ARTICLES

Law on Churches and Religion in the European Legal Area – Through German Glasses

By Hans Michael Heinig[*]

A. Introduction

Approximately ten to fifteen years ago the "danger of Europeanization" of the German law on churches and religion was hotly debated. The churches in Germany feared that the influence of the European Union would dramatically change their legal framework.[1] But also academic writers worried about the influence of the common market law or European antidiscrimination law on the legal situation of the churches in the member states[2] – sometimes in rather shrill tone.[3] One almost got the impression that Brussels replaced the Marxist *Ideologiekritik* (critique of ideology) as the main enemy of Christianity in Europe.

Today we know that all these menacing scenarios were blown out of proportion. The transforming effects of European law on the field of churches and religion are manageable. How did this occur? In this paper I will argue that the interaction between European law and national law as a multilevel regime provides several protective instruments for religion and their specific treatment in the national law, taming the transformation through Europeanization by strict legal control. This thesis will be deployed in the following text.

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[1] KIRCHENAMT DER EKD/SEKRETARIAT DER DEUTSCHEN BISCHOFSKONFERENZ (EDS.), ZUM VERHÄLTNIS VON STAAT UND KIRCHEN IM BLICK AUF DIE EUROPÄISCHE UNION(1995).

[2] A. Hollerbach, *Europa und das Staatskirchenrecht*, 35 ZEVKR (1990), 250; R. Streinz, *Auswirkungen des Europarechts auf das deutsche Staatskirchenrecht*, 27 ESSENER GESPRÄCHE ZUM THEMA STAAT UND KIRCHE 53 (1993); G. Robbers, *Die Fortentwicklung des Europarechts und seine Auswirkungen auf die Beziehungen zwischen Staat und Kirche in der Bundesrepublik Deutschland, id.*, 81; C. Link, *Staat und Kirche im Rahmen des europäischen Einigungsprozesses*, 42 ZEVKR 130 (1997).

[3] C. Hillgruber, *Staat und Religion*, DVBL. 1155 (1999).

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B. Religion and Churches in the Dynamics of European Legal Development

I. The European Union Lacks Empowerment over Religious Policy and Has No Legal Competence over Religion

The constituent treaties confer on the European Union neither a mandate for religion policy nor any legal competence over churches or religion[4] (excepting article 13 TEC, introduced in 1998, a provision to combat discrimination based on, inter alia, religion[5]). The catalogues of tasks and activities in articles 2 and 3 TEC make no mention of religion or the church. The Community may only act within the limits of conferred competences (article 5(1) TEC: the principle of enumerated powers), and it has no legal power to appropriate further *Kompetenz-Kompetenz* (competences). Thus, the Community also may not develop legislative, consultative, or coordinative activities in the area of Member State law on churches and religion.

II. Religion Clauses in European Regulations and Directives

Against this backdrop, it seems surprising at first glance that European regulations and directives contains numerous clauses pertaining to religion, whether setting uniform exceptions to certain provisions of European law or permitting the Member States to adjust for peculiarities of their law on churches.[6] Such clauses appear, for example, in employment law directives to allow for exceptional

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[4] See H. de Wall, *Neue Entwicklungen im Europäischen Staatskirchenrecht*, 47 ZEVKR 205 (2002); H. M. HEINIG, ÖFFENTLICH-RECHTLICHE RELIGIONSGESELLSCHAFTEN 380 (2003); S. MÜCKL, EUROPÄISIERUNG DES STAATSKIRCHENRECHTS 410 (2005); C. WALTER, RELIGIONSVERFASSUNGSRECHT – IN VERGLEICHENDER UND INTERNATIONALER PERSPEKTIVE 403 (2006).

[5] See e.g. D. KEHLEN, EUROPÄISCHE ANTIDISKRIMINIERUNG UND KIRCHLICHES SELBSTBESTIMMUNGSRECHT 9 (2003); M. TRIEBEL, DAS EUROPÄISCHE RELIGIONSRECHT AM BEISPIEL DER ARBEITSRECHTLICHEN ANTI-DISKRIMINIERUNGSRICHTLINIE 2000/78/EG 55 (2005); H. REICHEGGER, DIE AUSWIRKUNGEN DES RICHTLINIE 2000/78/EG AUF DAS KIRCHLICHE ARBEITSRECHT UNTER BERÜCKSICHTIGUNG VON GEMEINSCHAFTSGRUNDRECHTEN ALS AUSLEGUNGSMAXIME 29 (2005); H. M. Heinig, *Art. 13 EGV und die korporative Religionsfreiheit nach dem Grundgesetz*, *in* RELIGION UND WELTANSCHAUUNG IM SÄKULAREN STAAT, 215 (A. Haratsch et al. [eds.], 2001).

