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Religious Freedom and the Principles of Subsidiarity and Margin of Appreciation

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Religious Freedom and the Principles of Subsidiarity and Margin of Appreciation: the jurisdictional responsibilities and interrelationships of the European Court of Justice and the European Court of Human Rights.

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Abstract

The European Court of Human Rights and the Court of Justice of the European Union have distinct as well as inter-related jurisdictions. This important feature of the courts is addressed in this paper with reference to cases involving judgments on religious freedom within the bounds of the principles of subsidiarity and margin of appreciation. The courts have been guided by these principles, as well as contributing to their development, in considering matters of religious freedom under EU laws and conventions. The judgments indicate the extent to which in addressing these matters the jurisdictions of the courts and their underlying responsibilities have evolved in ways that suggest convergence, but with issues remaining concerning a commitment to fully engaging in the human rights sphere, particularly but not exclusively in relation to matters of religious freedom.

1. Introduction

Religious freedom has attracted a lot of attention across Europe over recent years. The Court of Justice of the European Union ('CJEU') and the European Court of Human Rights ('ECHR') have played a role in shaping the interpretation and application of the right to freedom of religion and the extent of its reach within the European Union ('EU'), and Europe more generally. They have done this through the application of two significant, interrelated principles: the principles of subsidiarity and the margin of appreciation. With the inherently political construct of the EU system in which each state acts in a manner to protect its sovereignty and its own discrete social policy agendas, these two principles have special importance. They provide crucial tools for the Courts to arrive at an accepted middle-ground between the overall imperative of protecting human rights and compliance with specific human rights obligations, while allowing States to

retain a degree of discretion with respect to certain policy areas which are appropriately and legitimately managed at the state level.

With the two Courts now operating in the human rights space, it is pertinent to address potential inconsistencies in the application of the two principles and the implications thereof for the jurisdictional responsibilities of the courts. This is particularly significant given the traditionally distinct and separate roles of the Courts – with one being an examiner of the existence of legislation consistent with EU law, and the other being solely concerned with the exercise of human rights compliance in a legitimate and proportionate way. Thus the research question to be addressed is: to what extent are there inconsistencies in the interpretation and application of the principle of subsidiarity and the margin of appreciation by the two courts with reference to cases involving the right to freedom of religion?

Religious freedom cases provide an interesting lens through which to consider the application of the two principles by the two Courts, given religion is a controversial social policy area and the content of the rights involved is quite broad. The cases highlight the real tension between sovereignty and the different cultural settings of EU member states, on the one hand, and the nature and importance of EU integration, on the other. While the CJEU may not often explicitly consider the right to freedom of religion, the right does receive some attention in the context of immigration and other social policy considerations, and its role could be expanding. The ECHR, by contrast, has considered freedom of religion in many instances, involving quite varying contexts, results and consequences. In the light of recent institutional changes to the ECHR, and of the evolving role of the CJEU, it is interesting to consider the jurisdictional responsibilities and interrelationships of the Courts, and the extent to which there has been a lessening of possible inconsistencies in interpretation and application of the principles of subsidiarity and the margin of appreciation.

2. The Court of Justice of the European Union and the European Court of Human Rights

The CJEU came into existence in 1952 as the court of the EU. The CJEU has jurisdiction to ensure that EU laws are interpreted and applied consistently across EU member states. It discharges its responsibilities by adjudicating disputes brought by a member state or individual, and by giving preliminary rulings, as requested, on the interpretation of EU law or the validity of acts adopted by EU institutions. The CJEU has formed an integral part of the institutional

architecture of the EU system, managing to enjoy a role of judicial empowerment and active policy role which has contributed to its overall crucial role in progressing integration within the EU through adjudicating on the application and compliance of EU law.¹ It has recently witnessed a fundamental change in its available jurisdiction through the legal entrenchment of the Charter of Fundamental Rights of the European Union ('EU Charter').

The EU Charter was adopted in 2000, coming into force through the Treaty of Lisbon in 2009, formally entrenching human rights into the EU system and making the rights already protected by EU law more visible and consistent across the system.² The EU Charter addresses the need for both EU institutions and national authorities to interpret EU law in a manner consistent with its provisions. As a result, the CJEU has now acquired its own human rights responsibilities, opening the avenue of recourse to it for individuals should member states be seen to be over-stepping the limits of relevant directives, or where there are alleged violations of EU Charter rights, as well as enabling national authorities to seek preliminary rulings on the nature and content of a particular right. But there are limits in that, as some commentators have noted, while the EU Charter is primary EU law, it does not mean that the CJEU has become the second ECHR, for the Treaty on the European Union stresses that the EU Charter does not extend competences of the EU.³

The ECHR was established in 1959, out of the Council of Europe, to adjudicate matters arising in relation to alleged breaches or violations by state parties of rights and obligations contained in the Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention'), which came into force in 1953. The ECHR sits outside, but alongside, the EU system and the CJEU as a key arbitrator of human rights and an avenue of recourse for individuals to bring actions against their member state claiming alleged violations of Convention rights. During its more than fifty years of operation, the ECHR has played an important role in addressing the exercise of human rights compliance across its state parties, while also having an influence on the CJEU and EU system concerning human rights interpretations and applications.

