

ARTICLE

A Double Conflict of Laws: The Emergence of an EU “Staatskirchenrecht”?

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Abstract

The law on state-church relations is no longer exclusively a national concern of the EU Member States. Despite supposedly strict neutrality clauses in the primary law of the EU and rigid statements—*inter alia*—by the German Federal Constitutional Court, it is safe to assume the formation of a supranational EU law on religion, which also touches upon the status of the churches and religious associations. This becomes obvious when state-church relations in Europe are reconstructed as a double conflict of laws that comprises interlocked conflicts between ecclesiastical law and worldly law, as well as between EU law and national law. Within the triangular relationship of these different legal spheres, EU law steers state-church relations towards the non-discrimination principle. The controversy in German law on religion between the proponents of a collective, institutionalist understanding (classic “Staatskirchenrecht”) and advocates of a rather fundamental rights-centered, individualist reading of the Constitution (“Religionsverfassungsrecht”) hence needs to be reconsidered. EU law calls for including yet a third paradigm into the debate: Equality.

Keywords: State-church relations; law on religion; antidiscrimination; EU law; constitutional identity

A. Introduction

Conflicts of competence have been a highly contentious issue in the constitutional law of the European Union (EU). The law on religion, especially in matters of state-church relations (“Staatskirchenrecht”), has, however, been exempted from these controversies until very recently. Member States seemed to have the exclusive concern for state-church relations, whereas the EU supposedly had no jurisdiction on the official status of churches and religious associations. State-church relations were considered too close to the respective national histories of the Member States and, hence, national constitutional laws were perceived as too manifold for any attempts of European legal harmonization, as discussed in Section B. Within the last two and a half years, however, the Court of Justice of the EU (CJEU) has released a series of judgments that severely challenge the traditional understanding of the EU as merely a neutral observer of state-church relations. On the contrary, these judgements testify to the emergence of an EU constitutional law on state-church relations. This article will argue that this development is best reconstructed as a double conflict of norms, which partially re-opens the debate on the supremacy of EU law over domestic law, analyzed in Section C. In substance, these EU law influences will push the continent’s constitutional law on religion from a paradigm of religious freedom towards a paradigm of non-discrimination, which is looked at in Section D.

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B. Constitutional Identities as a Limit to Integration?

At the outset of European integration, an EU constitutional law on religion seemed highly improbable. This is particularly true for its collectivist and institutionalist aspects, which are concerned with the relation between the churches and the government. The early European Treaties did not contain any reference to religion or churches. The European project was first and foremost an economic project.¹ Thus, matters of belief in the broadest sense were generously left out, although in the early years of European economic integration as much as today, churches proved to be important economic actors in many Member States.²

Not later than with the “invention” of an EU doctrine of fundamental rights, however, religion has become a genuine matter of European law, too. In this context, religion forms the substance of an individual right to freedom.³ Every Member State constitutionally recognizes individual religious freedom. Moreover, Article 9 of the European Convention on Human Rights includes a right to freedom of thought, conscience, and religion. Thus, the European Court of Justice, which began to derive fundamental rights from these two main sources, opened the way for an EU law on religion. Ever since the introduction of Article 10 of the EU Charter of Fundamental Rights and its recognition as an integral part of the European primary law through Article 6(1) of the Treaty on European Union (TEU), even a genuine constitutional document of the EU itself explicitly refers to religious freedom.

The other side of the law on religion—state-church relations—has not been a motive in the process of a constitutionalization of the EU for the longest time, however. To the contrary, church-state relations are a direct and profound expression of the different national histories in Europe.⁴ Every Member State exhibits a very specific configuration concerning the official status of churches and other religious associations. Therefore, when scholars of comparative constitutional law assign the different EU Member States to three types of organizational models, this can only be a very rough approximation.⁵

Countries like France or the Netherlands range on one side of the spectrum where religion is perceived as a purely private matter. Accordingly, French *laïcité* calls for a strict separation of government and religious institutions.⁶ Nevertheless, even in France, there is a certain degree of cooperation between the state and the churches, which includes certain tax reductions for the benefit of religious associations as well as a governmental system of prison and military chaplaincy, for example.⁷

On the other side of the spectrum, Denmark and England⁸ have an official state-church. Government and church institutions are closely intertwined.⁹ Queen Elizabeth serves as the “Supreme Governor” of the Church of England; at the same time, the English monarch must be a member of the Anglican Church. *Ex officio*, the archbishops of Canterbury and York, as well

¹Herman Reichold, *Verfassungsrechtliche und europarechtliche Fragen der Kirchenautonomie im Arbeitsrecht*, in STAAT UND RELIGION 111, 115 (Katharina Ebner et al. eds., 2014).

²For Germany, see SABINE BERGHAHN ET AL., EVALUATION DES ALLGEMEINEN GLEICHBEHANDLUNGSGESETZES 59 (2016).

³For an early, indirect reference to religious freedom, see Case 130/75, Prais v. Council, 1976 E.C.R. 1589, paras. 10–11. Cf. Ingolf Pernice, *Religionsrechtliche Aspekte im Europäischen Gemeinschaftsrecht*, 32 JURISTENZEITUNG 777 (1977).

⁴ANTJE VON UNGERN-STERNBERG, RELIGIONSFREIHEIT IN EUROPA 7 (2008); STEFAN MÜCKL, EUROPÄISIERUNG DES STAATSKIRCHENRECHTS 75 (2005).

⁵MÜCKL, *supra* note 4, at 387–92; AJ Nieuwenhuis, *State and Religion, a Multidimensional Relationship: Some Comparative Law Remarks*, 10 INT’L J. CONST. L. 153 (2012).

⁶Yoan Vilain, § 3 *Verfassungsprinzipien*, in FRANZÖSISCHES UND DEUTSCHES VERFASSUNGSRECHT 45, 68 (Nikolaus Marsch et al., eds., 2015).