[6] See M. VACHEK, DAS RELIGIONSRECHT DER EUROPÄISCHEN UNION IM SPANNUNGSFELD ZWISCHEN MITGLIEDSTAATLICHEN KOMPETENZRESERVATEN UND ART. 9 EMRK 77 (2000); H. Weber, *Geltungsbereiche des primären und sekundären Europarechts für die Kirchen*, 47 ZEVKR 226 (2002); Heinig (*supra* note 4), 396; Mückl (*supra* note 4), 459; Walter (*supra* note 4), 425; M. SÖBBECKE-KRAJEWSI, DER RELIGIONSRECHTLICHE ACQUIS COMMUNAUTAIRE DER EU 41 (2006); see esp. the helpfull documentation *Religion-Related Norms in European Union Law*, ed. by G. Robbers, available at: http://www.uni-trier.de/~ievr/EUreligionlaw/index.html.

planning of work times[7] or loyalty oaths,[8] in animal protection directives to permit kosher butchering,[9] in data protection provisions to allow religiously based organizations to circumvent specific prohibitions,[10] or in European media law, which forbid interrupting the broadcast of church services by commercial advertisements.[11] European secondary law also includes provisions on equal treatment,[12] public engagement,[13] and the promotion of religious organizations.[14]

[7] Art. 17(1) lit. c) Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organization of working time, O.J. L 299, 18/11/2003, p. 9.

[8] Art. 4(2) Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, O.J.L 303, 02/12/2000, 16.

[9] Annex III Chapter 4, No. 7 Regulation (EC) No 853/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific hygiene rules for food of animal origin, O.J.L 139, 30/04/2004, 55; Art. 4 Council Directive 95/23/EC of 22 June 1995 amending Directive 64/433/EEC on conditions for the production and marketing of fresh meat, O.J. L 243, 11/10/1995, p.7; Art. 5(2) Council Directive 93/119/EC of 22 December 1993 on the protection of animals at the time of slaughter or killing, O.J. L 340, 31/12/1993, p. 21; for further references see "Religion-Related Norms" (*supra* note 6).

[10] Art. 3(2) Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, O.J. L 080, 23/03/2002, 29.; Art. 10(2) Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data O.J. L 008, 12/01/2001, 1; Art. 8(2) lit. d) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, O.J. L 281, 23/11/1995, 31.

[11] Art. 11(5) Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, O.J. L 202, 30/07/1997, 60.

[12] In more then 20 legislative acts – for references see "Religion-Related Norms" (*supra* note 6).

[13] Art. 3 Council Regulation (EC) No 1659/98 of 17 July 1998 on decentralised cooperation. Official Journal L 213, 30/07/1998, 6; Art. 2(1) lit. a) Council Regulation (EC) No 550/97 of 24 March 1997 on HIV/AIDS-related operations in developing countries O.J. L 085, 27/03/1997, 1.

[14] E.g. Art. 132(1) lit. k) and l) Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax O.J. L 347 , 11/12/2006, 1.

III. European Law's Indirect Effects on the Legal Position of Churches and Other Religious Communities

These religion clauses in European secondary law reflect the reality that European law does indeed have implications for the legal framework of churches and other religious communities, the absence of explicit competences notwithstanding. The church is, after all, *of* this world and acts *in* this world. Religious communities are necessarily covered by the fabric of the law that is thrown over all of life's manifestations. Churches take on employees, make construction contracts, and act as corporations, for instance, when they operate their own broadcasting station or bank. Insofar as the EU legally regulates such—usually economically influenced—areas in exercise of competences conferred by the treaties, it also *indirectly* affects the legal situation of churches and other religious communities.[15]

Such indirect consequences for the legal position of churches and other religious communities are not exclusive to European law. The legal orders of the Member States are, in principle, already familiar with the phenomenon. In Germany, churches live "under" a legal order, formed by Germany's constitution, the Basic Law, and guaranteeing them a certain sphere of freedom; thus, they are subordinate in particular to "the law valid for all" (article 140 of the Basic Law, incorporating article 137(3) of the Weimar Constitution). When monasteries brew beer, they must abide by food law in force, and, when churches purchase heating oil, the German Civil Code applies.