3. Inter-relationships of the two courts

Traditionally established as two distinct courts, the inter-relationships between the CJEU and ECHR have strengthened over time. Since all EU member states are members of the Council of Europe and are parties to the Convention, they all enjoy access to both the ECHR and CJEU. Further, the EU Charter recognises the role of the Convention in protecting fundamental rights,

prescribing in Article 52(3) that where there are corresponding rights in the EU Charter with those in the Convention, similar meaning and interpretation should be given consistent with the Convention; though nothing prevents the relevant structures and institutions within the EU providing greater and more extensive protection of such rights.

The way in which the jurisprudence of the ECHR has been incorporated may be less comprehensive than some were advocating for.⁴ However, various reforms have brought the two systems closer together. Through the Treaty of Lisbon, the EU now has the option available to accede to the Convention, and it further noted that fundamental rights contained in the Convention shall constitute general principles of EU law, insofar as derived from the constitutional traditions common to the member states. In late 2014, the CJEU handed down Opinion 2/13, rejecting the draft EU proposal of accession to the EU due to a risk of negatively effecting the division of powers between the EU and member states. Given these ongoing political and legal tensions surrounding the inter-relationships and jurisdictions of the two Courts, accession by the EU remains the subject of considerable debate, and is a rather distant likelihood at present.⁵ At the same time, through structural changes, the application of the principles of subsidiarity and the margin of appreciation are perhaps strengthening the inter-relationships of the two Courts.

4. Principle of subsidiarity

The principle of subsidiarity looks to the level of government where legislative and policy actions and decisions are best taken to adequately respond to the issue or competency in question. The principle of subsidiarity was, through the Lisbon Treaty, incorporated into the Treaty of the European Union in the preamble and further supported by Article 5, noting EU competences are governed by the principles of subsidiarity and proportionality. The European Parliament notes, in guidance material, that ‘the principle of subsidiarity seeks to protect the capacity of the Member States to take decisions and to take action and authorises intervention by the Union when the objectives of an action cannot be sufficiently achieved by the Member States, but can be better achieved at Union level’.⁶ This is supported by Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality, which sets out practical requirements for EU institutions and National Parliaments for adhering to the principle of subsidiarity across a range of considerations and actions.

Article 8 provides that the CJEU has jurisdiction ‘in actions on grounds of infringement of the principle of subsidiarity by a legislative act’. Subsidiarity has been developed and applied to find the balance within the EU of seeking to promote integration, while at the same time recognising and protecting the cultural relativity and divergences across member states to protect their autonomy in certain policy areas.⁷ The CJEU plays an important role in the adherence to and respect for the principle of subsidiarity through its role in adjudicating member state compliance with EU law, thus contributing to the ongoing process of EU integration in the context of diversity.⁸

5. Principle of the margin of appreciation

The margin of appreciation has been developed by the ECHR to allow a state, where appropriate, to respond to its domestic setting as the primary protector of human rights in the system.⁹ A concept of state discretion was noted in the very early days of the ECHR, the phrase ‘margin of appreciation’ was first coined in 1960 in *Lawless v Ireland*.¹⁰ It was subsequently discussed in more detail in *Ireland v United Kingdom* where it was noted that, in the state of emergency threatening a nation context, ‘by reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence ... and the scope of the derogations necessary to advert [the national emergency]...’ and that, as such, this leaves those national authorities with a wide margin of appreciation.¹¹

By the mid-1970s the Court had broadened the applicability of the margin of appreciation to areas of public morality and social policy rights, especially in the seminal case of *Handyside v United Kingdom*,¹² considering the right to freedom of expression. Although the EHCR found an interference with Article 10 by the United Kingdom, it also found that Article 10(2) ‘leaves to the contracting state a margin of appreciation...’ and that generally the United Kingdom was ‘... in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them...’¹³; and, accordingly, that the United Kingdom had legitimately subjected freedom of expression to a necessary limitation in this context and there was no breach of Article 10.

