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the Public Order of the European Union

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Limitations on Religion in a Liberal Democratic Polity:
Christianity and Islam in the Public Order of
the European Union

Ronan McCrea^{*}

Abstract: This paper examines aspects of the European Union's approach to the accession of new member states and the integration of immigrants to show how the Union has viewed religion as a potential threat to the autonomy of the public sphere and to individual autonomy in the private sphere and has required acceptance of limitations on religious influence over law and law-making from both applicant states and individual migrants. It notes how, in common with the jurisprudence of the European Court of Human Rights, the EU has been willing to interfere with privacy and individual autonomy in order to protect such principles from the consequences of unlimited religious influence on law and society. Finally the paper considers how the Union's attempts to uphold limitations on religion in the public sphere have been complicated by the partial and contested nature of the secularity of its existing members. It shows how an Islamic presence in the public sphere has been identified by the Union as particularly threatening to the liberal democracy in contrast to its ready acceptance of the public roles of culturally and historically entrenched Christian denominations in many member states.

INTRODUCTION

European Integration arose partly out of horror at the consequences of fascism and fear of its totalitarian counterpart, Soviet Communism. It is therefore unsurprising that the European Union has been committed, to an increasingly explicit degree, to the liberal democratic system of government. The EU recognises religion's potentially totalitarian aspects and therefore requires certain

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limits on religious influence over the law and politics as part of this commitment to the principles of liberal democracy. This paper shows how the Union has seen excessive religious influence in the legal and political arenas as a threat to the autonomy of the public sphere, to individual autonomy in the private sphere as well as to important values such as gender equality. It demonstrates how EU law and policies in relation to the enlargement of the Union and the integration of migrants have required applicant states and individual migrants respectively to indicate acceptance of limitations religious influence over law and society as a condition of membership of, or residence in, the European Union. Thus, states have been required to maintain the autonomy of the public sphere from religious influence and to refrain from enacting legislation which enforces compliance with religious morality at the expense of individual autonomy. Similarly, migrants have been required to indicate their commitment to liberal principles such as gender equality and individual self-determination in matters of sexuality, even when such principles contradict their religious beliefs. EU law has therefore, sanctioned far reaching state interference in the private sphere of beliefs and opinions in the order to protect the general principle of the autonomy of the individual in the private sphere. Furthermore, the Union's attempts to impose these limitations on religion have been complicated by the partial and contested nature of the secularity of the public orders of its own Member States. Muslim-majority states like Turkey have been required to forswear any desire to introduce religious elements into its law while Muslim migrants have been asked to give explicit assurances in relation to their acceptance of liberal values in relation to issues of gender and sexuality. On the other hand the Union has been markedly reluctant to interfere with the important symbolic and institutional roles held by certain culturally entrenched Christian denominations in many Member States. Moreover, many such denominations, most notably the Catholic Church, continue to intervene in political matters and to influence legislation in areas such as the family, abortion and homosexual equality both at Member State and EU levels. The Union's attempts to protect its liberal democratic values from religious threats coupled with its explicit reluctance¹ to tamper with the evolving and sensitive arrangements surrounding Europe's culturally-entrenched denominations has therefore led to a situation which is directly discriminatory in that 'outsider' religions such as Islam are held to more demanding standards of secularity than 'insider' religions such as mainstream Christianity.

ENLARGEMENT AND RELIGION IN THE PUBLIC SPHERE

Since the Reformation and Enlightenment, relations between religious institutions and those of the state have been characterised in Europe by a gradual decline in

¹ See Declaration 11, annexed to the Treaty of Amsterdam, Official Journal C 340 , 10/11/1997 P. 0308.

religious power and the establishment of the legal and political supremacy of the institutions of the modern state.² Although religious institutions continue to play a role in law-making, including at EU level, religious bodies exercise have much lower political impact than in other areas of the world. The limited nature of religious influence over legal norms in Europe is shown by the fact that, even in relation to the law governing what Casanova terms 'lifeworld' issues (namely those relating to the beginning and end of life, family and sexuality) which are the highest political priority for mainstream European religious³ and which embodied the largely conservative approach of the Abrahamic religions to a significant degree as recently as 60 years ago, liberal norms of personal autonomy, privacy and equality have become increasingly dominant. This approach embodies the arguably Western notion of religion as a largely private matter with limited influence over law and political life and contrasts markedly with the situation in much of the rest of the world,⁴ most notably the Islamic world⁵ where religious principles continue to exercise a much greater influence over certain areas of law.⁶

ENLARGEMENT, CONDITIONALITY AND HUMAN RIGHTS

Even prior to 1989, it was clear that the criteria for inclusion in the Community amounted to more than adoption of a market economy. As far back as the 1960s, the Community was stressing the importance of respect for democratic principles and human rights in assessing Greece's application for membership.⁷ From the 1970s onwards Human Rights achieved an increasing prominence in the Community.⁸ Following the collapse of Communism, the speed with which newly liberated countries sought membership of the Union, meant that European

² See J. Casanova, *Public Religion in the Modern World* (Chicago and London: University of Chicago Press, 1994) 21-23 and 37. See also A. Ferrari, 'Religions, Secularity and Democracy in Europe: for a New Kelsenian Pact' (Jean Monnet Program, NYU School of Law, Paper No.3/05), at <http://www.jeanmonnetprogram.org/papers/05/050301.html> (last visited 22 November 2006).

³ See for instance the address of Pope Benedict XVI to the European People's Party of 30 March 2006, full text at http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/march/documents/hf_ben-xvi_spe_20060330_eu-parliamentarians_en.html (last visited 22 October 2006).

⁴ P. Berger and G. Weigel (eds), *The Desecularization of the Modern World: Resurgent Religion and Modern Politics* (Grand Rapids Michigan: Erdemans Publishing Company and Public Policy Center, 1999).

⁵ B. Lewis, *The Crisis of Islam: Holy War and Unholy Terror* (London: Phoenix, 2003) 14-17.

⁶ Private consensual sexual behaviour continues to be regulated by the criminal law to a significant extent in many largely Muslim societies. For instance, homosexuality remains a crime in the largely Muslim countries of Afghanistan, Algeria, Bahrain, Bangladesh, Iran, Iraq, Lebanon, Libya, Malaysia, Mauritania, Morocco, Oman, Pakistan, Somalia, the United Arab Emirates and Yemen see <http://www.gaylawnet.com/> (last visited 14 December 2006). In relation to the greater level of religiosity found in societies outside Europe see P. Norris and R. Inglehart *Sacred and Secular: Religion and Politics Worldwide* (Cambridge: Cambridge University Press, 2004).

⁷ For an account of how democracy and human rights moved from implicit to explicit conditions of EU membership see H. Sjursen (ed), *Questioning EU Enlargement: Europe in search of identity* (London: Routledge, 2006).

⁸ See the 1977 Tripartite Declaration on Human Rights of the Parliament, Council and Commission (OJ C 103, 27. 4. 1977, 5 April 1977). This process continued into the 1990s with direct reference being made to the European Convention on Human Rights in the Amsterdam Treaty and with the adoption of a Bill of Rights for the EU in the Nice Treaty. See also the series of rulings the ECJ in cases such as *Stander v City of Ulm-Sozialamt*, [1969] ECR 419 through to *ERT Case* [1991] ECR I 2925.

institutions were required to make explicit the criteria which would be used to determine who could and could not become a member of the Community. The resulting ‘Copenhagen Criteria’ were outlined in that city at the European Council of June 1993.

The criteria specified that:

Membership requires that candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and, protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union.⁹

The act of setting out such explicitly political criteria represented a recognition by Member States that a state which was eminently suitable economically for membership would not be permitted to join the Community unless it showed a commitment to certain ideals (democracy, protection of human rights etc.) adherence to which was deemed necessary for the proper functioning of the European polity. These criteria have played a prominent role, not only in the enlargement process but also in the Union’s view of itself. The Maastricht Treaty gave this process constitutional status stating in Article 6 that the Union was ‘founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law’ and pledging in the same article to respect the principles of the European Convention on Human Rights. The Copenhagen Criteria themselves have, according to both academic commentators and the Commission itself, also been turned into principles of European constitutional law.¹⁰ The European Commission is charged with assessing whether candidate countries meet these conditions. It makes a recommendation to the Member States who must unanimously decide to open negotiations.¹¹ Formal accession negotiations have never been opened by the Union with a state that has not been judged by the Commission to be in compliance with the Copenhagen Criteria.

⁹ See Presidency Conclusion, Copenhagen European Council, 21-22 June 1993 SN 180/1/93 REV1 EN, available at http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/ec/72921.pdf (last visited 15 October 2007).

¹⁰ See the Commission Regular Report of 2002 COM(2002)700 which states ‘since the entry into force of the Treaty of Amsterdam in May 1999, these [political] requirements have been enshrined as constitutional principles in the Treaty on European Union.’ See also C. Hillion ‘The Copenhagen Criteria and Their Progeny’ in C. Hillion (ed.) *European Enlargement: A Legal Approach* (Oxford: Hart Publishing, 2004), where it is argued that ‘The novelty of the Copenhagen criteria also lies in the way the obligations they embody have been enforced: their gradual ‘constitutionalisation’ has resulted in them being applied more strictly’ (3) and that ‘‘One may suggest that the political conditionality has been implicit in the Community legal order from the very outset, and made progressively more explicit’ (4).

¹¹ Article 49 Consolidated Versions of the Treaty on European Union and the Treaty Establishing the European Community, OJ C321 E/35, 29.12.2006. See ‘‘How Does a Country Join the EU’’ European Commission, DG Enlargement, available at: http://ec.europa.eu/enlargement/questions_and_answers/background_en.htm last accessed 12 September 2007).

The criteria themselves do not, on their face, appear to mandate any particular approach to management of the relationship between religion, law and politics. However, at certain moments in the accession process, the EU has indicated that adherence to the criteria and the liberal democratic values underlying them require limitations on the role played by religion and religious norms in lawmaking.