The legal problem now is that application of generally binding law can strike at the peculiarities, at the proprium, of a church. Therefore, the dominant interpretation of article 137(3) of the Weimar Constitution rightly bolsters the guarantee of corporate freedom for religious communities: a law is only "valid for all" if it sufficiently considers the particular interests of the individual religious communities, as determined from the perspective of their own self-conceptions (so-called balancing doctrine).[16]

The interesting question is whether a similar regime of weighing and balancing the diverse interests can be found in European lawmaking in its current state. Not only are the specific religious interests protected by fundamental rights, but also the

[15] Walter (*supra*, note 4), 404; Heinig (*supra*, note 4), 390, with further references.

[16] Heinig (*supra,* note 4) 158; Walter (*supra,* note 4), 540; M. Morlok, *Art. 137 WRV*, in: GRUNDGESETZ – KOMMENTAR (H. Dreier ed.), vol. 3, margin number 53; for a critical view, see Mückl (*supra,* note 4), ~~p.~~ 259 (citing B. Grzeszick, *Staatlicher Rechtsschutz und kirchliches Selbstbestimmungsrecht*, 129 AÖR 168 [2004]).

particular legal schemes for churches and religious groups in a given Member State to be considered. Both dimensions flow into the conceptualization of "the law on religion as multilevel law".[17]

C. The Law on Religion as Multilevel Law: Churches and Other Religious Communities in the European Legal Arena

I. The Concept of Multilevel Law

It has by now become common knowledge for any newspaper reader that international interdependence and interaction has significantly increased since the end of the Cold War, even in policy fields which until then were still reserved to national control. These processes of Europeanization, internationalization, and globalization thoroughly penetrate the law.[18] Important legislative decisions and preliminary decisions are coordinated internationally or sent up to a transnational level. European law, in particular, has established itself as an independent legal order with the claim of having an autonomous legal source. *Functionally* speaking, the two treaties that establish the European Union, regardless of their titles or the future of the draft Constitutional Treaty, already form a sort of constitution (limiting public power, organizing the political decision-making process, setting a supreme legal level, creating a reservoir of highest principles as a "value order").[19] Germany's Basic Law and the European treaties can thus be described as partial constitutions, and only in tandem do they establish the fundamental order of the society.[20]

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[17] The author has explored this concept in Heinig (*supra,* note 4), 405; Heinig (*supra,* note 5) 243; H. M. Heinig, *Die Stellung der Kirchen und Religionsgemeinschaften in der europäischen Rechtsordnung*, *in* KIRCHEN UND RELIGIONSGEMEINSCHAFTEN IN DER EUROPÄISCHEN UNION, 125 (P.C. Müller-Graff/H. Schneider [eds.] 2003), with further references.

[18] For an introduction to the extensive body of literature on this topic, see in German view R. Wahl, *Internationalisierung des Staates*, *in* VERFASSUNGSSTAAT, EUROPÄISIERUNG, INTERNATIONALISIERUNG 17 (2003); R. Wahl, *Der einzelne in der Welt jenseits des Staates*, in *id.*, 53; U. DI FABIO, DER VERFASSUNGSSTAAT IN DER WELTGESELLSCHAFT (2001); A. v. Bogdandy, *Demokratie, Globalisierung, Zukunft des Völkerrechts*, 63 HEIDELBERG JOURNAL OF INTERNATIONAL LAW 853 (2003); for an overview of the debate, see also H. M. Heinig, *Offene Staatlichkeit oder Abschied vom Staat,* 52 PHILOSOPHISCHE RUNDSCHAU 191 (2005).

[19] From the abundance of German literature, see C. Walter, *Die Folgen der Globalisierung für die europäische Verfassungsdiskussion*, DVBL. 4 (2000); M. Morlok, *Grundfragen einer Verfassung auf europäischer Ebene*, *in* STAAT UND VERFASSUNG IN EUROPA (P. Häberle et al. eds., 2000), 73; A. PETERS, ELEMENTE EINER THEORIE DER VERFASSUNG EUROPAS 76 (2001).