The margin of appreciation has since become a commonly used practical tool by the ECHR, applied in a way that recognises a need to balance the protection of rights with keeping states

engaged without significant encroachments into their internal affairs where the domestic action is legitimate or proportionate.¹⁴ It is applied when a determination is to be made about whether an interference with a right is necessary in a democratic society, turning to the State as being better placed to determine its local settings; though it is not a fixed unit of legal measurement.¹⁵

6. Inter-connectedness of the two principles

Traditionally, the principles of subsidiarity and the margin of appreciation have stood as two distinct principles, with the CJEU and ECHR applying them, respectively, in line with their own jurisdictional responsibilities. Several commentators have noted that the margin of appreciation has evolved out of the principle of subsidiarity as it is applied by the ECHR in relation to the Convention, with human rights compliance and decision making residing at the national level, as supported by a requirement that domestic remedies be first exhausted before recourse to the ECHR.¹⁶

When addressing the margin of appreciation, the analysis and interpretative tools of the Court reflect elements of the principle of subsidiarity. The ECHR couples its analysis with reference to European consensus when determining whether there are emerging similar patterns of state practice on related issues, or trends in Europe, that indicate what may be a reasonably proportionate response to the specific issue by the state in question.¹⁷ The analysis turns to a question of whether the responding domestic measure in question is justified and proportionate to achieving a legitimate aim. This reflects the principle of subsidiarity in that the Convention is subsidiary to national authorities, and thus the ECHR is not well-placed to arrive at dynamic interpretations of rights, overriding decisions of member states where they are appropriately being dealt with at the local level consistent with the margin of appreciation afforded to the state.¹⁸ At the same time, the ECHR refers to a concept of ‘European supervision’ which again reflects the principle of subsidiarity by recognising that the state cannot be left with unfettered power where it enjoys a margin of appreciation.

The importance of the two principles and their underpinning of the effective operation and ongoing relevance of the two Courts within the EU system and the European community has now been clearly and formally recognised. Protocol 15 of 2013 resulted in the principles of subsidiarity and the margin of appreciation being officially recognised within the structure and operation of the ECHR through the Convention. In turn, such developments have created an

important incentive for the ECHR to develop a more coherent concept of the two principles and perhaps a more consistent way in which they are applied across the ECHR's judgments.¹⁹

7. Freedom of religion

In recent years the ECHR has started to develop a more solid jurisprudence involving interpretation of religious freedom.²⁰ Freedom of religion is provided for under Article 9 of the Convention, which states:

‘Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance’.

Such a right and freedom, according to Article 9(2), ‘shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others’. Analysis of this right involves a three step process by the ECHR, by determining whether an interference or limitation of a right can be justified where it is prescribed by law which has a legitimate aim, is proportionate to the aim and also is necessary in a democratic society, before a conclusion is made as to whether a resulting violation has thus occurred.²¹ At this point, there are considerations of what extent a margin of appreciation is afforded to the state, and whether the state has acted within the appropriate limits of this margin. Commentators have observed that the ECHR has grappled with defining the right in a way that can provide coverage for the broad range of religions and faiths across Europe, while at the same time being precise enough to allow for practical application across a range of case law.²²

As the competences of the EU have expanded, the consideration of human rights issues has become increasingly pertinent,²³ with increasing opportunities for cases to arise before the CJEU invoking its jurisdiction with respect to the EU Charter. The expansion is consistent with Article 10(1) of the EU Charter which safeguards the right to religious freedom by providing that:

‘Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance’.

Commentators note that the CJEU is yet to fully realise its human rights jurisdiction, arguing that it lacks the depth of experience of other human rights bodies, despite having tangentially referenced human rights throughout a range of past judgments.²⁴ To more clearly understand the

role of the EU in this space, and thus the room for adjudication of religious freedom by the CJEU, it is important to appreciate movements that have occurred over recent years. In response, the following selection of cases addressed by the two courts over the past five years demonstrate the breadth of freedom of religion issues that can arise, predominantly regarding the wearing or display of religious symbols. The cases involve judicial considerations resulting in differing assessments and levels of engagement with freedom of religion. While other cases could be analysed and discussed, the selected cases raise interesting and different factual situations on which to assess the engagement of the two courts and how the principles of the margin of appreciation and subsidiarity are applied in the context of the courts differing yet inter-related jurisdictional responsibilities.