⁷Brigitte Basdevant-Gaudemet, *Staat und Kirche in Frankreich*, in STAAT UND KIRCHE IN DER EUROPÄISCHEN UNION 171, 194–97 (Gerhard Robbers, ed., 2nd ed. 2005); PETER UNRUH, RELIGIONSVERFASSUNGSRECHT 329 (2012).

⁸When I wrote this text, England was still a Member State of the EU. For sentimental reasons, I decided to hold on the example of England, even if Britain may sadly have left the Union by the time you are reading this piece.

⁹Cf. STEPHEN V. MONSMA & J. CHRISTOPHER SOPER, THE CHALLENGE OF PLURALISM: CHURCH AND STATE IN FIVE DEMOCRACIES 140 (2009).

as twenty-four other bishops, are permitted to sit and to vote in the House of Lords. The cases of Germany, Spain, Italy, and Belgium, amongst others, range somewhere in between, for there is neither an official state church nor a strict separation between religious associations and the government. In Germany, for instance, several different churches and religious associations have been accorded the status of public corporations. They may levy taxes, receive public benefits, and exercise certain public functions.¹⁰

These differences are anything but incidental. Arguably, they constitute key components of respective national identities of the EU Member States¹¹ as they are closely linked to specific “constitutional moments”¹² in each country. This is most obvious in the case of France: The very skeptical notion of French *laïcité* can be traced back to the revolution of 1789, which was directed against the worldly powers of the first estate—the clergy—as much as against the privileges of the nobility.¹³ The establishment of the Anglican Church as a state church in England must also be regarded as an act of national self-assertion, albeit with the opposite result. When Pope Clement VII refused to nullify King Henry VIII’s marriage with Catherine of Aragon, the English King broke with Rome and made himself head of the Church of England, which marked the beginning of the English Reformation.¹⁴

Finally, modern statehood in Germany is a direct result of the fierce religious civil wars, for the Augsburg and the Westphalian Peace Treaties of 1555 and 1648, respectively, opened a power vacuum that, henceforth, could only be filled by a worldly reign.¹⁵ State-church relations in Germany have ever since been subject to important constitutional compromises: Not just between Catholics and Protestants, but also between Napoleon’s France and the late Holy Roman Empire,¹⁶ between Social Democrats and Conservatives of the Weimar Republic,¹⁷ and between the delegates of the Parliamentary Council after World War II.¹⁸

This very brief glimpse into modern European history may suffice to illustrate the point: State-church relations are deeply rooted in each Member State’s constitutional evolution. The Federal Constitutional Court of Germany even speaks of state-church relations as a matter of German “constitutional identity”: When it determined a list of five subject areas that it deemed most essential to the German Basic Law, state-church relations was one of them.¹⁹ The Court’s remarks on the constitutional identity, however, are not merely a descriptive characterization of German core constitutional law.²⁰ Rather, they have very tangible legal consequences. The constitutional identity topos stems from the Court’s central decision on EU (con-)federalism. The court held that the constitutional identity precisely marked the limits of any supranational integration in view of the eternity clause of Article 79(3) of the Basic Law: This eternity clause protects—*inter alia*—Germany’s commitment to democracy.²¹ According to the Court, Germany would no

¹⁰MÜCKL, *supra* note 4, at 220–312.

¹¹Christian Waldhoff, *Kirchliche Selbstbestimmung und Europarecht*, 58 JURISTENZEITUNG 985 (2003).

¹²Cf. BRUCE ACKERMAN, *WE THE PEOPLE*, VOLUME I: FOUNDATIONS (1993).

¹³The strict separation between church and state was not established until 1905. The French revolutionaries had, however, cut back church autonomy in favor of a Civil Constitution of the Clergy as early as 1790. See Hans Maier, *Religion, Staat und Laizität—ein deutsch-französischer Vergleich*, 58 ZEITSCHRIFT FÜR POLITIK 213, 216 (2011); Basdevant-Gaudemet, *supra* note 7, at 172–73.

¹⁴Cf. David McClean, *Staat und Kirche im Vereinigten Königreich*, in *STAAT UND KIRCHE IN DER EUROPÄISCHEN UNION* 603, 607–08, 626–27 (Gerhard Robbers, ed., 2nd ed., 2005).

¹⁵DIETER GRIMM, *RECHT UND STAAT DER BÜRGERLICHEN GESELLSCHAFT* 56–59 (1987).

¹⁶See MÜCKL, *supra* note 4, at 11, for the secularization through the “Reichsdeputationshauptbeschluss” of 1803.

¹⁷For the Weimar constitution-making, see CHRISTOPH GUSY, *DIE WEIMARER REICHSVERFASSUNG* 321–30 (1997).

¹⁸Peter Badura, *Das Staatskirchenrecht als Gegenstand des Verfassungsrechts*, in *HANDBUCH DES STAATSKIRCHENRECHTS DER BUNDESREPUBLIK DEUTSCHLAND* 211, 236–44 (Joseph Listl & Dietrich Pirson, eds., 2nd ed. 1994).

¹⁹Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], June 30, 2009, 123, 267, at 363.

²⁰For a critical account, see Monika Polzin, *Constitutional Identity as a Constructed Reality and a Restless Soul*, 18 GERMAN L.J. 1595 (2017).

²¹Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], June 30, 2009, 123, 267, at 344.

longer be a truly democratic state if the German people did not have the decision-making powers to rule on the core matters that traditionally defined the German Constitution.²² As a result, even a unanimous vote of the constitution-amending legislature cannot effectively transfer authority to the EU in these matters. Thus, from the point of view of German constitutional law, state-church relations must remain a national competence as long as the German people do not give themselves a new constitution.

At first glance, EU primary law seems to be just as rigid in rejecting supranational competences regarding church-state relations. According to Article 4(2) TEU, the EU is committed to “respect[ing] the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional . . .”²³ More specifically, at the instigation especially of the German churches,²⁴ the EU Treaties of Amsterdam of 1997 were complemented by a final protocol which included a “Declaration on the status of churches and non-confessional organizations”. It reads:

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 organizations.