[20] For a critical viewpoint on the relativization of the term "constitution" through a focus on the constitutions functions, see C. Möllers, *Pouvoir Constitution – Constitution – Constitutionalisation, in*

In describing this constitutional plurality, Ingolf Pernice introduced the term *Verfassungsverbund* or "multilevel constitutionalism" into the legal jargon.[21] As a result, European legal scholarship firstly borrows from the term *Staatenverbund*,[22] already used by the German Federal Constitutional Court, to denote the sui generis nature of the Union, somewhere between a federal state and a federation of states, and transfers the term out of *state* in *constitutional* doctrine. Secondly, "multilevel constitutionalism" borrows from the term "multilevel system" which political science developed to describe federal systems.[23] The relationship between EU and Member States is then defined as a *dynamic multilevel system*, which is to say, no level in the overarching structure is per se assigned hierarchal precedence. The classic means to resolve conflicts between decision-making levels, namely, via super- and subordination, gives way to reciprocal reliance, reference, and restriction. Distinctions between the various decision-making levels give way to reciprocal checks, coordination, and cooperation.

II. Elements of First-Order Multilevel Law Relating to Religion

This system of interwoven policy and law also includes the law on churches and religion.[24] While the Union largely lacks *original* competences in this area, the indirect consequences discussed above do exist, a fact that is in turn reflected in the widely varying clauses of European secondary law. From a legal point of view, these clauses are not the product of unpredictable political contingency; rather, they result from the ensemble of legal norms that guides the multilevel system (first-order multilevel law).[25] This ensemble comprises, first and foremost, the division

PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 183 (A. v. Bogdandy & J. Bast eds., 2006); U. Haltern, *On Finality*, in: *id.*, 727.

[21] I. Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam*, 36 COMMON MARKET LAW REVIEW 703 (1999); I. Pernice, *Europäisches Verfassungsrecht im Werden, in* IUS PUBLICUM IM UMBRUCH: 25 (H. Bauer et al. eds.,2000); I. Pernice, *Europäisches und nationales Verfassungsrecht*, 60 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 148 (2001). For a critique of this concept, see M. Jestaedt, *Der Europäische Verfassungsverbund – Verfassungstheoretischer Charme und rechtstheoretische Insuffizienz einer Unschärferelation*, *in* GEDÄCHTNISSCHRIFT W. BLOMEYER, 637 (2004).

[22] BVerfGE 89, 155 (195).

[23] See e.g. M. Jachtenfuchs & B. Koch-Kohler, *Regieren im dynamischen Mehrebenensystem*, in: EUROPÄISCHE INTEGRATION 15 (M. Jachtenfuchs & B. Koch-Kohler eds., 1996).

[24] Along the same lines, see also Walter (*supra,* note 4), 403*;* D. Kraus, *Schweizerisches und europäisches Religionsrecht im Dialog*, SCHWEIZERISCHES JAHRBUCH FÜR KIRCHENRECHT 11 (2002); but see Mückl (*supra,* note 4), 563, whose skepticism is difficult to comprehend, since calls the "Europeanization of law on churches" into question but titled the article with that very term.

[25] For more detail on the term and the concept, see Heinig (*supra,* note 4), 414.

of competences according to the principle of enumerated powers, as outlined above. Alongside these, there are rules on both the exercise of competence and the application of law. These two sets of rules legally secure the effectiveness of integration, in that they strengthen the penetrating force of European law; but they also seek to prevent the European legal level from swallowing that of the Member States.

1. The Principle of Subsidiarity

The latter set, for example, is served by the principle of subsidiarity (article 5(2) TEC, defined in greater detail in the Subsidiarity Protocol), which permits the Community to take action outside its exclusive competences only if the objectives "cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community."

Admittedly, the principle of subsidiarity has only limited significance for European law's indirect influence on the legal position of churches, insofar as the Community is obligated to refrain from taking any measures. Article 5(2) ECT does not specifically limit the effects of Union measures on religious communities.[26] The failure to consider religious interests, for instance, through the inclusion of exception clauses for religious communities in secondary European law, is not a question of "necessity" in the sense of a legislative mandate. Rather, it is an issue of permissible encroachment into *fundamental rights*, specifically, the fundamental rights protection of the churches.[27]

2. Protection of National Identity (article 6(3) TEU) and Declaration No. 11 of the Intergovernmental Conference of Amsterdam

Two provisions, however, do relate directly to the consideration of particularities in national law on churches in European legislation and application of law: article 6(3) TEU and the so called "Amsterdam Declaration on Churches".[28] The former reads:

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[26] For more detail, see Mückl (*supra*, note 4), 422.