8. European Court of Human Rights and freedom of religion

The ECHR has adjudicated cases relating to the varying responses by EU member states to issues related to the Muslim and Christian faiths, particularly the wearing of religious dress or display of religious symbols, which have ignited debates and tensions between freedom of religion and the promotion of secularism and social harmony. The case of *SAS v France*²⁵ involved a timely analysis of these issues, with an alleged violation of the right to freedom of religion by France by way of Law no. 2010-11921, which created a criminal offence prohibiting the wearing of clothing designed to conceal one's face in public places, subject to certain narrow exemptions. Upon entry into force of this law, a French national woman, of Muslim faith who on occasion chose to wear the full veil, brought the case before the ECHR arguing that such a law violated her right to respect for private life under Article 8, and Article 9 of the Convention. While accepting an interference with the right under Article 8, the ECHR's assessment focused primarily on Article 9, given the ban prevents the applicant from wearing in public clothing that the practice of her religion requires. In its analysis, the ECHR notes the content of Article 9 as developed through its case law, particularly that Article 9 does not always '...guarantee the right to behave in the public sphere in a manner which is dictated by one's religion or beliefs', and that it may be necessary for the State to place limitations on such freedom to 'reconcile the interests of the various groups and ensure that everyone's beliefs are respected'.²⁶

Concerning the principles of subsidiarity and the margin of appreciation, the ECHR states that the Convention mechanisms of themselves play a subsidiary role, and that the State is often better placed to determine local needs when deciding general policy. Given that opinions on these matters vary widely across democratic societies, domestic policy-makers should be given

special power in responding accordingly, and thus are afforded a wide margin of appreciation in determining the extent of necessary limitations on the Article 9 right.²⁷ The ECHR goes on to conclude that as there is no settled common practice among member states, and given the wide margin of appreciation afforded to the State in these instances, Law no. 2010-11921 was proportionate to the aim of promoting and preserving underpinnings of French society of ‘living together’, and thus there was no violation of either Article 8 or Article 9 of the Convention. Interestingly, while there is a detailed discussion of the content of the right and an assessment of whether France’s law was legitimate and proportionate as to not violate the right, references to and conclusions regarding the margin of appreciation were not addressed in detail.

The 2013 case of *Eweida and Others v United Kingdom*²⁸ involved four different applications that were joined, as allowed under ECHR court rules, relating to matters of the Christian faith. The four applications concerned two overarching matters, with one relating to the wearing of Christian crosses in employment, and the other involving negative feelings and sentiments towards same-sex couples displayed in the course of the applicants’ employment.

The first applicant, Ms Eweida, was employed by British Airways and the second applicant, Ms Chaplin, was employed as a nurse at a public hospital, with both of their employers having uniform policies, including provisions relating to the wearing or display of religious symbols. British Airways’ uniform policy stated that overtly religious symbols in the conduct of customer contact and relations work were to be covered up, unless special approval was granted. The hospital’s uniform policy noted that necklaces were not permitted where there was a risk of injury when handling patients, due to health and safety reasons, with any religious symbols being worn first requiring approval. Ms Eweida one day decided to openly wear her cross on display at work, thus breaching company policy, which resulted in her being forced into unpaid leave when she would not comply, only able to return to work when the uniform policy, including now permitting the wearing of crosses, was changed. Ms Chaplin, by contrast, sought approval to wear her cross, but this was denied on the basis that the chain and cross could cause injury if it was pulled by a patient, and subsequently she was offered alternatives, such as fastening her cross to her identity badge. Due to continued non-compliance, Ms Chaplin was moved to a non-nursing position which subsequently ceased to exist.

The third applicant, Ms Ladele, a Christian opposed to same-sex marriage, was employed by a local public authority as a registrar of births, deaths and marriages, which included registering

civil partnerships following the *Civil Partnership Act 2004* (UK) coming into force. The fourth applicant, Mr McFarlane, a Christian opposed to same-sex relationships, was employed by a private company that provided sex-therapy and relationship counselling services. The employers of both applicants had relevant codes of conduct or equal opportunity policies relating to non-discrimination of their services. Both applicants had informally arranged with their colleagues that they would not need to take on same-sex relationship related work, being the registering of civil partnerships or providing counselling respectively, thus enabling each applicant to manage their personal and religious feelings accordingly. However, in both instances, other colleagues of the applicants started to complain of the applicants' discriminatory attitudes and practices and consequently various internal actions were taken against each of the applicants by their employers.