ROMANIA AND HOMOSEXUALITY

In 1996 the Romanian legislature amended Article 200 of the Penal Code to criminalise private homosexual acts and outlawed membership of gay and lesbian organisations. This law was strongly supported by the Romanian Orthodox Church with a former foreign minister identifying ecclesiastical opposition as a key factor behind the retention of the law.¹²

The Romanian government attempted to repeal article 200 in 1998 but this was rejected by parliament after a vociferous campaign by the Orthodox Church. Church officials referred to gays and lesbians as ‘the ultimate enemy’ and ‘Satan’s army’ and accused legislators of being ‘scared by the huge European pressures’.¹³ Again in September 2000 the Orthodox Church intervened forcefully appealing to legislators not to amend Article 200. Acknowledging the European dimension to the controversy Archbishop Nifon stated that he did not ‘believe that European Union integration hinges on the [homosexuality] issue’.¹⁴

At the time of the announcement of the Copenhagen Criteria in June 1993, the European Union had no competence in relation to sexual orientation discrimination.¹⁵ Neither had criminalisation of homosexuality been raised as an issue in any previous enlargement.¹⁶ However, notwithstanding this lack of internal competence or consensus amongst member states,¹⁷ the Union embraced the repeal of laws criminalising homosexual activity as part of the accession process. Importantly however, it did so on the grounds that such laws constituted an interference with the human rights of gays and lesbians. In its 1998 report on Romania’s progress towards accession, the Commission noted that a proposal to

¹² See ‘It’s Still No Breeze for Gays, Even Diplomatic Ones’ in *The New York Times*, 17 October 2001. Note in particular the comments of former Foreign Minister Mircea Geoana attributing key importance to the Orthodox Church in the debate over decriminalisation

¹³ See Florian Buhuceanu ‘ACCEPT Country Report on the Status of LGBT’ at <http://www.globalgayz.com/romania-news.html> (last visited 14 June 2006).

¹⁴ See ‘Romanian Orthodox Church Denounces Homosexuality’ Reuters News Agency 13 September 2000 at www.ilga.org (last visited 14 June 2006).

¹⁵ The Amsterdam Treaty of 1997 did widen the scope of the Union’s ability to legislate against discrimination to include discrimination on grounds of sexual orientation but such legislation required unanimity in the Council and was not enacted until late in the year 2000 (Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303/16)).

¹⁶ Homosexual acts were illegal in Scotland and Northern Ireland at the time of the accession of the United Kingdom in 1973. A similar prohibition was part of the law of the Republic of Ireland until July 1993.

¹⁷ At the time of the Copenhagen European Council homosexual activity was still a criminal offence in the Republic of Ireland which had by that stage been a Member State for some thirty years.

reform the penal code which included a proposal to decriminalise homosexuality had been rejected by the Romanian parliament¹⁸ and that there were ‘reports of inhuman and degrading treatment by the police, especially of Roma, children, homosexuals and prisoners’ by the police. These references were made in the section of the report dedicated to ‘Human Rights and the Protection of Minorities’ and not in the section which covered ‘Democracy and the Rule of Law’ indicating that the Commission saw the matter as a question of interference with the fundamental rights of a minority rather than a structural question relating to the role of religious norms in legislation.

The European Parliament was also particularly active on this issue. In September 1998 it adopted a resolution calling on Romania and Cyprus to abolish their anti-homosexual legislation. The resolution ‘deplored the refusal of the Romanian Chamber of Deputies to adopt a reform bill presented by the Government to repeal all anti-homosexual legislation provided by Article 200 of the penal code.’¹⁹ It also specifically linked the issue of decriminalisation to the question of accession expressing the Parliament’s refusal to ‘give its consent to the accession of any country that, through its legislation of policies, violates the human rights of lesbians and gay men’.²⁰ The Parliament repeated these sentiments in subsequent resolutions in March 2000 and July 2001.²¹ In the summer of 2001 the Parliament’s Intergroup for Lesbian and Gay Rights held a hearing on the situation of lesbians and gays in the accession states. These activities contributed to an increase in pressure on the Commission to take a more proactive stand in relation to the issue of homosexuality and enlargement.²² Like the Commission, the Parliament’s resolutions were phrased solely in terms of the implications of criminalisation for the human rights of gays and lesbians and did not address the controversy’s religious aspects.

In remarks to the European Parliament in September 2001, the Commissioner responsible for Enlargement Gunter Verheugen stated that he wished to make it clear that the Commission would continue to press for human rights and non-discrimination in enlargement negotiations, including on grounds of sexual orientation.²³ The Commissioner’s representative to the Intergroup on Gay and Lesbian Rights further stressed that there would be ‘no flexibility’ on this issue on the part of the Commission. Commissioner Verheugen was even more explicit in a letter sent to the International Lesbian and Gay Association in which he stated the applicant states would be expected to accept the elimination of

¹⁸ See Section 1.2 of *Regular Report from the Commission on Romania’s Progress towards Accession* at http://ec.europa.eu/enlargement/archives/pdf/key_documents/1998/romania_en.pdf (last visited 24 October 2006).

¹⁹ Res. B4- 0824 en 0852/98 adopted 17 September 1998. See in particular paragraph F.

²⁰ *ibid*, paragraph J.

²¹ Res. A5- 0223/2001, adopted 5 July 2001, paragraphs 80 and 83 and Res. A5- 0050/2000 adopted 16 March 2000, paragraphs 59 and 60.

²² See J. Sweibel, ‘Gay and Lesbian Rights and EU Enlargement’ at <http://www.eumap.org/journal/features/2002/april02/gaylesbeu> (last visited 14 June 2006).

²³ Quoted in *ibid*.

discrimination based upon sexual orientation and that 'Equal treatment of gays and lesbians is a basic principle of the European Union'.²⁴ In December 2001 faced with the determined opposition of the Orthodox Church and conscious of its failure to push decriminalisation through the parliament on the previous occasion, the Romanian government resorted to an emergency ordinance to amend Article 200 and finally decriminalised homosexuality.²⁵

European institutions had therefore succeeded in forcing the Romanian authorities to remove from their statute book a legal measure which enshrined in the criminal law religiously-influenced norms against homosexuality. They had done so in the face of a vociferous and popular campaign by religious leaders of Romania's state church in favour of retaining the law. However, despite this, the Union saw the issue not as a primarily religious one but as a question of human and minority rights. It was to take a somewhat different approach in its dealings with Turkey.

TURKEY AND ADULTERY

In the autumn of 2004, the Turkish government presented its overhaul of the criminal code to parliament as part of its attempt to win the backing of the European Council (scheduled for later that year) for the opening of accession negotiations with the EU. Despite the limited nature of EU competence in this area, it was the criminal law as it related to the 'lifeworld' issues of gender and sexuality that received the greatest attention.²⁶ Indeed as *Deutsche Welle* newspaper noted 'with pressure from the EU, women's rights groups were able to outlaw rape in marriages and get old fashioned terms like 'chastity', 'honor' and 'moral' out of criminal law books.'²⁷ However, despite the fact that the Turkish Constitutional Court had abolished the crime of adultery in 1996 (on the grounds that it unfairly penalised women),²⁸ the 2004 reforms proposed that it be re-criminalised. Prime Minister Erdoğan defended the measure on the grounds that the law represented a 'vital step' towards preserving the family and 'human honour'. He further argued that although Turkey wanted to join the European Union it did not have to adopt its 'imperfect' Western morals.²⁹ Although several

²⁴ See International News Report 'Anti-Gay Nations May Not Join European Union' Rex Wockner, 31 July 2001 at <http://gaytoday.badpuppy.com/garchive/world/073101wo.htm> (last visited 14 June 2006).

²⁵ Government Emergency Ordinance no. 89/2001. The Romanian also introduced an ordinance to enact a law prohibiting discrimination (including discrimination on grounds of sexual orientation) (Government Ordinance no. 137/2000). For details see <http://www.accept-romania.ro/news.htm> entry of 1 February 2002 (last visited 14 June 2006).

²⁶ See 'Turkey Changes Laws to Meet EU Standards' *Deutsche Welle* 1 September 2004 at <http://www.dw-world.de/dw/article/0,2144,1314044,00.html> (last visited 19 June 2006).

²⁷ *ibid.*

²⁸ See 'Verheugen Warns Turkey on Adultery Law' *Deutsche Welle* 10 September 2004 at <http://dw-world.de/dw/article/0,1564,1324102,00.html> (last visited 19 June 2006).

²⁹ Quoted in 'Turkey's Adultery Ban Splits the Nation' *The Age* newspaper, 7 September 2004 at <http://www.theage.com.au/articles/2004/09/06/1094322712399.html?from=storylhs> accessed on 19 June 2006.

EU member states retained laws criminalising adultery until relatively recently³⁰ the European Commission reacted strongly to this proposal with the Commission's official spokesman stating that the proposal 'certainly cast doubts on the direction of Turkey's reform efforts and would risk complicating Turkey's European prospects.'³¹ Certain Member States also expressed reservations with UK Foreign Secretary Jack Straw asserting that the proposal 'would create difficulties for Turkey'.³² However, although Turkish women's groups had been amongst those most strongly opposed to the law,³³ and although in its dealings with Romania, the Union has focused on the impact of the law in question on the specific group disadvantaged by it, the EU response did not stress the impact of the law on women or ideas of gender equality. Instead the response of Günther Verheugen, the Commissioner with responsibility for the Enlargement process, consisted of an uncompromising attack on the proposal which focused on the need to separate religious from legal norms. The Commissioner described the proposal to criminalise adultery as 'a joke' and that he '[could] not understand how a measure like this could be considered at such a time' While stating that he was not 'defending adultery' Verheugen went on to note that it was important that 'Turkey should not give the impression...that it is introducing Islamic elements into its legal system while engaged in a great project such as the EU'.³⁴ The Commissioner further characterised such a move as completely out of step with Europe and as unacceptable to the EU.³⁵

According to Commissioner Verheugen therefore, the feature of the proposed change which was most unacceptable to the EU was not the repression of adultery. After all, the EU has very limited competence in this area and the Commissioner made it clear that he was 'not defending adultery'. What was out of step with European values and inconsistent with membership of the EU was to attempt to introduce 'Islamic elements' into the legal system. Faced with this reaction from the Commission and certain Member States, the proposal was withdrawn within a matter of days.³⁶

³⁰ Irish law criminalised adultery until 1981, French law until 1975 and Austrian law until 1997. In the United States, 23 states have similar laws. See K Gajendra Singh, 'EU-Turkish Engagement: A Must for Stability of the Region' (South Asia Analysis Group Papers) at <http://www.saag.org/papers12/paper1127.html> accessed on 19 June 2006.

³¹ See "Adultery Fault Line with EU" *Turkish Daily News*, 18 September 2004, available at: <http://www.turkishdailynews.com.tr/archives.php?id=37707> (last visited 18 October 2006).