As this declaration did not yet form part of the proper text of the Treaties themselves, its legal effects were limited. It did, however, express the political conviction that the EU should remain neutral as to the different constitutional regimes in the Member States on that matter.

Since the Lisbon treaty reform of 2009, the Amsterdam Declaration even became legally binding, for it was directly incorporated into the Treaty on the Functioning of the EU (TFEU). The first two paragraphs of Article 17 TFEU now have the exact wording as mentioned above, yet they are supplemented by a third paragraph which proclaims, “recognizing their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organizations”.

In summary, the constitutional law of the Member States as well as EU primary law itself seemingly call for a complete neutrality of the EU in state-church relations. Particularly Article 17 TFEU and the case law of some Member States’ constitutional courts apparently point in the same direction when they demand the EU to stay out of at least the institutional aspects of the law on religion.

C. A Double Conflict of Laws

Translating the problem of state-church relations into the language of a conflict of laws, however, demonstrates that, indeed, the emergence of an EU law on state-church relations must be expected since a complete neutrality of the EU is hardly possible even here. This Article will argue that a full withdrawal of the EU from matters of church autonomy would come at prohibitive costs, for it would inevitably undermine core characteristics of European constitutional law as well.

I. First Conflict: Ecclesiastical Law v. Worldly Law

The first conflict of laws that occurs in any configuration of state-church relations in which state and church are not identical is obvious: At first, both ecclesiastical law and worldly law claim for themselves to comprehensively regulate social interactions. When these two laws differ in their valuations, there is a need for rules of collision that determine which legal sphere prevails in a given situation. These rules

²²*Id.* at 363.

²³With regard to an earlier version, see MÜCKL, *supra* note 4, at 413–16.

²⁴*Cf.* BURKHARD JOSEF BERKMAN, KATHOLISCHE KIRCHE UND EUROPÄISCHE UNION IM DIALOG FÜR DIE MENSCHEN: EINE ANNÄHERUNG AUS KIRCHENRECHT UND EUROPARECHT 500–01 (2008).

of collision, again, pertain to just one of the colliding spheres. The other side may, however, tacitly accept the opposite side's claim to final prevalence. Rules of collision may include strict rules of priority that give general precedence to one provision over the other. Moreover, they may call for balancing approaches, which aim for rather situational settlements.²⁵ They must, however, always include a rule of who is to speak the last word.

Despite the huge differences described above, most modern national constitutional orders claim the very last word for themselves. Therefore, they all ultimately tip the scale towards the worldly law. Nevertheless, some constitutional orders grant far-reaching autonomy to the churches by leaving not the theoretical *very last* word, but the practical *last* word to them.

Germany has followed this very path. The central constitutional provision to control state-church relations is Article 137(3) of the old Weimar Constitution, which is incorporated into the present German Constitution through its Article 140. The provision reads:

Religious societies shall regulate and administer their affairs independently within the limits of the law that applies to all. They shall confer their offices without participation of the state or the civil community.

The wording of Article 137(3) of the Weimar Constitution is somehow vague and even ambiguous. Many volumes have been filled in trying to define the notions of “within the limits of the law that applies to all” and the resulting understanding of an “independent regulation and administration of religious affairs”. Consequently, the conflict of religious and worldly norms is mediated not as much by the Constitution itself, but ultimately by the Federal Constitutional Court. The Court has traditionally been quite friendly towards church autonomy, for it has granted wide-ranging regulatory powers to the churches in a variety of issues that touch upon church interests.

Notably, the Federal Constitutional Court has emphasized church autonomy even stronger than the ordinary German courts. In a recent case, a Catholic hospital in Düsseldorf, Western Germany, fired one of its chief physicians—who is Catholic himself—when he divorced and remarried before having his first marriage annulled in accordance to canonic law. The case gives rise to a conflict of ecclesiastical and worldly law. Under canonical law, on the one hand, it is prohibited to remarry as long as the prior marriage has not been properly annulled or dissolved by the church authorities.²⁶ Moreover, Catholic ecclesiastical law expects Catholic employees who work in a Catholic institution to adhere to the law of the Roman Catholic Church. In consequence of disloyalty to religious command, Catholic law even allows for immediate dismissal as a last resort.²⁷ German labor law, on the other hand, considers questions of marriage and divorce to be irrelevant when executing an employment contract. To the contrary, a dismissal like the one in question would have to be rendered invalid, for it does not meet the requirement of “social acceptability” under the Federal Employment Protection Act.²⁸

The German labor courts unanimously resolved this conflict of laws in favor of the latter by ultimately following the assessments of German labor law.²⁹ Interestingly though, the labor courts did so in part with recourse to ecclesiastical law when they considered the claimant's second marriage only a minor disloyalty in view of canonical law. Hence, it held his dismissal to be excessive.³⁰

The employer—the Catholic hospital—thereupon filed a complaint with the Federal Constitutional Court. Unlike the labor courts, the Constitutional Court, in a much-debated

²⁵Cf. ROBERT ALEXY, *THEORIE DER GRUNDRECHTE* 77–87 (1986).

²⁶Canon 1085 Codex Iuris Canonici §§ 1, 2.

²⁷See the Fundamental Order of Ecclesiastical Service [Grundordnung des kirchlichen Dienstes] arts. 5(1), 5(3) (Apr. 27, 2015) and the earlier version of said Order from Sep. 22, 1993, respectively.

²⁸Federal Employment Protection Act [Kündigungsschutzgesetz] §1(1).

²⁹Cf. Bundesarbeitsgericht [BAG] [Federal Labor Court] Case No. 2 AZR 543/10 (Aug. 9, 2011).

³⁰Arbeitsgericht Düsseldorf [Labor Court of Düsseldorf], Case No. 6 Ca 2377/09, *juris de*, at 32 (July 30, 2009).

decision, tipped the scale in favor of canonical law: By referring to Article 137 of the Weimar Constitution, it held that German labor law had to be construed in light of church autonomy and, hence, in light of the respective ecclesiastical law.³¹ In other words: Although the worldly courts shall have the final say, they ought to refer to the church institutions in order to learn *what* to say.