All four applicants had brought separate applications before the domestic Employment Tribunal alleging religious discrimination contrary to the *Employment Equality (Religion and Belief) Regulations 2003* (UK). Following various domestic processes resulting in no success for the applicants, applications were lodged separately with the ECHR, which decided to link the four matters due to their similar situations and legal arguments relating to freedom of religion and freedom to manifest one's religion under Article 9 of the Convention. In its analysis of the matters, the ECHR noted that it is the duty of the State to act with neutrality and impartiality which is incompatible with any State power that seeks to assess the legitimacy of one's religious beliefs and how those beliefs are expressed.²⁹ It appreciated that for an act to be a 'manifestation' of that religion or belief, it must be intrinsically linked to that religion or belief, with a balance needing to be struck between the competing interests of the individual versus the community, subject to the relevant margin of appreciation enjoyed by the State.³⁰

The State enjoys a margin of appreciation to determine where similar situations can nevertheless require and permit quite different treatment or responses by the State, as justified where the respective measures are each proportionate to achieving a legitimate aim. The question of whether the actions of a particular private employer, compared to a public authority employer, can be held attributable to the State is to be considered in light of the recognition of a positive obligation on state authorities to secure Article 9 rights for those within their jurisdiction. The breadth of the margin of appreciation afforded to the State can thus vary significantly, tailored to the specific circumstances, as was the outcome for these four applicants. In Ms Eweida's case, the ECHR noted that the corporate image of the employer was given too much weight by

domestic courts, with later amendments to the uniform policy demonstrating the earlier prohibition was not crucial, there had been no real intrusion on the rights of others, and thus a fair balance between rights had not been struck. The Court found there was a failure by the State to sufficiently protect Ms Eweida's right to manifest her religion, and thus a violation of Article 9 had resulted. Conversely, in the cases of the other three applicants, the ECHR found no violation of the right under Article 9 due to the State acting within the varying margin of appreciation afforded to it in each instance. In Ms Chaplin's case, there was a wide margin of appreciation due to the State, involving delegation to the hospital, being best-placed to determine appropriate and legitimate measures in the interests of public safety. Similarly, the local authority, in Ms Ladele's case, was considered to have a wide margin of appreciation to strike the appropriate balance between religion and the equal opportunity and non-discrimination of others in providing a public service, and accordingly had acted within that margin afforded to it. Also in Mr McFarlane's case, the State was considered to have a wide margin of appreciation to ensure service provisions are non-discriminatory and thus had to strike the right balance between religion and securing the rights of others, as permitted within the margin.

Freedom of religion and the display of religious symbols in the education context has been another subject of controversy across Europe in recent years, with the case of *Lautsi and others v Italy*³¹ providing an interesting illustration. The case challenged the display of crucifixes in classrooms across Italy, in both state and religious schools alike. The applicant brought proceedings on behalf of her two children who were minors at the time, alleging that crucifixes in the state school the children attended was a violation of Article 2 of Protocol No. 1 taken together with Article 9 of the Convention.

Article 2 of Protocol No. 1, declared by the ECHR as being in principle the *lex specialis* in this case given its coverage of the specific issue of education in relation to religious freedom,³² provides that

‘no person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions’.

This provision is to be read in light of Article 9, particularly as it imposes a duty of neutrality and impartiality on the part of the State. Also, Article 2 of Protocol 1 extends beyond the content

of teaching to the exercise of all functions in relation to education and teaching and the organisation of the school environment.³³

The ECHR noted that whether or not to perpetuate a tradition such as the ongoing display of crucifixes in classrooms, which the Italian Government argued educates children about the history and symbolism of the foundations of democracy, falls within the margin of appreciation that Italy enjoys to make such decisions. Further, it concluded that, as there is no European consensus on the matter, such a margin of appreciation is warranted and, accordingly, that Italy has not exceeded its limits of this margin, that there has been no violation of Article 2 of Protocol 1, and that no separate issues arise under Article 9.

Significantly, in its analysis, the ECHR provided a solid analysis of how the measures may interfere with such rights, yet the margin of appreciation was afforded in such a way that overrules these determinations and leaves Italy with the relevant discretion to act as it sees fit within this rather wide margin in a controversial social policy area. Such a judgment clearly illustrates the practical application of the margin of appreciation as a tool to further state participation and engagement, while recognising that, consistent with the principle of subsidiarity, certain social policy measures are best left to be responded to at the state level.