³² See "Turkey Backs off Plan to Outlaw Adultery", Associated Press, 14 September 2004, available at: <http://www.wwrn.org/article.php?id=7164&sec=36&con=54> (last visited 18 October 2006).

³³ See 'Verheugen Warns Turkey on Adultery Law' *Deutsche Welle* 10 September 2004 at <http://dw-world.de/dw/article/0,1564,1324102,00.html> (last visited 19 June 2006).

³⁴ *ibid.*

³⁵ See 'EU Warns Turkey Not to Recriminalize Adultery' D. Wes Rist, 8 March 2005 <http://jurist.law.pitt.edu/paperchase/2005/03/eu-warns-turkey-not-to-recriminalize.php> (last visited 19 June 2006).

³⁶ n 32 above.

A DIFFERENCE IN APPROACH?

Therefore, the manner in which the Copenhagen Criteria have been interpreted by the institutions of the EU means that a measure of respect for a private zone of autonomy within which the individual citizen is free to define his or her own sexual existence without being forced to adhere to religious norms, is seen as a fundamental requirement of accession to the Union. As the EU's own practice of consulting extensively with religious organisations shows, this does not require a complete removal of religious influence from the lawmaking process. However, such influence has to be constrained by the principles of personal autonomy, political pluralism and the respect for privacy rights. Accordingly, while religious bodies are welcome to contribute to the law-making process, religious dogma cannot determine the content of such laws, particularly when the demands of such dogma are inconsistent with the autonomy of the individual to determine his or her identity and private conduct. As the case studies show, these principles were applied to both Romania and Turkey as part of the Enlargement process.³⁷

However, there remain striking differences in the approaches adopted by the Commission in dealing with the two countries. In both cases religious elements in societies with single dominant religion (Sunni Islam and Orthodox Christianity respectively) had succeeded in pressuring the government into attempting to enact (or to retain) legislation giving religiously-influenced norms, which condemned certain private sexual behaviour, the force of law. In the Romanian case, the EU viewed this solely as a question of the human right of gays and lesbians to be left alone by the state. In the Turkish case however, the proposal was seen not as a human rights issue or even an issue of privacy, but was instead framed as an issue of the general relationship between religion and the law. While the problem with the Romanian law was that it violated gay and lesbian human rights, the problem with the Turkish legislation was, according to the Commission that it appeared to be 'introducing Islamic elements into its legal system'. Despite the leading role played by the Orthodox Church in the campaign to retain Article 200, Romania was never warned against introducing 'Orthodox elements' into its legal system and the systemic relationship between the Orthodox Church and the Romanian State was assumed to by the EU to be in accordance with acceptable norms. The attempt to criminalise adultery on the other hand was viewed as emblematic of a wider potentially systemic problem in the relationship between the law and religion in the Turkish State. A right to be free from religiously inspired rules was upheld for 'sinners' in both Romania and Turkey to be sure, but the manner in which EU framed its demands that this right be respected differed markedly. It

³⁷ This analysis is further supported by the limited caselaw in this area. In EFTA Surveillance Authority Decision 336/94 it was held that restrictions imposed by Member States on slot-machines could not be justified solely on religious grounds, while the rulings of the Court of Justice in *Commission v Italy* C-260-04 (paragraph 35) and *Commission v Greece* Case C-65/05, OJ C326, 30.12.2006 make it clear that 'religious factors' can be taken into account by Member States exercising their margin of appreciation in regulating gambling.

should be noted that the controversy in relation to Turkey's adultery law lasted only a few days, thus limiting the opportunity for the Union to produce official documentation to confirm Commissioner Verheugen's characterisation of the relevant issues. However, the approach adopted by the Commissioner in seeing Islam as more threatening to liberal democratic values than other religions is, as will be shown below, in line with the approach both of his successor as Enlargement Commissioner,³⁸ with the approach of the European Court of Human Rights,³⁹ and with the approach of both EU and Member State legislation relating to immigrant integration.⁴⁰

SEXUAL ORIENTATION DISCRIMINATION, A EUROPEAN NORM?

The difference in approach may of course be explained by the fact that homosexuality had already been the subject of debate within the Union for some years during which time a distinctive EU norm in relation to gay and lesbian rights had emerged. Although the Union's acquisition of substantive powers in relation to sexual orientation discrimination post dated the controversy in relation to Romania,⁴¹ its institutions had since the early 1980s, been debating and formulating an approach to the issue of gay and lesbian rights which by 1998 had, in certain respects, become relatively. By 1998, outright criminalisation had been condemned by the European Court of Human Rights, the European Parliament had voiced its support for gay and lesbian equality on several occasions and the treaties had been amended so as to enable the Union to legislate in this area. There had been no similar process in relation to the laws regulating adultery which had not been the subject of any debate at EU level nor had adulterers either organised themselves or been recognised as a minority group to the same degree as gays and lesbians. It is therefore arguable that the Union's characterisation of the Romanian issue solely in terms of its human rights implications arose from the fact that the Union had already established a common approach on this issue under which discrimination against gays and lesbians was seen as a violation of human rights. This certainly chimes with Commissioner Verheugen's statement in the summer of 2001 that 'equal treatment of gays and lesbians is a basic principle of the European Union'.⁴² As Romania was seeking to join a polity which was increasingly defined itself as a 'Community of Values', a failure to decriminalise homosexuality could be seen as a failure to adhere to the common value that the Union had established in relation to sexual orientation. An attempt to criminalise

³⁸ Olli Rehn, European Commissioner for Enlargement, Open Debate on Enlargement, European Parliament Foreign Affairs Committee, Brussels, 7 May 2007. Reference SPEECH/07/287 Date 07/05/2007, at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/287&format=HTML&aged=0&language=EN&guiLanguage=en> (last visited 1 August 2007).

³⁹ See below 17-22.

⁴⁰ See below 24-49.

⁴¹ n 15 above.

⁴² n 24 above.

adultery did not involve such an established value and was therefore approached in a different manner from that of the criminalisation of homosexuality.

However, despite the Commissioner's assertion that equal treatment of homosexuals was 'a basic value of the European Union', in the period in which the Commission was dealing with the issue of Article 200 of the Romanian Penal Code, acceptance of the principle of equal treatment of gays and lesbians in the EU was in fact quite limited. In its 1997 decision in *Grant v South West Trains*,⁴³ the ECJ specifically ruled that discrimination on grounds of sexual orientation was not prohibited on by the treaty and that gay and lesbian equality was not a fundamental principle of EU law. Indeed at paragraph 31 of the judgment the Court specifically stated:

While the European Parliament, as Ms Grant observes, has indeed declared that it deplures all forms of discrimination based on an individual's sexual orientation, it is nevertheless the case that the Community has not as yet adopted rules providing for such equivalence.

While the Treaty of Amsterdam did provide the Union with competence to legislate in this area, it could only do so on the basis of unanimity and did not do so until late 2000. Even when it did finally act in this area, the EU deferred significantly to religious sensibilities giving religious bodies (including institutions such as healthcare and educational establishments whose purposes were not exclusively religious) scope to continue to discriminate on the basis of sexual orientation in the Employment Directive⁴⁴ and allowing member states not to recognise civil partnerships between same sex couples in the 2004 Citizenship Directive.⁴⁵ A norm relating to the equality of sexual orientations had not therefore, been definitively embraced by the Union at the time during which it pressured Romania to decriminalise homosexuality and was, at most, emergent and subject to continuing dispute.

RELIGION IN GENERAL OR ISLAM?

A second explanation for the difference of approach outlined above is that the EU saw, in the attempt by the Turkish authorities to criminalise adultery, something very different from that which they saw in the efforts of Romanian leaders to retain the ban on homosexuality. More specifically, the criminalisation of adultery may have been seen as representative of a wider desire to increase the influence of religion over the Turkish state to a degree which might threaten the liberal

⁴³ Case C-249/96 *Grant v South West Trains* [1998] ECR I-0621.

⁴⁴ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303/16. 21.12.2000, article 4(2).

⁴⁵ Directive of the European Parliament and the Council 2004/58/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 229/35, 29.6.2004, articles 2(2)(b) and 3(2)(b).

democratic order. The idea that a failure to maintain religious influence within certain bounds represents a potential threat to the liberal democratic order and is inconsistent with European citizenship, is seen in other contexts. As will be shown below, both the law of the EU and of certain member states in relation to migration as well as the caselaw of the European Court of Human Rights suggest that the according to religious precepts of an overly influential role in public life represents a threat to the liberal democratic system of government and to the rights of others to freedom from religion. Furthermore, in both cases the law has been applied in such a way that suggest that this threat is seen as being present to a greater degree in Islam as opposed to other religions.

Turkey is, of course, a secular country, however many in Turkey perceive the state's secularity to be under threat.⁴⁶ The army in particular has intervened on several occasions to 'defend' the country's secular system from what it sees as the threat of Islamic movements. The Turkish government which sought to criminalise adultery was made of the AKP or Justice and Development Party. The AKP is the successor to the Welfare Party (*Refah Partisi*) a party which had been forced out of office in 1997 by the Turkish military and later banned for threatening the secular nature of the Turkish republic.

The AKP's Islamist past has meant that although it now portrays itself as a moderate conservative party which supports democratic principles, it has been viewed with extreme suspicion both by Turkey's secular elite and by some EU governments. This past may have caused the EU (along with many in Turkey) to view the attempt to criminalise adultery as part of a wider strategy aimed at increasing the role of Islam in public life in Turkey and undermining the secular nature of the state. Of course, many current EU member states are far from officially secular with official state churches and close institutional and financial links between certain denominations being a prominent feature of the European constitutional landscape.⁴⁷ Moreover, explicitly Christian parties are part of governments in several EU states such as Germany, Sweden and the Netherlands. However, EU law has tended to see in Islam, a greater threat to the liberal democratic order than other religions. Seen in this way, Commissioner Verheugen's statement that Turkey could not afford to give the impression that it was 'introducing Islamic elements into its legal system' can be seen as reflecting a view on the part of the EU that an Islamically-influenced legal system might fail to respect the degree of personal autonomy and respect of the right to privacy required by the liberal democratic European order.

The compatibility of Islam with Western liberal democracy has been the subject of much debate in recent years. The role played in Islam by the sharia with its interventionist and conservative approach to issues of gender and sexuality, has been a prominent aspect of discussion in this area. Those who assert that a degree

⁴⁶ See M. Howe, *Turkey: A Nation Divided over Islam's Revival* (Boulder, Colorado: Westview Press, 2000).