II. Second Conflict: National Law v. EU Law

The classic conflict of law in any multilevel order—be it a federal, a confederal system, or something in between—is the conflict between the different layers of government. The EU is no exception. Such conflicts between the Member States' law and European Law have been a principal constitutional theme since the “invention” of the supremacy of EU law by the European Court of Justice in the early 1960s.

It is obvious that there needs to be some allocation of competences between the EU and Member States in matters of state-church relations as well. What is much less evident, though, is that this entails a full-fledged conflict of norms, even here.³² As this Article has tried to show, the Member States' constitutional laws as well as EU primary law treat state-church relations as a core matter of national jurisdiction.³³ Neither the “constitutional identity” proposition of the German Federal Constitutional Court nor Article 17 TFEU, however, can prevent normative conflicts between EU law and national law. The general prohibition of state aids, for example, has historically been a key instrument in establishing a single European market. Ever since the Roman Treaty of 1957,³⁴ it is even inscribed into the primary law of what was then the European Economic Community. The Member States may not diverge from the strict procedural and material European requirements, as state aids are generally suspected to bring about market distortions. Now, although the law of state-church relations is supposedly of purely national concern, it may come into conflict with said European rules that ban state aids.

Such a case arose just recently when the CJEU had to assess certain tax benefits in favor of the Catholic Church. A Catholic school in the province of Madrid filed for a tax reimbursement when it renovated and expanded its assembly hall.³⁵ Generally, such construction measures are subject to property tax in Spain. The Catholic Church, however, referred to a concordat of 1979 between the Holy See and the Kingdom of Spain, as well as to a corresponding decree of the Spanish treasury that permanently exempts the Catholic Church from having to pay property tax. Because of this conflict of worldly norms, the local Spanish administrative court asked for a preliminary ruling by the CJEU. In particular, it wanted to know whether the claimed tax reimbursement violated the EU law on the prohibition of state aids because the affected school also offered commercial educational programs and, arguably, acted as a private enterprise.

With regard to Article 17 TFEU, the CJEU had two options here. It could either interpret the provision as a strict exemption clause³⁶ and absolve Spain from any additional European restrictions, or it could read Article 17 as an obligation to duly take the respective national peculiarities of state-church relations into account when balancing them against the worldly

³¹Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court] Oct. 22, 2014, 137, 273.

³²HANS MICHAEL HEINIG, DIE VERFASSUNG DER RELIGION 378–82 (2014).

³³See *supra* Section B.

³⁴See Treaty Establishing the European Community art. 92, Aug. 31, 1992, 1992 O.J. (C 224) [hereinafter EEC]; Gabriela von Wallenberg & Michael Schütte, *AEUV Art. 107, in DAS RECHT DER EUROPÄISCHEN UNION; VOL. I: EUV/AEUV 2* (Eberhard Grabitz et al., eds., 59th ed. 2016) (discussing a similar prohibition of state aids which had also been laid down in Article 4 lit. c of the Treaty Establishing the European Coal and Steel Community of 1951).

³⁵CJEU, Case C-74/16, *Congregación de Escuelas Pías Provincia Betania v. Ayuntamiento de Getafe*, ECLI:EU:C:2017:496, Judgement of 27 June 2017.

³⁶Cf. Claus Dieter Classen, *AEUV Art. 17, in DAS RECHT DER EUROPÄISCHEN UNION; VOL. I: EUV/AEUV 3*, 33 (Eberhard Grabitz et al., eds., 53rd ed. 2014) (the author ultimately performing some balancing himself, to be sure).

orders of EU law.³⁷ The CJEU opted for the latter and, arguably, this did not come as a surprise. Time and again, the CJEU's case law is driven by two central concerns. The first is the practical effectiveness, and the second is the unity of EU law.³⁸ With a rigid understanding of Article 17 TFEU, both principles would inevitably be suspended whenever church interests were at play. Tax cuts for business activities of the Catholic Church in Spain would not be in breach of EU law, whereas in other countries, governments could not publicly fund similar businesses. The notion of a prohibited state aid would differ from one Member State to the other. Moreover, such a defragmentation of the law would likely show detrimental effects: Spanish church-owned companies would have a considerable economic advantage over other European companies—yielding exactly the kind of market distortions that EU law wanted to combat in the first place.

It might be objected that, when granting autonomy, a certain defragmentation of the law and, hence, cutbacks of the law's effectiveness are in the very nature of things. Admittedly, the second way of reading Article 17 TFEU—the balancing approach—can have the same effects. Even here, the supremacy of EU law is hampered, for within the scope of Article 17 TFEU, European law needs to be interpreted in the light of the respective Member State's law—and not the other way around. Even here, the result may be a polyphony of twenty-eight variances of EU state-aid law whenever state-church relations are affected, too. Even here, this will harm the single market. The difference, however, is that, institutionally, the CJEU retains a continuing responsibility because it is to the Court itself to supervise the balancing.³⁹ The Court may differentiate as to how much of EU law's supremacy it is willing to give up in a given area of law. Depending on the area of law and the typical interests at stake, it may cushion disproportionate strains and, thus, remain true to its role as a “guardian to the treaties”.⁴⁰ Therefore, a balancing approach does not undermine the position of the CJEU to the same extent as a rigid reading of Article 17 TFEU would irretrievably weaken the Court.

III. Interlocked Conflicts

Finally, both conflicts—the one between worldly and ecclesiastical law as well as the one between national and supranational law—are not isolated from each other. To the contrary, they are closely intertwined, and precisely because of this complex meshing, they cause new tensions in the European legal architecture. National law, EU law, and ecclesiastical law form a perfect triangle, whose three sides may each claim precedence over the others in a given case. A question may be defined in national law as pertaining to the status of the churches. On the one hand, this may break open national legal ties in favor of autonomous assessments of ecclesiastical law. From the European perspective, on the other hand, this does not automatically suspend the supremacy of EU law, which could in turn substantially diminish the autonomous space of ecclesiastical law again. In such a scenario, it is, however, far from clear whether the national side—and the ecclesiastical side—of the triangle will accept such a supremacy of EU law.