[27] Heinig (*supra,* note 4), 421; the effects of the principle of subsidiarity can also work directly against the interests of churches, as for example when the ECJ (properly) strikes down limitations on Sunday working hours in the directive on work times due to a violation of the principle of subsidiarity (ECJ, ECR 1996-I, 5755 [5805]; see also Heinig, [*supra,* note 4], 487; Walter [*supra,* note 4], 23).

[28] Heinig (*supra*, note 4), 417.

"The Union shall respect the national identities of its Member States."

Closely related to this norm, a Declaration was passed—instead of a separate article on churches, as some governments initially proposed—at the intergovernmental conference in Amsterdam:

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.

Granted, a declaration *on* a treaty is not an article *in* a treaty. So the Declaration's wording promises more than its norm typology can deliver. It is intended to reveal the law, but it is not law. Its main legal function is as an interpretive aid for the treaties in force.[29] Its main political function, of course, goes well beyond this, for the reference to churches and religious communities' acts as a signal in religious policy that these organizations are no mere *quantité négligeable* on Brussels's stage but are recognized actors in Europe's policy-making drama.[30]

Legally, the Declaration stands in close connection to article 6(3) TEU, which the Treaty of Maastricht inserted. To some degree, the Declaration emphasizes the notion that the basic structures of the Member States' law on state churches and religion can be categorized under "national identity."[31] Article 6(3) TEU and the

[29] Heinig (*supra,* note 4), 418; Walter (*supra,* note 4), 410; Mückl, (*supra,* note 4), 453.

[30] For more on the Declaration, see B. Grezeszick, *Die Kirchenerklärung zur Schlussakte des Vertrags von Amsterdam*, 48 ZEVKR 284 (2003); Heinig (*supra,* note 4), 415; Walter (*supra*, note 4), 410; Mückl, (*supra*, note 4), 453; Triebel (*supra*, note 5), 277, with further references.

[31] For approaches with partly very divergent accents but a similar result, cf. Walter (*supra*, note 4), 411; Heinig (*supra*, note 4), 421; Mückl, (*supra*, note 4), 413; Triebel (*supra,* note 5), 255; A. UHLE, STAAT – KIRCHE – KULTUR 150 (2004); for a skeptical point of view as to the inclusion of the law on church and religion under "national identity," see also Vachek (*supra,* note 6), 271. The term "identity" relates to collective entities, and article 6(2) TEU deliberately introduces it into the treaties as a legal term for pragmatic, political purposes. Political theory and cultural theory, of course, will diagnose an enormous potential for conflict in the tension between collective identity and (religious) pluralism in a democratic constitutional state. Inasmuch, sufficient consciousness of issues involving the downtrodden in Christian cultural history is often lacking; see e.g. Uhle, *supra*; A. UHLE, FREIHEITLICHER VERFASSUNGSSTAAT UND KULTURELLE IDENTITÄT, esp. 473 (2004); the same accusation can be made against J. H. H. WEILER, EIN CHRISTLICHES EUROPA (2004), whose focus on Roman Catholic official documents seems strongly alienating—as though Christianity had no internal pluralism that is even actually constitutive of modern Europe.

Declaration constitutes a mandate to consider the diversity[32] of nationally organized bodies of law on churches and religion in the European legislative process. This requires protection of the specific form a given Member State has chosen for such law; furthermore, the closer the chosen form comes to the ensemble of fundamental principles underlying the multilevel system, the greater this protection becomes. In Germany's legal order, for example, the principle of an open, cooperative division of church and state would be definitional, whereas the inclusion of church taxes in wage deductions would be only peripheral to national identity.

It is of course also noteworthy that article 6(3) TEU and Declaration No. 11 are not exclusively aimed at functioning to protect religion. Their aim of preserving existent structures is neutrally set, so that the Union may equally respect equally France's laical orientation and systems with established churches. Article 6(3) TEU primarily serves the interest in maintaining national diversity in unity; protection of religion only follows incidentally from national peculiarity.