⁴⁷ See J.T.S. Madeley and Z. Enyedi (eds), *Church and State in Contemporary Europe: The Chimera of Neutrality* (London: Frank Cass Publishing, 2003).

of incompatibility exists have focused on two main aspects. The first relates to the low level of secularisation experienced by largely Muslim societies. In a protracted process beginning with the Enlightenment and Reformation, the major Christian denominations in Europe, either voluntarily or after protracted conflict, have accepted significant limitations on the scope of religious authority in relation to matters of public policy.⁴⁸ Lewis argues that this process has not occurred to the same extent in the Muslim majority countries (which also provide many of Europe's immigrants). Such societies are he believes 'still profoundly Muslim, in a way and in a sense that most Christian countries are no longer Christian'.⁴⁹ The second (and possibly related) argument asserts that, mainstream Islamic theology is incompatible with the secular state and the notions of personal autonomy and distinction between public and private morality underlying the liberal democratic project. Joffé argues that 'representative democracy is seen as alien to Islam'⁵⁰ and that 'the holistic nature of normative Islamic society does not accept the premise of the socio-political atomism that is implicit in the democratic and capitalist projects'.⁵¹ Gabriel notes that 'in modern western societies many matters that are considered as more liable to moral scrutiny and judgment rather than legal investigation' but that such matters 'are still within the ambit of law in Islamic societies'.⁵² In a similar vein Lewis and Roy argue that 'few [...] practising Muslims are interested in a privatized faith as it is experienced by most Western Europeans and sometimes advanced as a model for Muslims'.⁵³ All of these views of point to a potential incompatibility between Islam, as a faith based on an all-encompassing system of holy law (the Sharia) and the liberal democratic system acceptance of which is a prerequisite for EU membership. Indeed, the influential Muslim theologian Tariq Ramadan has argued that to require European Muslims to adopt the Western 'privatised' approach to religion effectively requires Muslims to 'be Muslim without Islam' and that such an approach is based on 'a widespread suspicion that to be too much a Muslim means not to be really and completely integrated into the Western way of life and its values'.⁵⁴ However, the idea that Islam is in some way incompatible with the modern state or liberal democracy is, notwithstanding its high levels of popular support,⁵⁵ highly controversial, with

⁴⁸ n 2 above.

⁴⁹ B. Lewis *The Crisis of Islam: Holy War and Unholy Terror* (London: Phoenix, 2003) 14.

⁵⁰ G. Joffé 'Democracy, Islam and the Cult of Modernism' (1997) 4(3) *Democratization* 134. Quoted in Van Ham P. van Ham *European Integration and the Postmodern Condition* (London and New York: Routledge, 2001) 211.

⁵¹ Joffé, *ibid.*

⁵² T. Gabriel 'Is Islam against the West?' in R. Geaves, T. Gabriel, Y. Haddad and J. Idleman Smith (eds) *Islam and the West Post 9/11* (Aldershot: Ashgate, 2004) 15.

⁵³ J.S.Fetzer and J.C. Soper *Muslims and the State in Britain France and Germany* (Cambridge: Cambridge University Press, 2005) 150 summarising the arguments made by Lewis in *Islam and the West* (Oxford: Oxford University Press, 1993) 173-186 and Olivier Roy in *Vers un islam européen*, (Paris: Editions Esprit, 1999) 89-103.

⁵⁴ T. Ramadan 'To Be a European Muslim' (Leicester: Islamic Foundation, 1999) 184-185.

⁵⁵ A poll of French citizens done for the newspaper *Le Monde* in November 1989 showed that two thirds of French people had a very negative view of Islam S. Allievi, 'Relations between Religions' in B. Maréchal (ed) *Muslims in the Enlarged Europe: Religion and Society*, (Leiden: Koninklijke Brill NV, 2003) 323. A

many commentators arguing that such views are tainted with orientalism and even racism.⁵⁶

The truth or otherwise of these assertions is not for this work to address. What is important for the purposes of this chapter is to note that the campaign by the Romanian Orthodox Church to retain legislation criminalising homosexuality was viewed as an individual instance of interference by the state (albeit largely at the behest of religious authorities) with the privacy rights of a minority group. The attempt by the formerly-Islamist governing party of Turkey to enact legislation criminalising adultery was, on the other hand, seen as representative of a far wider and more serious issue; the maintenance of the more general limitations on Islamic influence over the legal system which were seen as necessary for Turkey to remain eligible for EU membership (the introduction of 'Islamic elements' into the Turkish legal system being seen by the Commission as *ipso facto* inconsistent with its desire to join the Union). This objection to 'Islamic elements' contrasts strikingly with the acceptance by the Union of the specific invocation of Christian influence in the constitutions of EU member states such as Ireland, Germany and Spain whose constitutions, to varying degrees name the Christian God as a source of fundamental values or authority. Indeed the government of the German State of Baden-Württemberg justified the retention of crucifixes in state schools, despite a ban on the Muslim headscarf on the grounds that human rights, democracy and German constitutional values derive from Christian norms.⁵⁷ If anything the difference in treatment has become even clearer in more recent times. In May 2007, Enlargement Commissioner Olli Rehn, while discussing Turkish membership in the European Parliament, stated that 'if a country wants to become a member of the EU, it needs to respect the principle of democratic secularism, part of our Copenhagen Criteria' thus identifying secularism as a part of the Criteria, something which had not been done in relation to the application of any other state.⁵⁸ The Commissioner's statement was supported by Dr Hannes Swoboda MEP, a Vice-President of the Party of European Socialists, despite his acknowledgement that there was no common approach to secularism amongst

1990 poll showed that 65 per cent of Swedes had a negative view of Islam and 88% considered it to be incompatible with the democratic system (*ibid*). A Pew Research poll in 2006 interviewed some 14,000 people in 13 countries across the world. European respondents showed very high levels of hostility towards and fear of, Islam amongst Europeans. Relations between Muslims and Westerners were seen as 'generally bad' by 70 per cent of Germans, 66 per cent of French people, 61 per cent of Spaniards and 61 per cent of British people. Clear majorities in Germany, Britain and Spain also agreed that there was 'a conflict between being a devout Muslim and living in a modern society' (although a large majority of French respondents rejected this view). High percentages of respondent in all countries stated that they considered Muslims to be fanatical (Spain 83 per cent, Germany 78 per cent, France 50 per cent and Britain 48 per cent) (see 'The Great Divide: How Westerners and Muslims View Each Other' *Pew Research Foundation*. Released 22 June 2006 available at: <http://pewglobal.org/reports/display.php?ReportID=253>) (last visited 22 November 2006).

⁵⁶ See R. Geaves 'Who Defines Moderate Islam 'post' September 11?' in R. Geaves, T. Gabriel, Y. Haddad and J. Idleman Smith (eds) *Islam and the West Post 9/11* (Aldershot: Ashgate, 2004) 66.

⁵⁷ J. Klausen, *The Islamic Challenge: Politics and Religion in Western Europe* (Oxford and New York: Oxford University Press, 2005) 177. Irish abortion law is also arguably heavily influenced by Catholic teaching in this matter.

⁵⁸ See n 38 above.

existing Member States and that the Union had not stressed secularism in previous Enlargements.⁵⁹ Thus the approach of the EU to these issues seems, at least in part, to be influenced by notions of a potential incompatibility between Islam and the values of liberal democracy which view Islamic influence over the legal system as more threatening to the European public order than Christian influence.

THE EUROPEAN CONVENTION ON HUMAN RIGHTS, ISLAM AND MILITANT DEMOCRACY

The perception the Islam and the role of sharia therein are inconsistent with the notions of personal autonomy, privacy and pluralism which underlie the European public order is also to be seen in several of the decisions of the European Court of Human Rights whose decisions, while not part of EU law, are very influential in determining the scope the Union's human rights obligations.⁶⁰ Most notably, in the case of *Refah Partisi and Others v Turkey*⁶¹ the Grand Chamber of the Strasbourg court upheld the dissolution of the predecessor of Erdoğan's AKP by the Turkish Constitutional Court on the grounds that it was a 'centre of activities contrary to the principle of secularism'.⁶² The European court's judgment reflected a profound fear of the political nature of Islam and made, in debates in which euphemism normally plays such a dominant role, strikingly clear pronouncements in relation to the role of sharia and Muslim values in European political life.

In 1995 the *Refah Partisi* won the largest number of votes (22%) in the Turkish general election. It subsequently entered into a coalition government with another party and its leader became prime minister. In May 1997 the Principal State Counsel at the Court of Cassation brought proceedings in the Turkish Constitutional Court to dissolve Refah, on the grounds that it was 'a centre of activities against the principle of secularism'. The application cited acts and speeches by leaders and members of the party which were alleged to show that the party aimed to introduce sharia law and to a theocratic regime both of which were said to be incompatible with a democratic society.⁶³

Refah applied to the European Commission on Human Rights in May 1998. In July 2001 the a Chamber of the Court held by four votes to three that there had been no violation of Article 11 of the Convention (which protects the right of freedom of association) and (unanimously) that no separate claim arose under Articles 9, 10, 14, 17 or 18).⁶⁴ Refah's lawyers appealed this decision to the Grand Chamber of the Court which unanimously held that the actions and speeches which formed the basis of the decision of the Turkish Court showed the party to

⁵⁹ See 'Democratic Secularism is a Copenhagen Criterion for Turkey', *Turkish Daily News*, 10 May 2007, at <http://www.turkishdailynews.com.tr/article.php?enewsid=72817> (last visited 1 August 2007).

⁶⁰ See Case C-540/03 *Parliament v Council* [2006] ECR I -05769.

⁶¹ *Refah Partisi and Others v Turkey* (2003) 37 EHRR 1.

⁶² *ibid* at [12].

⁶³ See the summary of the facts of the case available at the Court's website at: <http://www.echr.coe.int/Eng/Press/2003/feb/RefahPartisiGCjudgmenteng.htm> (last visited 14 December 2006).

⁶⁴ *ibid*.

have a long term aim of setting up a regime based on sharia. It further found that such a system would be incompatible with the democratic values of the Convention and that the opportunities which Refah had to put such policies into practice meant that its dissolution could be considered to have met a 'pressing social need' and to have been within the restricted margin of appreciation afforded to Contracting States in this area.