Furthermore, this interlock of the laws obviously correlates with a corresponding interlock of institutions. In particular, it gives rise to new conflicts between the national courts and the CJEU.

³⁷Cf. Christian Waldhoff, *AEUV Art. 17*, in *EUV-AEUV KOMMENTAR* 13 (Christian Calliess & Matthias Ruffert, eds., 5th ed. 2016).

³⁸On a more general note, see the vibrant debate on “Constitutional Pluralism,” *inter alia*, Neil Walker, *The Idea of Constitutional Pluralism*, 65 *MODERN L. REV.* 317 (2008); Niels Petersen, *The Concept of Legal and Constitutional Pluralism*, in *INTERNATIONAL TAX LAW: NEW CHALLENGES TO AND FROM CONSTITUTIONAL AND LEGAL PLURALISM* 1, 4–8 (Joachim Englisch, ed., 2016); Neil Walker, *Constitutional Pluralism Revisited*, in 22 *EUR. L. J.* 333 (2016).

³⁹In the preliminary ruling procedure, it is generally the responsibility of the national courts to assess the facts and to balance the interests in a given case. The CJEU may, however, give some—more or less abstract—guidance on how to do the balancing.

⁴⁰Traditionally the European Commission is referred to as the “Guardian of the Treaties.” Nevertheless, it also characterizes the self-conception of the CJEU. Cf. ULRICH HALTERN, *EUROPARECHT: DOGMATIK IM KONTEXT* 27–44 (2nd ed. 2017).

Once more, the case of the remarried chief physician from Düsseldorf illustrates this. Recall that the German Federal Constitutional Court had ordered the labor courts to reconsider the case in view of strong church autonomy.⁴¹ In the hierarchical court system, this is usually where the story ends. The labor court judges might feel offended, but the Constitutional Court says what the law is, and the ordinary courts have to obey. Because the case was not only about a conflict of German law and church law, but also about a clash of church law and EU law, the labor court judges had yet another option of pushing the case back into the fields of worldly law: They submitted the case to the CJEU. In September 2018, the CJEU did indeed back the labor court's position.⁴² In a Grand Chamber judgment, the Court heard the case against a strict standard of EU law rather than adhering to the assessments of German constitutional law and Catholic canonical law. The Court made it clear that it considered the claimant's dismissal in breach of the European non-discrimination principle. The claimant had been treated unequally because he belonged to the Catholic Church, for his non-Catholic colleagues at the hospital are not being fired if they remarry. This difference in treatment cannot be justified, the Court writes, because there was no plausible connection between the claimant's job as a physician and the concept of marriage as promulgated by the Catholic Church. Therefore, the result is a contradiction between the CJEU and the Federal Constitutional Court and the churches; but what makes this contradiction particularly blatant is that all of this occurred in the very same case.⁴³

It was now up to the German Federal Labor Court to resolve this contradiction. Not surprisingly, the labor court followed the CJEU's interpretation of church autonomy.⁴⁴ Systematically, however, it was confronted with three standpoints from three different institutions, all of which claimed to prevail: The Catholic Church insisted on its autonomy in managing its own personnel; the Federal Constitutional Court treated state-church relations as a matter of Germany's "constitutional identity" and refused to tolerate any outside interference; and the CJEU saw no exception of the supremacy of EU law. Theoretically, the case could infinitely go back and forth between the different sides of the triangle as long as none of the legal actors are prepared to compromise.

IV. The European Convention on Human Rights: Yet Another Conflict?

What has been missing so far in this reconstruction of colliding legal spheres is the European Convention on Human Rights ("the Convention"). Does it add yet another conflict to the equation? Although the Convention does not directly address church autonomy,⁴⁵ problems very similar to the ones in *IR v. JQ* can arise, *inter alia*, under its Article 8 (right to privacy), Article 9 (freedom of thought and religion), Article 10 (freedom of speech), Article 11 (freedom of association), and Article 14 (non-discrimination principle). These provisions hence constitute yet another legal layer of the European law on religion. Institutionally, they are backed by a proud and confident European Court of Human Rights (ECtHR).

Both the legal nature of the Convention as well as the case law of the ECtHR in matters of church autonomy, however, do not suggest a third full-fledged conflict of laws that is comparable

⁴¹See *supra* Section C.I.

⁴²CJEU, Case C-68/17, *IR v. JQ*, ECLI:EU:C:2018:696, Judgement of 11 Sept. 2018.

⁴³For an earlier case with similar contradictory judgments of the Federal Labor Court and the Federal Constitutional Court, but with the European Court still leaning to the other side, see Waldhoff, *supra* note 11, at 983–84.

⁴⁴Bundesarbeitsgericht [Federal Labour Court], Feb. 20, 2019, Case 2 AZR 746/14, *IR v. JQ*, press release No. 10/2019, https://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=pm&Datum=2019&nr=21974&pos=0&anz=10&titel=Kündigung_des_Chefarztes_eines_katholischen_Krankenhauses_wegen_Wiederverheiratung. In a parallel case, the Federal Labor Court also sides with the CJEU rather than the Federal Constitutional Court. See Bundesarbeitsgericht, [BAG] [Federal Labor Court] Oct. 25, 2018, Case 8 AZR 501/14, *Egenberger v. Diakonie*.