3. Fundamental Rights Protection of Religion in the European Legal Area

In contrast, religious interests are *directly* protected by the relevant fundamental rights in the European legal arena. Recently, the area of fundamental rights has become an apparent tangle of widely varying fundamental rights regimes, leaving the normal citizen with hardly a chance at a meaningful overview. National fundamental rights stand alongside the European Convention on Human Rights. Article 6(2) TEU obligates the EU to safeguard fundamental rights in line with the ECHR and the traditions common to the Member States. This obligation stands alongside a Charter of Fundamental Rights of the Union, which is currently still only declaratory and without binding legal force. These juxtapositions may seem quite chaotic at first glance; however, careful interpretation reveals that the catalogues and provisions are elements of a painstakingly coordinated arrangement between national and transnational protection of fundamental rights.

In this arrangement, the protection of fundamental rights in the multilevel system is not guided by a superior level but is instead organized for interplay and reciprocity. One example is the obligation in article 6(1) TEU, setting a minimum standard for the Member States' protection of fundamental rights. At the same

[32] For an informative survey of the law on religion in each and every Member State of the EU, see G. ROBBERS ED., STAAT UND KIRCHE IN DER EUROPÄISCHEN UNION, 2d ed. 2005. As informatively saturated as the volume is, it still lacks in terms of actual comparative law. But, for selected examples of comparative legal analysis, see Mückl (*supra,* note 4) (Great Britain, France, Spain, Germany); Walter (*supra*, note 4) (France, Germany, USA).

time, article 23(1) of the German Basic Law requires that the Union guarantee a level of fundamental rights protection essentially comparable to that of the Basic Law.

The fundamental right to religious freedom and the prohibition of religious discrimination are both central and essential to a public order that is liberal, secular, and based on the rule of law. Thus, the two have naturally been recognized as basic principles of Community law. This also applies to the corporate dimension of religious freedom, whose concrete scope is to be determined according to the ECHR and the constitutional traditions common to the Member States. The widely variant church-and-state regimes, however, place this determination in a difficult setting.[33]

In addition to religious freedom and non-discrimination, the EU Charter of Fundamental Rights includes further rights involving religion, such as, the parental right to ensure education in conformity with personal religious convictions (article 14(3)) or the EU's duty to respect for religious diversity (article 22).[34]

4. Protection of Cultural Diversity

Of less significance to the German law on churches and religion in the European legal area is article 151(4) TEC. According to that the Community must respect cultural diversity. Here, "culture" is a technical legal term and not a term of cultural theory. Inasmuch, it is to be interpreted restrictively.[35]

D. A Case Study: Article 13 TEC and Directive 2000/78/EC

Article 13 TEC, by way of the Treaty of Amsterdam in 1998, conferred on the European Union the competence to take measures against discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation.[36]

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[33] For detailed analyses of the issue, see Walter (*supra,* note 4), 369, 419; Mückl, (*supra,* note 4), 427; C. Grabenwarter, *Die korporative Religionsfreiheit nach der Menschenrechtskonvention*, *in* FESTSCHRIFT W. RÜFNER 147 (2003); H. de Wall, *Von der individuellen zur korporativen Religionsfreiheit*, *in* DIE EMRK IM PRIVAT-. STRAF- UND ÖFFENTLICHEN RECHT 237 (J. Renzikowski ed., 2004) with further references.

[34] See H. M. Heinig, *Die Religion, die Kirchen und die europäische Grundrechtscharta*, in: ZevKR 46 (2001), 440; G. Robbers, *Religionsrechtliche Gehalte der Europäischen Grundrechtecharta, in* FESTSCHRIFT H. MAURER 425 (2001); S. Hölscheidt & E. Mund, *Religionen und Kirchen im europäischen Verfassungsverbund*, EUROPARECHT 1087 (2003).

[35] Heinig (*supra*, note 4), 381; Mückl (*supra*, note 4), 447; but see Triebel (*supra,* note 5), 263.

[36] For more detailed references, see *supra,* note 5.

The norm and the relevant secondary law are a useful case study of the modus operandi of this European first-order multilevel law in how it relates to religion, protects religious interests via fundamental rights, and deals with legitimate national peculiarities without neglecting the regulatory interest common to Europe as a whole.