The degree to which the Court viewed an Islamist political orientation as threatening to the European political order is shown by the fact that on the three previous occasions on which the Strasbourg institutions had been called upon to rule on the compatibility of the decision by the Turkish authorities to dissolve a political party (all non-religious parties), it found a violation of the Convention in each case.⁶⁵ Furthermore, it noted that the dissolution of a political party was 'a drastic measure' and that such severe measures could be used 'only in the most serious cases'.⁶⁶ The Court noted that democracy was the 'only political model contemplated by the Convention and, accordingly, the only one compatible with it'.⁶⁷ It also appears to endorse the Rawlsian model of church-state relations in stating that had 'frequently emphasized the State's role as the neutral and impartial organizer of the exercise of various religions' and characterizing the adoption of such a role as a 'duty'.⁶⁸ Recalling previous decisions in which it had upheld limitations on the right to wear an Islamic headscarf in certain contexts⁶⁹ the Court declared that in the Turkish context:

the Convention institutions have expressed the view that the principle of secularism is certainly one of the fundamental principles of the State which are in harmony with the rule of law and respect for human rights and democracy. An attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion.⁷⁰

Accordingly, the political order upheld by the Convention may require religions to adapt and submit to secular government in order to be covered by the protection provided to religion under the Convention system. The Convention instruments may therefore refuse even to recognise as religious (for the purposes of the protection of article 9), a movement which, like some interpretations of Islam, does not recognise the legitimacy (and supremacy within its sphere) of the secular

⁶⁵ See C. Moe 'Refah Partisi and Others v Turkey' *The International Journal of Not-for-Profit Law*, Vol.6 Issue 1, September 2003 at http://www.icnl.org/journal/vol6iss1/rel_moeprint.htm. The cases in question are: *United Communist Party of Turkey and Others v Turkey* (133/1996/752/951), January 30, 1998; *Socialist Party and Others v Turkey* (20/1997/804/1007), May 25, 1998; *Freedom and Democracy Party (ÖZDEP) v Turkey* (Application no. 23885/94), December 8, 1999.

⁶⁶ n 61 above at [133].

⁶⁷ *ibid* at [86].

⁶⁸ *ibid* at [91].

⁶⁹ *Dahlab v Switzerland*, Application 42393/98, Judgment of 15 February 2001 and *Yanasik v Turkey*, no. 14254/89, Commission decision of January 6, 1993, DR 74.

⁷⁰ n 61 above at [93].

state. In taking such an approach the Court seems to adopt a singularly ‘Western’ view of religion. As Esposito points out, the notion of religion as a system of personal beliefs as opposed to a comprehensive phenomenon ‘integral to politics and society’ is both ‘modern and Western in origins’.⁷¹ Moreover, he argues that such a view of religion causes secularist Westerners to view religions which he feels do not, in general, adhere to such an approach, as ‘incomprehensible, irrational, extremist, threatening’.⁷²

The Court went on to declare explicitly its belief in the incompatibility of sharia with democracy and human rights and in particular those parts of Islamic law dealing with the status of women. In paragraph 123 of the judgment it stated that it:

considers that sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it. [...] It is difficult to declare one’s respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts. In the Court’s view, a political party whose actions seem to be aimed at introducing sharia in a State party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention.⁷³

The Court further endorsed its essentially ‘Western’ definition of religion and its view of limitations on the public role thereof as a necessary part of the European public order stating that ‘freedom of religion, including the freedom to manifest one’s religion by worship and observance, is primarily a matter of individual conscience,’ and that ‘the sphere of individual conscience is quite different from the field of private law.’⁷⁴

The degree to which Islamic religious law is identified as incompatible with the European public order envisioned by the Convention is striking. While elements of the Court’s reasoning could be applied to religion in general, it is nevertheless clear that the danger to the democratic human rights based order protected by the Convention was seen by the Court as coming from Islam. The judgment specifically problematises sharia and notes specific elements of Islamic

⁷¹J. Esposito, *The Islamic Threat: Myth or Reality* (Oxford and New York: Oxford University Press, 2002) 199.

⁷²*ibid* 198.

⁷³n 61 at [123].

⁷⁴*ibid* at [128].

law which it sees as incompatible with the ideals of the Convention.⁷⁵ In particular, the judgment highlights the manner in which it believes sharia violates the key Convention norms of privacy and personal autonomy ('it intervenes in all spheres of private and public life in accordance with religious precepts') and pluralism ('Principles such as pluralism in the political sphere have no place in it').⁷⁶ Despite the fact that many biblical passages relating to gender equality and sexuality are as patriarchal and interventionist as the sharia, the Court has never detected a threat to democracy in the official status of certain Christian denominations as state churches or in the presence in the legislatures and governments of explicitly Christian political parties in many member states.⁷⁷

Not only was sharia considered to be incompatible with European values, as Boyle pointed out the Refah party was dissolved not for actual attempts to introduce Islamic law 'but rather because of what it might do, should it, at some point in the future, become the outright party in power'.⁷⁸ The threat posed by a party which was thought to harbour concealed desires to introduce Islamic law was therefore considered by the Court to be such that the 'drastic' measure of dissolving a political party which had won a plurality of votes in the most recent election was justified. In upholding the dissolution of a political party which had recently won a fair and free election on the grounds that its Islamic ideology represented a threat to the democratic order, the Court of Human Rights not only appeared to embrace the highly controversial notion of 'militant democracy'⁷⁹ but also appeared to give implicit credence to the notion of the existence of a degree of incompatibility between political religion in general, political Islam in particular, and the liberal democratic system on which the Council of Europe is based. The views of the Court of Human Rights on these questions has the potential to influence the approach of EU institutions to these matters to a significant degree.⁸⁰ Furthermore, the Strasbourg Court's approach in this area is strikingly similar to the approach adopted by the EU Enlargement Commissioner to the adultery issue where the legislation in question was viewed as being representative of broader but concealed desires to introduce 'Islamic elements' into the Turkish legal system.

⁷⁵ While explicitly Christian political parties in existing Member States may, due to the influence of their religious texts, have a similarly conservative approach to sexual morality, a desire to introduce biblical sexual morality into the secular law has not been attributed to them by European institutions.

⁷⁶ Such an all-encompassing nature which is also clearly inconsistent with the recognition of a zone of freedom from religion which the EU required of both Romania and Turkey. The Court also noted at paragraph 125 that Turkey had previously experienced 'an Islamic theocratic regime' during the Ottoman period.

⁷⁷ See for instance *Darby v Sweden* (1990) 13 EHRR 774.

⁷⁸ K. Boyle, 'Human Rights, Religion and Democracy: The Refah Party Case' (2004) 1(1) *Essex Human Rights Review*.

⁷⁹ See for instance: P. Macklem, 'Militant democracy, legal pluralism and the paradox of self-determination' 2006 4(3) *International Journal of Constitutional Law* 488, P. Harvey 'Militant Democracy and the European Convention on Human Rights' 2004, 29(3) *ELRev* 407, M. Kocak and E. Orucu, 'Dissolution of Political Parties in the Name of Democracy: Cases from Turkey and the European Court of Human Rights' 2003, 9(3) *European Public Law* 399.

⁸⁰ n 60 above.

The notion that EU law perceives Islam to be potentially threatening towards both the notion of privacy and personal autonomy as well as the liberal democratic order more general does not rely merely on extrapolation from the approach of the institutions of the Council of Europe. It is also to be seen in developments in the law of migration both of the Union itself of individual EU member states which are the subject of the second set of case studies in this chapter.

MIGRATION, INTEGRATION AND THE EU

This section will assess the development of the law of the EU governing migration and the rights of long-term residents from non-EU countries. It will show how the EU law in these areas increasingly demands explicit reassurances from individual migrants that they are personally committed to liberal democratic values. It will then examine similar developments in the law governing citizenship and the integration of migrants at Member State level (with particular emphasis on developments in the Netherlands and Germany) in order to show how emerging trends at this level have influenced and been facilitated by the Union's law in this area.

In recent years, the question of the integration of immigrant communities has been particularly prominent in European politics. Much of this concern has centred on a perceived incompatibility between what are seen as the liberal democratic values of Europe societies and the more intensely religious and conservative values adhered to by some Muslim immigrant communities. Kofeman has noted that the increased diversity of migration to Europe has led European states to create more complex systems which differentiate between migrants on the basis of their mode of entry and legal status and which grant differential access to civil, economic and social rights on this basis.⁸¹ This section argues in addition to distinguishing between migrants on the basis of mode of entry and legal status, the migration law of both the EU and several member states, has begun to differentiate between migrants on the basis of their adherence to certain values, with those who fail to hold certain 'European' values being disfavoured in relation to the granting of citizenship and residence rights. Furthermore, just as the Commission sought a wider and more exacting standard of a-religiosity from Muslim Turkey than from Christian Romania, the migration laws of Member States and the EU have been applied to a greater degree to Muslim than non-Muslim immigrants.

This section further argues that one of the key 'European' values in question is the acceptance of limitations on the public role of religion and of the legitimacy of a zone of individual freedom from religion and its prescriptive norms. It

⁸¹ E. Kofmann, 'Contemporary European migrations: civic stratification and citizenship' (2002) 21 *Political Geography* 1035.

suggests that just as the EU saw a threat to ‘European norms’ in the attempt by the Turkish government to criminalise adultery, EU migration and integration law, having been influenced by emerging trends at member state level, sees the failure of *individual* immigrants to adhere to such norms (particularly in relation to gender and sexuality where the views of devout Muslims diverge most notably from those of native Europeans), as a threat to personal autonomy, to the liberal democratic order and to the rights of others. Under this view, the holding of private views becomes a matter of concern for the state which justifies the penalisation of the holding of such beliefs through withholding benefits such as citizenship or residence rights. Thus, in order to protect the privacy rights of personal autonomy of individual citizens, the Union either interferes with, or facilitates efforts by individual Member States to interfere with, the private views and conduct of individual (generally Muslim) immigrants. This making of ‘windows into men’s souls’ problematises not merely Islam, but individual Muslims, who are required to demonstrate a personal commitment to certain ideas and whose private views and behaviour become public matters. Like the European Court of Human Rights’ embrace of the notion of ‘militant democracy’ such an approach has the potential to undermine, to a degree, the private/public distinction which such laws are intended to protect.