9. Court of Justice of the European Union and freedom of religion

The EU has grappled with issues of religion for many years, given different cultural and religious settings of member states, and tensions between religion and politics in the process of EU integration.³⁴ However, since the 1990s, the broadening of EU competencies has resulted in more consideration of the impact of religion issues on state and EU policies, and thus EU responses have been required.³⁵ An example of this is Directive 78/2000/EU on equality in employment and occupation, which provides protections against direct and indirect discrimination on the basis of religion, noting that such discrimination may undermine the objectives of the EU and thus should be prohibited in member states. This provides opportunities for the CJEU to consider related cases brought before it alleging violation of the directives with EU Charter rights and, in doing so, to apply the principle of subsidiarity in determining the member state has appropriately and proportionally given effect to the directive consistent with EU law. However, the CJEU has not yet directly considered discrimination or alleged violation of rights on the basis of religion or belief.³⁶ Commentators have questioned what level of

discretion the CJEU will give to the national authorities of member states in applying non-discrimination and equality directives, given their sensitive nature and the varying cultural settings in each state that may influence respective law and policy responses.³⁷

Prior to the two cases mentioned below, which were considered in May 2016, the CJEU had experienced an absence of direct adjudication of the right to religious freedom, though the willingness of the CJEU to consider religious freedom and its content in connection with EU law, was nevertheless illustrated in *Bundesrepublik Deutschland v Y and Z*.³⁸ The preliminary ruling involved interpretation of EU Council Directive 2004/83/EC, regarding the minimum standards for qualification as a refugee. The key question referred to the CJEU was whether the Directive was to be interpreted in a way that meant not every interference with religious freedom, interfering with Article 9 of the Convention, constituted an act of persecution within the meaning of the Directive, and that a severe violation of religious freedom only arises when the core area of religious freedom is adversely affected.

In commencing assessment of the facts and questions of EU law before it, the CJEU declared that ‘freedom of religion is one of the foundations of a democratic society and is a basic human right’, before going on to note that having to refrain from public religious practices to avoid persecution should they be returned to Pakistan would be in conflict with the protection which the directive is seeking to provide the applicants through granting them refugee status. It declared, therefore, that the directive should be interpreted in a way to mean that a fear of persecution is well-founded if the authorities can reasonably infer that upon return to the country of origin, the applicant will engage in religious practices that could expose the applicant to a real risk of persecution.³⁹ This reflects the principle of subsidiarity being applied by the CJEU to recognise that where action is to be taken appropriately at the national level, there is still to be consistency in member states’ responses to the Directive, in line with EU law more generally and perhaps even broader human rights considerations, and that the CJEU is rightly placed to provide such guidance within its jurisdictional responsibilities.

Two matters recently before the CJEU engaged the CJEU’s religious freedom jurisdiction for the first time in quite contrasting ways, involving interpretation of Directive 78/2000/EC. The French and Belgian courts issued preliminary references to the CJEU in the cases of *Achbita*⁴⁰ and *Bougnaoui*,⁴¹ respectively, regarding whether restricting the wearing of an Islamic headscarf at work amounts to religious discrimination within the meaning of the directive.⁴² Both cases

involve issues of women of Muslim faith, who wear an Islamic veil, having had their employment terminated for failure to stop wearing the veil where the employer has stated they are failing to observe the principle of neutrality in the workplace.⁴³ The preliminary ruling question directed to the CJEU in *Achbita* related to whether Directive 78/2000/EC Article 2(2)(a) as a direct discrimination provision can be interpreted as meaning that a prohibition on wearing a Muslim headscarf at work is not direct discrimination where the employer prohibits all employees from wearing signs of religious beliefs in the workplace. The question before the CJEU in *Bougnaoui* similarly related to whether Article 4(1) of the Directive, relating to exemptions due to occupational requirements, can be interpreted as meaning that the wishes of a customer to not be served by an employee wearing an Islamic headscarf can be a genuine occupational requirement, and thus not discrimination. The two cases were noted by commentators as providing the CJEU with a further opportunity to consider ECHR jurisprudence on religious freedom and either apply, distinguish or at least comment on it, as well as indicating a position on the appropriate interpretation of the employment equality directive for the first time.⁴⁴ This accords with ECHR having had quite a lot of engagement with freedom of religion matters with a growing number of applications particularly under its new full time court structure from 1998 onward.⁴⁵

After much anticipation and discussion by commentators awaiting these two preliminary rulings being handed down, the effect of the two decisions in the context of the CJEU embracing its human rights jurisdiction with respect to freedom of religion is limited. Of particular interest, however, are the two very different approaches taken by the individual Advocates General in the two cases, which deal with the same EU Directive and involve relatively similar factual situations.