The Union found itself confronted with the challenge that under respective Member State law, churches and religious communities are variously permitted to involve religion in their legal regulation of the workplace. For instance, churches and other religious communities have the right under German law to impose specific obligations of loyalty on their employees and require church membership. This practice constitutes unequal treatment based on religion, but its constitutional justification flows from the freedom of churches to design their own organization and administration according to their own religious dictates.[37]

Unavoidably, the varying modes of legal practice in the Member States led to a conflict of goals between protection of national peculiarities in their laws on churches and religion, protection of a church's fundamental freedom, and the European interest in combating discrimination.[38] In the end, this conflict was prudently solved by adopting a separate exception for religious organizations (article 4(2) of Dir. 2000/78/EC). This maintains a minimum standard of protection from discrimination even within religious organizations, while allowing an organization to circumvent the prohibition of unequal treatment based on religion, using the standard of national law in force when the Directive was enacted.[39] Thus, the legal interests involved were balanced as delicately as possible, without eliminating any one of them per se.

This means of "achieving practical concord"[40] is quite typical of the regulatory effects of first-order multilevel law in the area of laws on churches and religion.

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[37] For an overview, see A. v. CAMPENHAUSEN & H. DE WALL, STAATSKIRCHENRECHT, 177 (4th ed. 2006); for more detail, see also Reichegger (*supra,* note 5), 5; Heinig (*supra*, note 5), 162; C. D. CLASSEN, RELIGIONSFREIHEIT UND STAATSKIRCHENRECHT IN DER GRUNDRECHTSORDNUNG, 154 (2003), each with different emphases on scope.

[38] See also C. Waldhoff, *Kirchliche Selbstbestimmung und Europarecht*, JZ 978 (2003); M. Germann & H. de Wall, *Kirchliche Dienstgemeinschaft und Europarecht*, *in* GEDÄCHTNISSCHRIFT W. BLOMEYER 549 (2004); C. Link, *Antidiskriminierung und kirchliches Arbeitsrecht*, 50 ZEVKR 403 (2005).

[39] For detailed references, see *supra*, note 8; see also Heinig (*supra,* note 4), 472; Mückl, (*supra,* note 4), 505; Walter (*supra,* note 4), 427; C. Walter, *Religion und Recht der Europäischen Union*, *in* RELIGION UND INTERNATIONALES RECHT 207 (A. Zimmermann ed. 2006), with further references.

[40] German: "Herstellung praktischer Konkordanz." K. HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 142 and passim (20th ed. 1995).

This approach can be evaluated from various points of view: that the EU's fundamental freedoms obligate and empower churches, that European contracting and employment law binds churches, that European competition law is applied to ecclesiastical organizations, or if religious communities established under public law are able to implement directives.[41] Whatever the perspective, recourse to the apparatus of first-order multilevel law permits prudent resolutions, adequately balancing the fundamental right to corporate religious freedom and the peculiarities of national laws on churches in the European legal area, without however declaring any interest per se to trump.

E. The Constitutional Treaty or the Law of Religion as Symbolic Law

This sketch of the multilevel profile of the European law on religion would not take a significantly different shape or focus in the frame of the currently failed Constitutional Treaty for Europe.[42] It would have elevated the Declaration on Churches to the status of an article, without intending any changes to its regulatory content.[43] Certain fundamental rights with implications for church and religion would have been explicitly anchored, without extending their protective scopes. Finally, a dialogue between the European Commission and representatives of churches and other religious communities would have been required, even though this has already long been the practice without any particular legal basis.[44]

In terms of law and religion, then, the Constitutional Treaty is less promising for any legal or technical answers it might have given to open questions. Rather, its significance lies in the vivid symbolic emphasis it would have placed on this legal area. In constitutional law in general, and in the constitutional law on religion in particular, certain societal self-reconciliations crystallize, transcending the technical

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[41] Walter (*supra,* note 4), 433, 439; Mückl, (*supra*, note 4), 462, 481, 485, 519; Heinig (*supra*, note 4), 442, 451, 458, with further references.