THE UNION’S ‘BASIC PRINCIPLES ON INTEGRATION’

In recent times both migration policy statements and substantive Community legislation in this area have increasingly emphasised the need for migrants to adopt ‘European values’ and have viewed a failure to do so as a threat to European societies. Although less explicit than the measures adopted in the Netherlands and parts of Germany (which will be discussed below), the output of Community institutions has nevertheless, in common with the emerging law in these member states, clearly seen a failure to restrict the public role of religious principles (particularly in relation to gender and sexuality) as a potentially threatening phenomenon which can be the subject of regulation in the interests of disempowered groups and the development of European society as a whole.

In 2003 the Commission began to monitor the integration policies of member states through its ‘Synthesis Report on National Integration Policies’.⁸² The European Council of June 2003 added to this development by stressing the need to for the ‘issue of the smooth integration of legal migrants into EU societies [to be] further examined and enhanced’.⁸³ The conclusions also stated that:

⁸² ‘2003 Synthesis Report on National Integration Policies’ Annex 1 to ‘*Communication on Immigration, Integration and Employment*’ Com (2003) 336 Final, 44 et seq. (section 2.6).

⁸³ Council of the European Union, Thessaloniki European Council, 19 and 20 June 2003, Presidency Conclusions 11638/03 POLGEN 55 at [9].

integration policies should be understood as a continuous, two-way process based on mutual rights and corresponding obligations of legally residing third-country nationals and the host societies.⁸⁴

However, the later development of this principle of mutuality indicates that dilution of the principle of freedom from religion is not what the Union had in mind in endorsing such mutuality. The conclusions of the European Council held at Brussels on the 4th and 5th of November 2004 called for the establishment of ‘the common basic principles underlying a coherent European framework on integration’ which were to ‘form the foundation for future initiatives in the EU’.⁸⁵ It then set out a list of basic minimum elements of such principles. This basic minimum restated the conclusion of the Thessaloniki Council that integration was ‘a continuous, two-way process’ and stressed ‘frequent interaction and intercultural dialogue’.⁸⁶ However, it supplemented these principles with an assertion that integration also ‘implies respect for the basic values of the European Union and fundamental human rights’.⁸⁷ The delineation of the precise relationship between these potentially conflicting principles was left for the Justice and Home Affairs Council.

The Justice and Home Affairs Council met later the same month and, in a meeting chaired by Dutch Immigration Minister Rita Verdonk who has become known in the Netherlands for her robust insistence that migrants must adapt to the country’s liberal values,⁸⁸ agreed on the content of the ‘Common Basic Principles for Immigrant Integration in the European Union’.⁸⁹ The principles noted that ‘the precise integration measures a society chooses to implement should be determined by individual Member States’ but also stated the Union’s interest in the issue, noting that ‘The failure of an individual Member State to develop and implement a successful integration policy can have in different ways adverse implications for other Member States and the European Union’.⁹⁰ In a theme that would become more explicit in the principles themselves, it stated that such failure ‘can have impact [sic] on the economy and the participation at [sic] the labour market, it can undermine respect for human rights (...) and it can breed alienation and tensions within society’.⁹¹ The invocation of the state interest in the promotion of respect for human rights as a relevant factor in relation to immigrant integration is particularly relevant as the this interest provides the basis for the

⁸⁴ *ibid.*

⁸⁵ *ibid.*

⁸⁶ *ibid.*

⁸⁷ *ibid.*

⁸⁸ See ‘Dutch Unveil the Toughest Face in Europe with a Ban on the Burka’ *The Times*, 13 October 2005 at: <http://www.timesonline.co.uk/tol/news/world/europe/article577915.ece> (last visited 10 October 2007).

⁸⁹ See: Press Release, 2618th Council Meeting, Justice and Home Affairs, Brussels, 19 November 2004. 14615/04 (Presse 321)

⁹⁰ *ibid* 16.

⁹¹ *ibid.*

interference with the religious beliefs and cultural practices of individual immigrants which the principles on integration authorise.

The principles themselves clearly endorse a model of immigrant integration under which the religious beliefs of immigrants, in so far as they may affect the freedom from religion of others or the evolution of society in undesirable directions, are seen as a legitimate subject of state regulation. The first principle restates the conclusion of the Thessaloniki and Brussels Council's that 'Integration is a dynamic, two-way process of mutual accommodation by all immigrants and residents of Member states.'⁹² However the provided by the Council for this principle makes it clear that what is envisaged is not a process of mutual transformation of political, legal and cultural values. The explanation states that:

the integration process involves adaptation by immigrants, both men and women, who all have rights and responsibilities in relation to their new country of residence. It also involves the receiving society, which should create the opportunities for the immigrants' full economic, social, cultural and political participation.⁹³

Therefore, integration is seen as a process of adaptation on the part of immigrants coupled with facilitation on the part of the native population. Native populations are required to facilitate the participation of immigrants in their societies but are not required to adapt their own values or culture. Immigrants on the other hand are under an obligation to engage in a process of 'adaptation (...) in relation to their new country of residence.'⁹⁴

The second principle makes this point even more clearly. It states that 'Integration implies a respect for the basic values of the European Union'.⁹⁵ The explanation states that:

Everybody resident in the EU must adapt and adhere closely to the basic values of the European Union as well as to Member State laws. The provisions and values enshrined in European Treaties serve as both baseline and compass, as they are common to the Member States.⁹⁶

The adherence to the values of the EU is therefore categorised as an individual duty to which residents must adapt if necessary. The explanation goes on to assert that:

Member States are responsible for actively assuring that all residents, including immigrants, understand, respect, benefit from and are protected on

⁹² *ibid* 19.

⁹³ *ibid*.

⁹⁴ *ibid*.

⁹⁵ *ibid*.

⁹⁶ *ibid*.

an equal basis by the full scope of values, rights, responsibilities, and privileges established by the EU and Member State laws. Views and opinions that are not compatible with such basic values might hinder the successful integration of immigrants into their new host society and might adversely influence society as a whole.⁹⁷

There are a number of important features of this principle. First, while the Member States are required to ensure that all residents (and not just immigrants) understand and respect the Union's basic values, a failure to adhere to these values on the part of immigrants is seen as more serious on the basis that such a failure will 'hinder their integration into their new host society' and 'might adversely influence society as a whole'. Adherence to the Union's basic values is seen under these principles as an important part of the society which the Union and its member states are trying to build. More importantly, the principles make it clear that it is the holding of 'views and opinions that are not compatible with such basic values' which constitutes the threat to immigrant integration and the construction of the kind of society desired by the Union and its member states. The mere holding of such views therefore generates a sufficient state interest to justify regulation by the law of the Member State or the Union. This approach clearly chimes with the approach of the governments of the Netherlands and certain German states outlined below which sees in the ongoing adherence to religiously-influenced conservative attitudes to sexuality and gender by certain immigrant communities, a threat to the continued acceptance of key values. The idea that the promotion of certain values is an important goal of the state is also seen in other principles. Principle 5 notes the importance of education to immigrant integration and states that:

Transferring knowledge about the role and working of societal institutions and regulations and transmitting the norms and values that form the binding element in the functioning of society are also a crucial goal of the educational system.⁹⁸

Having defined individual adherence to certain views, opinions and values as an important goal for the state and as a potential site of legal regulation, the crucial question becomes how far the duty to accept such values should prevail over the rights of migrants to cultural and religious freedom. Principle 8 has a definite answer. It states that:

⁹⁷ *ibid.*

⁹⁸ *ibid* 21.

The practice of diverse cultures and religions is guaranteed under the Charter of Fundamental Rights and must be safeguarded, unless practices conflict with other inviolable European rights or with national law.⁹⁹

The requirement of respect for diverse religions and culture is therefore specifically subordinated to the need to protect ‘other inviolable European rights’ or ‘national law’. This represents rejection of those versions of multiculturalism which prioritise the protection of group identity and collective religious freedom over individual rights and which reject the imposition of host society standards on migrant communities, is made even more explicit in the accompanying explanation which states:

Member States [...] have a responsibility to ensure that cultural and religious practices do not prevent individual migrants from exercising other fundamental rights or from participating in the host society. This is particularly important as it pertains to the rights and equality of women, the rights and interests of children, and the freedom to practice or not to practice a particular religion.¹⁰⁰

The explanation also expresses a preference for the use of non-coercive measures as a means of ‘addressing issues relating to unacceptable cultural and religious practices that clash with fundamental rights’ but goes on to state that ‘however, if necessary according to the law, legal coercive measures can also be needed.’¹⁰¹ The Union’s policy framework for the integration of immigrants therefore, specifically subordinates the religious autonomy of individual migrants to the need to protect European basic values and the fundamental rights of others. While not naming any religion in particular, the framework does deliberately emphasise issues such as the equality of men and women which have been prominent in debates around the practice of Islam in Europe.¹⁰²

⁹⁹ *ibid* 23.

¹⁰⁰ *ibid*.

¹⁰¹ *ibid*.

¹⁰² This decisively non-multicultural approach and the importance of the idea of limitations on the public role of religion in this area have been further underlined by the statements of Commissioner Fratini in relation to the controversy which erupted in relation to the publication of cartoons by the Danish newspaper *Jyllands Posten* which were perceived as being insulting towards the prophet Muhammed by many Muslims. While recognising that ‘*it is important to respect sensitivities*’ the Commissioner went on to state: ‘*Equally, we have reaffirmed that our European society is based on the respect for the individual person’s life and freedom, equality of rights between men and women, freedom of speech and a clear distinction between politics and religion. We have said clearly and loudly that freedom of expression and freedom of religion are part of Europe’s values and traditions, and that they are not negotiable*’ (emphasis added). See the interview with Commissioner Fini in *Equal Voices* Issue 18 June 2006 published by the European Monitoring Centre on Racism and Xenophobia (EUMC). Available at http://eumc.eu.int/eumc/index.php?fuseaction=content.dsp_cat_content&catid=4498115372af1 (accessed 6 October 2006).

THE REFUGEE, LONG-TERM RESIDENTS AND FAMILY REUNIFICATION DIRECTIVES

Although the basic principles are not binding the ideas underpinning them are clearly visible in the ‘hard law’ enacted by the EU in this area. Indeed, the principles themselves are specifically referred to in the preamble to the directive establishing minimum standards for the granting of refugee status which anticipates the establishment of such principles in paragraph 36 which states that:

‘The implementation of the Directive should be evaluated at regular intervals, taking into consideration in particular (...), the development of common basic principles for integration.’¹⁰³

This section will show how in a number of directives relating to the legal status of immigrants, EU law has defined a failure on the part of individual immigrants to indicate acceptance of key liberal democratic values, as a threat to key public policy goals, particularly the right of individuals to live their lives in ways which conflict with religious doctrine. In particular, the directives in question legitimise actions on the part of individual member states which seek to penalise those immigrants who fail to indicate their acceptance of limitations on the influence of religious principles on law and public policy and their acceptance of liberal democratic values such as pluralism and individual autonomy. Under this approach, the private views of immigrants become a legitimate site of state regulation notwithstanding the Union’s commitments to freedom of conscience.