Advocate General Sharpston in *Bougnaoui* provides a solid overview of the relevant religious freedom legal framework, making several important remarks about how the ECHR and also Member States have engaged with religious freedom, and how relevant considerations are significant concerning the facts of the case. The religious freedom discussion and analysis comprises the majority of Sharpston's overall opinion, leading to a conclusion that the Directive should be read in a way that means workplace rules preventing employees wearing religious signs or dress can be classed as direct discrimination; and that where there is indirect discrimination, such discrimination is only justified where the measure is actually proportionate to a legitimate aim. In stark contrast, Advocate General Kokott in *Achbita* adopts a more

formulaic approach, choosing not to engage in broader commentary and considerations of the European interpretations of religious freedom, but rather addressing the interpretation of the Directive in a detailed way through a more confined human rights lens. Kokott concludes that prohibiting a female employee from wearing religious apparel is not direct discrimination under the Directive in circumstances where the ban is founded on a general company ruling prohibiting all forms of religious apparel. She appreciates that this might constitute indirect discrimination which, on the basis of several considerations, may nevertheless be justified in order to promote company policy of religious and ideological neutrality.

A consequence of the contrasting approaches is that it remains unclear how the CJEU may decide to develop its human rights jurisdiction with reference to the Convention and ECHR. Beyond just a move towards closer formal collaboration and inter-relationships of the two Courts, cultural change is required within the CJEU to ensure it can have more effective future human rights engagement, while still retaining its distinct role as an arbitrator of protection and promotion of EU laws more generally.

10. Analysis and concluding remarks

The above cases, and related EU action, illustrate the vast range of contexts in which rights relating to freedom of religion can be engaged and considered, and the complex social policy questions they raise. While the CJEU may still be recognising its human rights jurisdiction on these issues, the CJEU's openness to considering the importance of religious freedom has been illustrated, and even in the context of *Achbita* and *Boungaoui* how far the CJEU as a whole will take its newfound human rights and specifically religious freedom platforms is yet to be confirmed. By contrast, the ECHR frequently considers religious freedom cases under Article 9 of the Convention, and engages in discussion of the content of rights and analysis of the response, though ultimately turns to affording a wide margin of appreciation to the state.

In the application of the principle of subsidiarity, whether by direct reference or implication in their method and reasoning, the Courts defer back to the state to respond appropriately at the national level, with the CJEU ensuring this is done so consistently with EU law more generally, and the ECHR ensuring a legitimate and proportionate inference with a fundamental human right, in ways that demonstrate neither Court is overstepping its jurisdiction. The principle of the margin of appreciation is applied by the ECHR in support of this by recognising that, where

there is no European consensus, the Court is not in a position to override national authorities on matters of complex social policy where the state is better placed to respond.

It is pertinent to reflect on how the CJEU and ECHR are likely to interact going forward, and how the application of the principles may evolve, in the light of recent structural changes still waiting to have full effect and of the cases currently before the CJEU that invoke its jurisdiction regarding religious freedom for the first time. At present, the CJEU is not capitalising on its newfound ability to engage with its human rights jurisdiction in a way that could be shaping regional and international applications and understandings of such rights, and building on human rights foundations and compliance within the EU.⁴⁶ Commentators have noted that, from a few process perspectives, there are reasons for the CJEU being well advised to assume a more proactive human rights adjudication role, including cases being able to be brought before it at any time and decisions being generally more timely than the ECHR processes, coupled with the fact that the CJEU does not have as large a backlog of cases.⁴⁷ However, some worry that given CJEU resistance to greater formal recognition and interaction between the two Courts, there may be significant adverse effects on the development of human rights protections if the CJEU actively distances itself from the ECHR's jurisprudence.⁴⁸ Accordingly, future reforms and a move towards closer formal collaboration and inter-relationships of the two Courts have to be done in a way that shapes a relationship based on preserving the distinct functions and jurisdictions the Courts, while also ensuring the two jurisdictions can complement one another and operate effectively together with consistency, not duplication.⁴⁹