⁴⁵Note the Court's doctrinal shift in *Hasan & Chaush v. Bulgaria*, App. No. 30985/96, para. 62 (Oct. 26, 2000), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-58921%22%5D%7D>}. Cf. HEINIG, *supra* note 32, at 397–401.

with the ones outlined above. First of all, the Convention does not have a direct third-party effect.⁴⁶ Second, in a dualist system such as Germany's, the Convention first and foremost addresses the state as such.⁴⁷ Thus, for these formal reasons, a possible conflict between the Convention and German constitutional law is necessarily asymmetric to begin with. The same holds true for possible conflicts between the Convention and EU law, as the EU is not yet a signatory to the Convention, and the Convention only forms a source of recognition amongst others when it comes to European fundamental rights.⁴⁸

Apart from these categorical considerations, the relevant case law of the ECtHR does not imply another serious conflict, either. Particularly in matters of church labor law, the Strasbourg court has allowed for a considerable margin of appreciation.⁴⁹ Accordingly, the ECtHR has regularly upheld the judgements of the German labor courts. In the rare occasion of a violation of the Convention, the ECtHR referred to deficits in balancing church autonomy with individual rights—however, not on a general level, but solely in view of the specific facts of the individual case.⁵⁰ Predominantly, the same holds true even in cases with an emphasis on individual, rather than collective religious freedom.⁵¹ Therefore, although the case law of the ECtHR has definitely added some colors to the “double conflict” in EU state-church law—the Advocate General, in his opinion on the *Egenberger* case, discusses the case law of the ECtHR quite intensively⁵²—it does not amount to a third full confrontation of laws.

D. Nondiscrimination and the EU Law on State-Church Relations

In view of these at least three interlocked legal spheres, the question remains as to how such a conflict of laws can be resolved. Especially in German constitutional law literature, scholars have proposed to mitigate possible EU law influences on state-church relations by recourse to a doctrine of an *effet réflexe*. The most recent CJEU case law, however, dismisses this concept, as discussed in Section D.I. Although the emergence of an EU law on state-church relations must be accepted after all, a genuinely European addition to the national laws on religion cannot be a full-fledged legal regime in view of Article 17 TFEU. As EU law selectively complements national state-church law, it particularly adds an equality paradigm to conventional doctrine, discussed in Section D.II.

I. Beyond a Mere “Effet Réflexe”

A familiar doctrinal approach to assess interferences in protected legal positions entails a differentiation between direct or indirect intrusions. A direct intrusion involves an intentional,

⁴⁶Cf. Mathias Ruffert, *Grundrechtliche Schutzpflichten: Einfallstor für ein etatistisches Grundrechtsverständnis?*, in *GRUNDRECHTE ALS PHÄNOMENE KOLLEKTIVER ORDNUNG* 109, 112 (Thomas Vesting et al., eds., 2014).

⁴⁷Cf. Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court] Oct. 14, 2004, 111, 307, at 316.

⁴⁸See Treaty on European Union art. 6(3), Jan. 9, 2016, 2016 O.J. (C 202).

⁴⁹See, *inter alia*, Fernández v. Spain, App. No. 56030/07, para. 123 (June 12, 2014) <http://hudoc.echr.coe.int/eng?i=001-145068>; Siebenhaar v. Germany, App. No. 18136/02, para. 39 (Feb. 3, 2011) <http://hudoc.echr.coe.int/eng?i=001-103249>; Obst v. Germany, App. No. 425/03, para. 52 (Sep. 23, 2010) <http://hudoc.echr.coe.int/eng?i=001-100464>.

⁵⁰See Schüth v. Germany, App. No. 1620/03, paras. 67–69, 74 (Sep. 23, 2015) <https://hudoc.echr.coe.int/eng#%22ecli%22%222010:0923JUD000162003%22>]. Note that this judgement was released on the same day as *Obst v. Germany*, *supra* note 49, which upheld the Federal Constitutional Court's general reasoning regarding church authority in Germany under Article 137(3) of the Weimar Constitution. Cf. Jacob Joussen, *Die Folgen des Mormonen- und des Kirchenmusikerfalls für das kirchliche Arbeitsrecht, in Deutschland*, 64 *RECHT DER ARBEIT* 173, 175–76 (2011).

⁵¹To be sure, the Lautsi-judgement concerning the mandatory display of crucifix in Italian public schools is an important counterexample. See Lautsi v. Italy, App. No. 30814/06 (Nov. 3, 2009) <http://hudoc.echr.coe.int/eng?i=001-104040>. See also, however, the critical discussion of the Court's case law on individual religious freedom and the analysis concerning the margin of appreciation in Susanna Mancini, *The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty*, in 6 *EUR. CONST. L. REV.* 6, 20–23 (2010).

⁵²Opinion of Advocate General Tanchev at paras. 33, 68, Case C-414/16, *Egenberger v. Diakonie* (Nov. 9, 2017), <http://curia.europa.eu/juris/document/document.jsf?jsessionid=774100A049CC4D18996500CB54B8022A?text=&docid=196511&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1533718>.

head-on encroachment of a certain right, whereas an indirect intrusion is merely the result of a legal reflex. A direct intrusion must be assumed when an act of law explicitly discriminates against the protected position. In contrast, a reflex effect may occur when a formally neutral legal act has a factual effect on the protected position, although the act primarily serves another, non-related objective. This approach is particularly popular in German constitutional law scholarship, which has also endorsed the concept in matters of state-church relations. In the context of German constitutional law, it seems especially well-fitting, not least because the abovementioned central constitutional provision in Germany's law on religion—Article 137(3) of the Weimar Constitution—could even be read to precisely make such a distinction.⁵³

Accordingly, it has been argued that direct intrusions into intra-church issues, as well as targeted manipulations of the Member States' law on state-church relations by the EU, infringe upon Article 17 TFEU. Contrarily, mere indirect European intrusions shall be subject to strict proportionality analysis, but they shall not generally be prohibited.⁵⁴