Two directives in particular have been distinctly marked by the ideas on which the basic principles are based. In September 2003 the Council adopted a directive on the right to family reunification of third country nationals residing in the EU.¹⁰⁴ The preamble of the directive states that ‘Member States should give effect to the provisions of this Directive without discrimination on the basis of sex, race, colour, [...] religion or beliefs, political or other opinions.’¹⁰⁵

This would seem to indicate that the religious or political views of those seeking family reunification are not a basis on which such a benefit could be refused. However, the provisions of the directive to which this non-discrimination principle apply, indicate that such views can indeed be taken into account by Member States in considering applications under this directive. Paragraph 11 of the preamble states that:

the right to family reunification should be exercised in proper compliance with the values and principles recognised by the Member States, in particular with respect to the rights of women and children; such compliance justifies

¹⁰³ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as persons who otherwise need international protection and the content of the protection granted.

¹⁰⁴ Council Directive 2003/86/EC of 22 September 2003 on the right of family reunification. OJ L251/12 3.10.2003

¹⁰⁵ *ibid* preamble to the directive at [5].

the possible taking of restrictive measures against applications for family reunification of polygamous households.

While the issue of polygamy is singled out, it is nevertheless made clear that the need to comply with ‘the values and principles recognised by the Member States’ applies across the board.

The general grounds for refusal of family reunification are set out in the directive. Paragraph 14 of the preamble states that:

the person who wishes to be granted family reunification should not constitute a threat to public policy or public security. In this context it has to be noted that the notion of public policy and public security covers also cases in which a third country national belongs to an association which supports terrorism, supports such an association or has extremist aspirations.

Thus it is made clear that merely supporting an organisation which supports terrorism or holding certain political views (‘extremist aspirations’) can be sufficient grounds for the refusal of family reunification. The substantive article of the directive dealing with refusal of applications for family reunification (Article 6) does not specifically mention the holding of extremist opinions as a ground for refusal stating instead that ‘Member States may reject an application [...] on grounds of public policy, public security or public health’¹⁰⁶ and that ‘when taking the relevant decision, the Member State shall consider, [...], the severity or type of offence against public policy or public security committed by the family member, or the dangers that are emanating from such a person.’

Taken together paragraph 14 of the preamble and the provisions of Article 6 endorse the view that the holding of certain opinions by migrants is seen as a threat to either public security or to public policy both of which are seen as dependent on the continued attachment of citizens to the liberal democratic system. This approach lies at the heart of recent changes in immigration law and policy at member state level which are outlined below. References to the rights of women in paragraph 11 of the preamble further support the view that such policies are necessary for the protection of certain groups who may be victimised should the ‘extremist’ worldview of certain migrants increase its influence in the host society.

As well as endorsing the notion of private opinions of migrants as a valid subject for state regulation, the directive also contains measures designed to facilitate member state efforts to encourage integration on the part of their migrant populations. Article 4(1) provides that member states may require children over the age of 12 satisfy ‘a condition for integration provided for by existing legislation on the date of implementation of this Directive’. This is supplemented by a more general provision in Article 7(2) which provides that ‘Member States

¹⁰⁶ *ibid* article 6(1).

may require third country nationals to comply with integration measures, in accordance with national law'. Thereby protecting the religion-related measures taken at member state level outlined below. The compatibility of certain cultural/religious practices with the aim of greater integration is directly addressed in Article 4(5) which states that 'In order to ensure better integration and to prevent forced marriages Member States may require the sponsor and his/her spouse to be of a minimum age, and at a maximum 21 years, before the spouse is able to join him/her.'

Articles 4(1), 4(5) and 7(2) were all absent from the Commission's initial draft of the Directive but were included at the behest of certain Member States. Germany and Austria pushed strongly for Articles 4(1) and (along with the Netherlands) 7(2) which were inserted in September 2001¹⁰⁷ and November 2002¹⁰⁸ respectively. Article 4(5) was inserted during the final stage of negotiations in February 2003 by the Dutch and German governments.¹⁰⁹ These three member states have, as will be shown below, taken a leading role in changing domestic immigration law in such a way that Muslim migrants in particular are required to give assurances that they are willing to place limits on the public and political role of their religion as a prerequisite for the granting of residence or citizenship rights.

These provisions have proved highly controversial. As noted above, many of the provisions which permitted the imposition of integration requirements were introduced by the Council at a very late stage in the legislative process. Indeed the insertion of the relevant provisions came so late that Parliamentary debates on the subject focused almost exclusively on the question of the acquisition of competence in the native languages of member states by immigrant populations. Furthermore, Article 4(6) which enabled Member States to place an age limit of 15 years on applications for reunification as minor children, was inserted after the consultation of the European Parliament which had advocated a less restrictive approach.¹¹⁰ In December 2003, the Parliament applied to the Court of Justice to annul certain aspects of the Directive which, it alleged, violated the right to respect for family life and the non-discrimination principle both of which were asserted to form part of the general principles of law protected by the Court.

The Parliament did not seek the annulment of the directive as a whole but sought instead to have the provisions allowing for the imposition of integration conditions (along with a further provision allowing Member States up to three years to process applications) struck down and severed from the rest of the directive which was to remain in force. The specific provisions challenged by the Parliament were:

¹⁰⁷ See Council document 12022/01 of 24 September 2001. See also K. Groenendijk 'Legal Concepts of Integration in EU Migration Law' (2004) 6(2) *European Journal of Migration and Law* 119.

¹⁰⁸ See Council document 14272/02 of 26 November 2002. For an account of the disputes amongst Member States in relation to this measure see Groenendijk, *ibid* 119-120.

¹⁰⁹ See Council document 6912/03 of 28 February 2003. See also Groenendijk, *ibid*.

¹¹⁰ The Rapporteur backed the idea of language integration but balked at the idea that failure to meet it could result in a refusal of a permit. See the report of Baroness Ludford MEP (COM (2001)127-C5-0250/2001-2001/0074(CNS)) (A5-0436/2001).

- the final subparagraph of Article 4(1) enabling Member States to require that a child aged over 12 who arrives independently from the rest of his/her family, meet an integration condition before he or she is granted entry and residence.
- Article 4(6) which allowed Member States to request that applications under the Directive for reunification of minor children be submitted before the child reaches the age of 15.
- Article 8 which enables Member States to provide a waiting period of no more than three years between the making of an application and the issuing of a permit.¹¹¹

The Advocate General advised the Court to dismiss the application on the grounds that it was not possible to sever the impugned provisions without altering the substance of the Directive and thereby trespassing on the territory of the Community legislature. In relation to the merits she found that the failure to consult the Parliament in relation to Article 4(6) rendered its adoption by the Council void¹¹² (though this point had not been argued by the Parliament's lawyers and was not taken up by the full court). She also found that Article 8 potentially permitted a situation where Member States could violate the fundamental rights of applicants under the directive by applying a waiting period of up to three years and that it was therefore contrary to Community law.¹¹³ Most importantly for our purposes, the Advocate General upheld paragraph 4(1) as a proportionate means through which Member States can pursue their legitimate desire to 'to integrate immigrants as fully as possible'.¹¹⁴

The Grand Chamber of the Court issued its judgment at the end of June 2006.¹¹⁵ The Court resolved the admissibility question by holding that:

the fact that the contested provisions of the Directive afford the Member States a certain margin of appreciation and allow them in certain circumstances to apply national legislation derogating from the basic rules imposed by the Directive cannot have the effect of excluding those provisions from review by the Court of their legality as envisaged by Article 230 EC.¹¹⁶

It further held that the issue of severability could only be resolved by consideration of the substance of the case.¹¹⁷

¹¹¹ n 60 above.

¹¹² *ibid* at [59].

¹¹³ *ibid* at [105].

¹¹⁴ *ibid* at [112] and [113].

¹¹⁵ *ibid*.

¹¹⁶ *ibid* at [22].

¹¹⁷ *ibid* at [29].

As noted above, the European Court of Human Rights has adopted a very particular approach to the issue of Islam and liberal democracy. In its ruling in relation to the family reunification directive, the Court of Justice went out of its way to stress the importance of the role played by the European Convention of Human Rights in the determining the substance of the general principles which form part of EU law and which are upheld by the ECJ.¹¹⁸

Thus, the ECHR was recognised by the Court as being of special significance in the determination of the substance of the human rights norms protected in EU law. Furthermore, in its analysis of the provisions of the directive impugned by the Parliament, the Court showed a striking degree of deference to the decisions of the Strasbourg court. The judgment noted that the preamble to the directive states that it: ‘respects the fundamental rights and observes the principles recognised in particular in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the Charter of Fundamental Rights of the European Union’.¹¹⁹

Although it failed to ask the Court to annul Article 7(2) of the Directive which allows Member States to impose integration conditions on third country nationals, the Parliament argued that, in relation to the right to family life of applicants under the directive:

a condition for integration does not fall within one of the legitimate objectives capable of justifying interference, as referred to in Article 8(2) of the ECHR, namely, national security, public safety, the economic well-being of the country, the prevention of health of morals and the protection of the rights and freedoms of others¹²⁰

which seemed to indicate a somewhat wider objection to such measures. The Court explicitly relied on several rulings of the Strasbourg Court in coming to its decision not to annul the relevant parts of the Directive. In particular it noted the decisions in *Sen v the Netherlands*, *Gül v Switzerland* and *Ahmut v the Netherlands* from which it concluded that Article 8 ‘may create positive obligations inherent in effective ‘respect’ for family life’ and that ‘regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; [in relation to which] the State enjoys a margin of appreciation.’¹²¹

It found that Article 4(1) of the Directive merely partially preserved this margin of appreciation in circumstances where a child over 12 arrives independently of the rest of his or her family. Accordingly:

¹¹⁸ *ibid* at [35].

¹¹⁹ *ibid* at [38].

¹²⁰ *ibid* at [42].

