Craig and De Burca, *European Union Law* (3rd edn), p 645.