The CJEU's most recent caselaw, however, can hardly be reconciled with this approach. Only the judgement of *Congregación de Escuelas Pías* concerning the Spanish tax reimbursements may still fit this picture, for the case arguably only involved an indirect encroachment of Spanish state-church relations: EU law on state aids does not specifically aim at the churches. To the contrary, it is concerned with public funding for private businesses, whereas the churches, first and foremost, pertain to the sphere of the spiritual and the cultural rather than the economical. Nevertheless, it is unclear if the unconditional subjugation of the Catholic Church under the EU's prohibition of state aid had passed a strict proportionality analysis. In any case, the CJEU, in its judgement, did not explicitly enter into such an analysis.⁵⁵

The *IR v. JQ* judgement in the case of the remarried physician from Düsseldorf, however, evidently reaches beyond mere reflex effects. To be sure, EU antidiscrimination law is not solely directed against the churches, either. When religiously motivated, disciplinary measures against a Church member within an organization of the very same Church are contested, though, this clearly involves an encroachment of intra-church affairs. As such, it can hardly pass proportionality analysis under the proposed doctrine.⁵⁶ On a more general account, the case even blurs the line between an indirect and a direct intrusion, for confronting religious associations with a prohibition to discriminate *on the grounds of religion* does indeed aim at the very essence of a religious association. Besides, "religion" is formally promoted as a legal criterion here. All of this can no longer be seen as merely a collateral reflex effect of the law. Instead, religion is a direct object of regulation, and, as the *IR v. JQ* case proves, the CJEU has started to look into internal processes within religious organizations with more skepticism.

II. A Paradigm of Equality in State-Church Relations

Arguably, the case of *IR v. JQ*—next to other recent case law such as the *Egenberger*,⁵⁷ *Achbita*,⁵⁸ and *Bouagnaoui*⁵⁹ judgments—bears witness to a realignment of the continent's law on religion,

⁵³See *supra* Section C.I., particularly with regard to the criteria of "within the limits of the law that applies to all." For an early critique, see GERHARD ANSCHÜTZ, *DIE VERFASSUNG DES DEUTSCHEN REICHS: VOM 11. AUGUST 1919 550–53* (12th ed. 1930).

⁵⁴UNRUH, *supra* note 7, at 601.

⁵⁵Interestingly, the CJEU did not even mention Article 17 TFEU in its final judgment, although the Advocate General had pointed to the interpretation of that provision as a central problem of the case. See *Congregación de Escuelas Pías Provincia Betania*, Case C-74/16 at para. 4.

⁵⁶The CJEU, to the contrary, only assessed the proportionality of the disciplinary measure—the termination of the labor contract—and not the proportionality of an EU law intrusion into intra-church affairs. *IR*, Case C-68/17, paras. 54–61.

⁵⁷CJEU, Case C-414/16, *Egenberger v. Diakonie*, ECLI:EU:C:2018:257, Judgement of 17 Apr. 2018.

⁵⁸CJEU, Case C-157/15, *Achbita v. G4S Secure Solutions NV*, ECLI:EU:C:2017:203, Judgement of 14 Mar. 2017.

⁵⁹CJEU, Case C-188/15, *Bouagnaoui v. Micropole SA*, ECLI:EU:C:2017:204, Judgement of 14 Mar. 2017.

which leaves intact national peculiarities but, nevertheless, has a noticeable impact. In legal scholarship, there is a classic controversy about the guiding norms and principles of the German constitutional law on religion.⁶⁰ Some scholars emphasize the collective and institutional side of the law on religion and the great significance of state-church relations to Germany's constitutional history. To them, Article 137 of the Weimar Constitution, which includes the prohibition of a state church, the right of the churches and religious associations to form corporations under public law, as well as the abovementioned principles of church autonomy, represents the key constitutional provision on religious affairs. This conception is criticized by another group of scholars who emphasize religious liberty as the first paradigm of the constitutional law on religion. For one thing, they stress the point that the institutionalist approach is geared towards the Christian churches, whereas the realities of a modern multi-religious society rather call for a liberal and individualistic stance. Consequently, they suggest the fundamental right to religious freedom in Article 4 of the German Basic Law to be the central point of reference. Hence, they claim that even the institutionalist aspects of state-church relations ultimately amount to serve individual religious freedom.

It is especially noticeable, however, that another provision of the Basic Law only plays a very subordinate role, both in the caselaw of the Federal Constitutional Court as well as in German constitutional law scholarship. Article 3(3) of the German Basic Law contains a non-discrimination clause which states that “no person shall be favored or disfavored because of . . . faith or religious opinions”. In both schools of thought—the institutionalist and the individualist one—problems of equality do matter, to be sure. Equality aspects, however, are dissolved into lines of reasoning that either adhere to a logic of civil liberty or of institutional autonomy. More often than not, equality is not a full legal standard on its own. Consequently, the Federal Constitutional Court tested its so-called “headscarf-cases”, which included the heavily contested question whether public school teachers were allowed to wear religious symbols and garments in class, predominantly against a standard of religious liberty.⁶¹ Also in the constitutional complaint procedure of Jehovah's Witnesses, the Court heard the case purely on the grounds of Article 137 of the Weimar Constitution.⁶² It did so notwithstanding the fact that all of these key cases clearly raise equality issues, too.

With the emergence of an EU constitutional law on religion, this is very likely to change. While EU law does not level out the Member States' law on religion, it provokes a shift in the focus towards matters of equality. This applies to both the individual as well as the collective dimension of the law on religion. Thus, EU law complements the institutional dimension as well as the strong notion of individual freedom in the constitutional law on religion with a paradigm of non-discrimination. This entails material and procedural consequences.

1. Material Dimension

The evolving CJEU case law on religion puts a strong emphasis on equality.⁶³ Thus, the CJEU, in its most recent opinions, has prominently reverted to the non-discrimination principle of Article 21 of the EU Charter of Fundamental Rights as well as to the provisions of Council Directive

⁶⁰See Stefan Mückl, § 159 *Grundlagen des Staatskirchenrechts*, in *HANDBUCH DES STAATSRICHTS DER BUNDESREPUBLIK DEUTSCHLAND*, VOL. VII 711, 712–14 (Josef Isensee & Paul Kirchhof, eds., 3rd ed. 2009).