Endnotes

1. R Daniel Kelemen, 'The Court of Justice of the European Union in the Twenty-First Century' (2016) 79 *Law and Contemporary Problems* 117-140, 120.
2. Stephen Brittain, 'The Relationship between the EU Charter of Fundamental Rights and the European Convention on Human Rights: an Originalist Analysis' (2015) 11(3) *European Constitutional Law Review* 482-511, 482.
3. Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8(3) *European Constitutional Law Review* 375-403, 376-377.
4. Brittain, above n 2, 501.
5. Xacier Groussot and Eric Stavelfeldt, 'Accession of the EU to the ECHR: A Legally complex Situation' in Joakim Nergelius and Eleonor Kristoffersson (eds), *Human Rights in Contemporary European Law* (Hart Publishing, 2005) 7, 7.
6. European Parliament, 'The Principle of Subsidiarity' (2016) *Fact Sheets on the European Union*, 1.
7. Jeff Edmund Katcherian, 'Unravelling the Paradox: Competence and the Failure of Subsidiarity in the European Union' (2012) 35(2) *Political and Legal Anthropology Review* 271-288, 271-272.
8. Thomas Horsley, 'Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?' (2012) 50(2) *Journal of Common Market Studies* 267-282, 267.
9. Dean Spielmann, 'Whither the Margin of Appreciation' (2014) 67 *Current Legal Problems* 49-65, 49.
10. App. No 332/57 (ECHR 14 November 1960).
11. App. No 5301/71 (ECHR 18 January 1978) 207.
12. App. No 5493/72 (ECHR 7 December 1976).
13. *Handyside v United Kingdom* App. No 5493/72 (ECHR 7 December 1976) 48.
14. Josh Delbrueck, 'International Protection of Human Rights and State Sovereignty' (1982) 57 *Indiana Law Journal* 567-578, 567.
15. Spielmann, above n 9, 55-56.
16. Alastair Mowbray, 'Subsidiarity and the European Convention on Human Rights' (2015) 15 *Human Rights Law Review* 313-341, 321-322.
17. Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press, 2015) 12.
18. Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press, 2015) 23.
19. Justice Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14 *Human Rights Law Review* 487-502, 491.
20. Mark Hill QC, 'Tensions and Synergies in Religious Liberty: An Evaluation of the Interrelation of the Freedom of Belief with Other Human Rights; Parallel Equality and Anti-Discrimination Provisions; Enforcement in Competing European Courts; and Mediated Dispute Resolution' (2014) 3 *Brigham Young University Law Review* 547-563, 547.
21. Francoise Tulkens, 'Freedom of Religion under the European Convention on Human Rights: A Precious Asset' (2014) 3 *Brigham Young University Law Review* 509-530, 521.
22. Francoise Tulkens, 'Freedom of Religion under the European Convention on Human Rights: A Precious Asset' (2014) 3 *Brigham Young University Law Review* 509-530, 513.
23. Groussot and Stavelfeldt, above n 5, 7.
24. Grainne De Burca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20(2) *Maastricht Journal* 168-184, 171-172.
25. App. No. 43835/11 (ECHR 1 July 2014).
26. *SAS v France* App. No. 43835/11 (ECHR 1 July 2014) 125-127.
27. *SAS v France* 129-130.
28. App. No 48420/10; 59842/10; 5167/10; 36516/10 (ECHR 27 May 2013).
29. *Eweida and Others v United Kingdom* App. No 48420/10; 59842/10; 5167/10; 36516/10 (ECHR 27 May 2013) 81.
30. *Eweida and Others v United Kingdom* 82-84.
31. App. No. 30814/06 (ECHR 18 March 2011).
32. *Lautsi and others v Italy* App. No. 30814/06 (ECHR 18 March 2011) 59.
33. *Lautsi and others v Italy* App. No. 30814/06 (ECHR 18 March 2011) 63.
34. Sean Oliver-Dee, 'The European Union's Awkward Embrace of Religious Freedom' (2014) 12(3) *The Review of Faith and International Affairs* 25-32, 25-26.

35. Flavia Zanon and Giuseppe Sciortino, 'The newest diversity is the oldest: Religious pluralism and the EU' (2014) 14(4) *Ethnicities* 498-516, 499.
36. Michael Rubenstein, 'Recent and Current Employment Discrimination Cases in the Court of Justice of the European Union' (2015) 15 *The Equal Rights Review* 57-74, 73.
37. Hill, above n 20, 559.
38. (C71/11, C99/11) [2012] CJEU.
39. (C71/11, C99/11) [2012] CJEU, 80.
40. (C-157/15) [2016] CJEU.
41. (C-188/15) [2016] CJEU.
42. Sara Benedi Lahuerta, 'Wearing the veil at work: Achbita and Bougnaoui – Can a duty to reasonable accommodation be derived from the EU concept of indirect discrimination?' on EU Law Analysis (15 March 2016) <<http://eulawanalysis.blogspot.com.au/2016/03/wearing-veil-at-work-achbita-and.html>>
43. Rubenstein, above n 27, 73.
44. Lahuerta, above n 33.
45. Tulkens, above n 21, 510.
46. De Burca, above n 24, 184.
47. Hill, above n 20, 558.
48. De Burca, above n 24, 172.
49. Roberto Baratta, 'Accession of the EU to the ECHR: the Rationale for the ECJ's Prior Involvement Mechanism' (2013) 50 *Common Market Law Review* 1305-1332, 1312.