[42] For views of the Constitutional Treaty as a whole from the perspective of the law on established churches and the state, see S. Muckel, *Die Rechtsstellung der Kirchen und Religionsgemeinschaften nach dem Vertrag über eine Verfassung für Europa*, DÖV 191 (2005); P. R. Schnabel, *Die Stellung der Kirchen im Verfassungsvertrag der EU*, KIRCHE UND RECHT (loose-leaf collection) 140, 87; H. M. Heinig, *Das Religionsverfassungsrecht im Konventsentwurf für einen "Vertrag über eine Verfassung für Europa," in* RELIGIONSFREIHEIT ALS LEITBILD 169 (H. Kreß ed., 2004); for a persuasive systemization and classification in entire corpus of European law on religion, see H. de Wall, *Das Religionsrecht der EU*, 50 ZEVKR 383 (2005); regarding the separate article on churches (very critically), see M. Triebel, *Der Kirchenartikel im Verfassungsentwurf des Europäischen Konvents*, 49 ZEVKR 644 (2004).

[43] Walter (*supra*, note 4), 415.

[44] This dialogue is carried out especially by church liaison bureaus in Brussels. See de Wall (*supra,* note 42), 387, with further references.

limits of state structures. Inasmuch, the law on religion and churches is always also symbolic law,[45] or, to put it another way, "tell me what kind of laws you have on religion, and I'll tell you what kind of state you are."[46] In this sense, the Constitutional Treaty, with its mandated dialogue and the invocation of religious inheritance in its preamble would have strengthened the effect of the obligation to respect diversity among the Member States. This effect, which was already textually reinforced in the Treaty of Amsterdam's Declaration on Churches, is in some sense paradoxical: the obligation to respect diversity in the Member States of the European Union is simultaneously and inherently a rejection of a strictly laical orientation of EU itself, since only in this way can European law sufficiently take non-laical traditions into consideration.

The highly ambivalent symbolic value of the law is shown in the reaction of the German churches to the issue of how a reference to religion in the preamble should appear. They vehemently demanded a *nominatio dei* similar to the one in the Basic Law and took the failure of the political campaign as an affront. They felt that Christianity's centrality in the emergence and existence of Europe was being ignored. The churches, here, however, seemed to have lost sight of the significance of the agreed invocation of religious inheritance, tolerated by all involved in the Convention and in the European Council. This formulation already represented an important symbolic gain over the status quo. Moreover, drafting a symbolically charged preamble requires some level of consideration for the sensitivities of the individual Member States with their widely varying traditions of civil religion and laws on churches and religion.[47]

F. German Legal Scholarship and the Europeanization of Law on Church and Religion

The processes of internationalization and Europeanization shape the legal order as a whole; thus, as the above discourse has shown, these processes do not leave the German law on churches and religion untouched. At the same time, the long-held fears of German scholarship in this area—namely, that Brussels would turn the

[45] See esp. G. Robbers, *Staat und Religion*, 59 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER, 232, 259 (2000); for a critical viewpoint, see M. Morlok, *Diskussionsbeitrag*, i~~b~~*d.* 341; for an instructive discussion of the topic, see generally S. Magen, *Staatskirchenrecht als symbolisches Recht*, *in* KOEXISTENZ UND KONFLIKT VON RELIGIONEN 30 (H. Lehmann ed, 2004).

[46] G. Robbers, *Diskussionsbeitrag*, 59 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 361 (2000).

[47] See to this problem also Hölscheidt~~/~~ & Mund (*supra,* note 34), 1083, 1092; P. Bahr & H. M. Heinig, *Apologetik oder Analyse*, ZEE 229 (2003); Heinig (*supra*, note 42), 180.

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discipline's object of study upside-down, so to speak—have not proven true. The transformative effects penetrating the national level have stayed within limits. The internationalization of the law has transformed much, but it is also checked by mechanisms specific to the multilevel system. For the foreseeable future, such mechanisms also promise to secure the adequacy of the law on religion in the European legal area.

The scholarship on the law on churches and religion is challenged as a separate subdiscipline of legal academia, to reproduce this development in all its theoretical depth. In the context of the internationalization of the law in general, one observes a sort of continuing trend in scholarly efforts to analyze national law on church and religion: the discipline tends to be averse to theory and resistant to innovation. Insights from the social sciences or religious studies are hardly ever taken up. Surprisingly, the same holds true for much theological research. However, internationalization has accelerated the dynamics of both the legal order and the scholarship that accompanies it. Against this backdrop, and especially considering the "return of the gods"[48] to the stage of political debate, the discipline cannot expect to maintain this introversion in the long term without progressively marginalizing itself.

[48] F. W. GRAF, DIE WIEDERKEHR DER GÖTTER (2004).

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