⁶¹To be precise: The second of the two Senate decisions on the Islamic headscarf did resort to the non-discrimination principle in some detail. Still, the main focus is on Article 4 of the German Basic Law. See Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court] Jan. 27, 2015, 138, 296. The first Senate decision of 2003, however, devotes only few words in an opinion of almost sixty pages to the non-discrimination principle. See Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court] Sep. 24, 2003, 108, 282, paras. 39, 42, 71, 97, 99.

⁶²Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court] Sep. 20, 2000, 102, 370, at 384.

⁶³Even the very first EU—then EEC—judgement on religious freedom is actually a non-discrimination case. See Prais, Case 130/75. Cf. BERKMANN, *supra* note 24, at 47–48, 113–15.

2000/78/EC.⁶⁴ By contrast, the Court—quite opposite to the German approach—did not busy itself with legal arguments about religious liberty (Article 9 ECHR) or state-church relations (Article 17 TFEU) as such, although it had sufficient opportunity to do so. The chief physician's case could have been tested against a standard of religious liberty, for the dismissal from the hospital arguably infringes on the claimant's right to withdraw himself from Catholic faith as promulgated by the church. Conversely, the CJEU could have taken the perspective of the Catholic Church, which must be worried about its status *vis-à-vis* the provisions of worldly labor law. Instead, the European non-discrimination principle led the case.⁶⁵

Not every change in paradigms necessarily entails a radical upheaval, though. While a shift towards non-discrimination obviously has some repercussions on the national constitutional orders, it may actually also help to preserve the different basic structures of the Member States' constitutional law on religion. Again, the chief physician's case illustrates this well. The Court decisively pointed out that the defendant, the Catholic hospital, had also hired non-Catholics as chief physicians. Thus, it could find fault with a difference in treatment between the claimant and his non-Catholic colleagues. While the latter were allowed to divorce and remarry without having to fear any negative consequences, only the Catholic claimant was fired after his second wedding. Therefore, the Court primarily sanctioned this inconsistency. This also directly affects church autonomy, as we have seen, for ecclesiastical law is ultimately pushed back between the parties. Arguably, the Church itself, however, reduced the scope of church autonomy when it freely admitted that others could do the job just as well by hiring non-Catholic chief physicians in the first place. This also draws a line between ecclesiastical office and rather secular occupation: As the Catholic Church does not allow non-Catholics to become priests, it unequivocally signals that priesthood is of central significance to church autonomy. Consequently, the EU prohibition of religious discrimination—and in that case, also of sex discrimination—is barred, as long as the Church is consistent to its policies.⁶⁶

2. Procedural Dimension

The EU law-induced shift towards equality in the law on religion also has a procedural dimension. EU law calls for enhanced scrutiny through the worldly courts. From the perspective of individual and collective religious autonomy, a relaxed scrutiny of the worldly courts has a freedom-enhancing effect. The same, however, does not hold true for matters of equality, especially if the equality of insiders and outsiders is in question. Therefore, the latest CJEU case law on religion is even predominantly concerned with the right to an effective remedy.⁶⁷ In the language of a collision of norms: The final say needs to be with the worldly courts in order to effectuate the non-discrimination principle, for a proper control of consistency can hardly be performed from within.

This heightened scrutiny towards the churches and religious associations in matters of equality is arguably the most severe restricting effect of EU law on church autonomy. Nevertheless, even here, the CJEU's case law is by far not as radical as it could have been with regard to the Member States: In the triangle between the religious decision-makers, the CJEU, and the national courts, it is to the latter to ultimately assess the facts of the specific case and to determine whether a

⁶⁴Council Directive 2000/78, 2000, O.J. (L 303) 16–22 (EC) (establishing a general framework for equal treatment in employment and occupation).

⁶⁵Moreover, this cannot fully be explained with the preliminary ruling procedure, for the CJEU has regularly undertaken a comprehensive review, even when faced with only a very specific question from the national court.

⁶⁶This even holds true for the *Egenberger* case to a certain extent, as the CJEU reported Section 3 of an internal directive of the Protestant Church of Germany, which states that certain job positions may be filled with non-Protestants for lack of suitable Protestant applicants. See *Egenberger*, Case C-414/16, para. 20.

⁶⁷See European Union Charter of Fundamental Rights art. 47; *IR*, Case C-68/17, para. 43; *Egenberger*, Case C-414/16 paras. 46, 49, 53–55, 58.

consideration has a plausible connection with the right of autonomy of the church. Although EU law demands for a worldly control, it awards the national courts with that duty. The *very last* word remains with the Member States—even in matters of equality.

E. Conclusion

Even the law on state-church relations is no longer exclusively a national concern of the EU Member States. Despite supposedly strict neutrality clauses in the primary law of the EU and rigid statements—*inter alia*—by the German Federal Constitutional Court, it is safe to assume the formation of a supranational EU law on religion, which also touches upon the status of the churches and religious associations. This becomes obvious when state-church relations in Europe are reconstructed as a double conflict of laws, which comprises interlocked conflicts between ecclesiastical law and worldly law, as well as between EU law and national law. Within the triangular relationship of these different legal spheres, EU law steers state-church relations towards a paradigm of non-discrimination, adding yet another layer to the classic controversy between a fundamental rights-centered, individualist, and a rather collective, institutionalist understanding of the constitutional law on religion.

The non-discrimination paradigm of EU law arguably strikes a reasonable balance, especially in terms of the conflict between national law and EU law, for it ultimately entrusts the Member States with its case-by-case implementation. Even the conflict between ecclesiastical law and worldly law, however, is not fundamentally skewed in disfavor of the churches. Even though the autonomous sphere of the churches has become smaller, EU law mostly demands for mere consistency in their autonomous valuations. The main point of reference remains the churches' plausible self-conception. While new accountabilities may be unpleasant, they are certainly not fatal to ecclesiastical law, even under an emerging EU law on religion.