¹²¹ *ibid* at [54].

the final subparagraph of Article 4(1) of the Directive cannot be regarded as running counter to the right to respect for family life. In the context of a directive imposing precise positive obligations on the Member States, it preserves a limited margin of appreciation for those states which is no different from that accorded to them by the European Court of Human Rights.¹²²

The Court specifically endorsed the compatibility of integration conditions with the ECHR in paragraph 66 where it stated that: 'It does not appear that such a condition is, in itself, contrary to the right to respect for family life set out in Article 8 of the ECHR(...) In any event, the necessity for integration may fall within a number of legitimate objectives referred to in Article 8(2) of the ECHR'. This does not however indicate that there Member State discretion in this area is unfettered as the Court points out in paragraph 70:

The fact that the concept of integration is not defined cannot be interpreted as authorising the Member States to employ that concept in a manner contrary to general principles of Community law, in particular to fundamental rights. The Member States which wish to make use of the derogation cannot employ an unspecified concept of integration, but must apply the condition for integration provided for by their legislation existing on the date of implementation of the Directive in order to examine the specific situation of a child over 12 years of age arriving independently from the rest of his or her family.¹²³

The directive does therefore act as a kind of 'stand still' measure with Member States being unable to introduce further restrictions in this area. However the stand still provision as the Court made clear, applies only in relation to the relatively narrow area of the directive and does not affect the right of individual states to introduce other restrictive measures in the immigration arena in general. Moreover, the idea of compulsory integration, including a duty to adhere to 'European' or national values (which was already a feature of national legislation in certain Member States), was not, of itself contrary to Community law.

The Grand Chamber also rejected the Parliament's arguments in relation to Article 4(6) on the basis that an age limit on applications interfered with family life and was discriminatory. The Council argued that encouraging immigrant families to bring their children at a young age in order to facilitate their integration was a legitimate objective under Article 8(2) ECHR.¹²⁴ The Court held that 'It does not appear that the contested provision infringes the right to respect for family life set out in Article 8 of the ECHR as interpreted by the European Court of Human

¹²² *ibid* at [62].

¹²³ *ibid* at [70].

¹²⁴ *ibid* at [79].

Rights' and that the fact that Article 5(5) of the Directive requires Member States to take the best interests of the child into account meant that: 'Article 4(6) cannot be regarded as running counter to the fundamental right to respect for family life'.¹²⁵

Article 8 of the Directive was upheld on similar grounds. The Court held that the provision:

preserves a limited margin of appreciation for the Member States by permitting them to make sure that family reunification will take place in favourable conditions, after the sponsor has been residing in the host State for a period sufficiently long for it to be assumed that the family members will settle down well and display a certain level of integration. Accordingly, the fact that a Member State takes those factors into account and the power to defer family reunification for two or, as the case may be, three years do not run counter to the right to respect for family rights set out in particular in Article 8 of the ECHR as interpreted by the European Court of Human Rights.¹²⁶

The judgment is notable in several respects. First the ECJ endorses integration of immigrant communities as a legitimate objective which can be pursued by states under Article 8(2) of the ECHR. It seems willing to uphold relatively substantial interferences with the Article 8 rights of immigrants in order to enable Member States to pursue the integration policies which they see fit. Moreover, the Court's heavy reliance on the judgments of the Strasbourg Court in order to determine the content of the Union's fundamental rights guarantees may prove important for the future development of the EU law as it relates to the interaction of questions of religion, integration and the right of states to require adherence to certain religion-related norms from individual immigrants. The primary reason given by the Court for upholding the three impugned provisions of the directive was that each complied with Article 8 of the ECHR as interpreted by the Strasbourg Court. The ECJ judgment therefore appears to indicate that legislation which complies which appears to comply with the standards set down by the Strasbourg court will, almost inevitably, not be found to be in violation of the fundamental rights norms which form a part of EU law. The judgment in the *Refah Partisi* case indicates that the Court of Human Rights is willing to uphold extensive interferences with ECHR rights in order to defend the liberal democratic order from what it sees as the threat of political Islam. Should EU law follow this approach, interference by Member States with rights to religious liberty and to privacy in the defence of 'European' values are unlikely to fall foul of EU human rights norms.

The approach adopted by the Council in relation to the family reunification directive has been repeated in a second directive which established the rights of

¹²⁵ *ibid* at [90].

¹²⁶ *ibid* at [98].

third country nationals who are long-term residents of the EU.¹²⁷ Like the family reunification directive, the preamble to the long term residents directive which was adopted in late 2003, contains a paragraph noting that Member States should not discriminate, *inter alia*, on grounds of religious or political beliefs in giving effect to the directive.¹²⁸ However, it also subordinates this duty to a requirement that third country nationals seeking to use the terms of the directive ‘should not constitute a threat to public policy or public security’.¹²⁹ Article 5(2) of the directive specifically states that ‘Member States may require, third country nationals to comply with integration conditions, in accordance with national law’.

Article 6 provides the grounds on which long-term resident status may be refused. It states that ‘Member States may refuse to grant long-term resident status on grounds of public policy or public security.’¹³⁰ Member States therefore, can refuse long term resident status on the ground that the applicant is a threat to public policy or public security. At the same time, Article 5 makes it clear that applications may be refused if integration conditions are not met. A failure on the part of migrants to integrate is, as a permissible ground for refusal of status under ground 6, therefore seen as a threat to either public policy or public security. Furthermore, Article 9(3) makes it clear that long-term resident status can be withdrawn from those who constitute a threat to public policy while Article 12 permits the expulsion of such people provided they are shown to constitute ‘an actual and sufficiently serious threat to public policy or public security.’¹³¹

As with the family reunification, the requirement contained in Article 5(2) was not present in the Commission’s initial draft of the legislation but was inserted by Member States. Indeed, at the insistence of the Austrian and German governments the phrase ‘integration measures’ was strengthened to ‘integration conditions’ in order to emphasise that failure to adhere to such conditions could potentially result in a refusal of the relevant permit.¹³² The Court of Justice’s ruling in relation to the family reunification directive make it unlikely that such provisions will be held to fall foul of the Union’s human rights commitments.

Therefore, in the light of both the statement of basic principles and the ruling of the ECJ in the family reunification case, the directives passed in this area clearly provide space within EU law for member states to take active steps to regulate the religious views of individual migrants and to refuse concrete legal benefits to those migrants whose views do not adhere to the fundamental values of the Union or individual member state. By categorising a failure on the part of such migrants to adhere to the fundamental values of the Union as a threat to public policy and/or public security, EU legislation provides justification for laws aimed at limiting the

¹²⁷ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long-term residents OJ L16/44 23.1.2004.

¹²⁸ *ibid* paragraph 5 of the preamble.

¹²⁹ *ibid* paragraph 9. Paragraph 21 also mentions public policy and public security as relevant factors along with public health.

¹³⁰ *ibid* Article 6(1).

¹³¹ *ibid* Article 12(1).

¹³² See Groenendijk, n 107 above at 122-123.

degree to which those who adhere to conservative religiously-influenced norms in relation to gender and sexuality can either attempt or even simply desire to enshrine such norms in public policy. As Groenendijk points out, previous migration related legislation in the Union had focused on integration primarily as something which could be encouraged by enhancing the residence status of immigrants and providing for equal treatment. Regulation 1612/68 for instance (which enshrines free movement of EU citizens) does not allow for any integration tests and restricts language examinations to situations where a knowledge of the language of the relevant member state is necessary to carry out the relevant employment.¹³³ However, since 2003, EU law has increasingly adopted an approach under which ‘the lack of integration or the assumed unfitness to integrate are grounds for refusal of admission to the country’.¹³⁴ The heavy reliance by the Court of Justice on the jurisprudence of the Court of Human Rights in order to determine the limitations that the fundamental rights norms of the EU will place on such a policy substantially lessens the likelihood of large scale interference with this policy on the part of the ECJ.

DEVELOPMENTS AT MEMBER STATE LEVEL

THE NETHERLANDS

The increasing emphasis placed by EU law on integration and adoption of ‘European Values’ by immigrants has occurred against a background of similar developments at member state level. In recent years several member states have radically overhauled their approach to migrant integration and have placed the question of religion at the centre of such changes. The approach of the Netherlands to these issues of religion, migration and citizenship has been extremely influential. The Netherlands is a country with a libertarian and egalitarian approach to questions of sexuality. Prostitution and pornography are tolerated while same sex marriage has been legal since 2001. It also has a Muslim population of over one million (out of a total of approximately 16 million). A series of events in the late 1990s and early 2000s the murders of and death threats against figures such as Pim Fortuyn, Theo van Gogh and Ayaan Hirsi Ali who were severely critical of Muslim attitudes towards gender, sexuality and freedom of expression.

These trends and events led to a situation where ‘old-style multiculturalism’ was as Fukuyama says, ‘widely seen as a failure in Holland’.¹³⁵ Dutch government policy changed radically to deal with these concerns. In 2000, 2002 and 2003 legislative changes were introduced which required applicants for naturalisation to

¹³³ *ibid* 116.

¹³⁴ *ibid* 113.

¹³⁵ F. Fukuyama ‘Europe vs. Radical Islam’ *Policy Review*, 27 February 2006.

indicate their ‘integration’ into Dutch society by means of a series of exams examining knowledge of Dutch society and the Dutch language.¹³⁶ Worries that the ‘importation’ of spouses by Muslim immigrants from their countries of origin was hampering integration efforts led to an increase in the minimum age after which spouses could benefit from family reunification. Tighter rules were introduced providing that religious preachers from abroad had to attend integration courses in which Dutch values would be explained to them. Most strikingly, a new test for immigrants with accompanying explanatory video was introduced in 2006.

The immigration test required immigrants to answer a series of questions about the Netherlands such as its provincial structure and the role of the monarchy. It also requires immigrants to show an awareness of Dutch norms in relation to sexual liberalism and gender equality. Questions in the exam ask how people should react if they see two men kissing or whether hitting women or female circumcision are acceptable practices.¹³⁷ Those who wish to sit the exam are required to take extensive language classes and are sent an instructional video which shows footage of topless bathing and a same-sex couple kissing. Those who pass the test will be required to swear allegiance to Holland and its constitution within five years.

The claim that the test is aimed at Muslims is strengthened by the fact that immigrants from non-European ‘Western’ countries such as the United States, Canada and Australia are exempt.¹³⁸ Muslim groups severely criticised the proposal. The Islamic Human Rights Commission, a British-based organisation, described the test as ‘Islamophobic’ and said that it sent out a message that ‘Muslims are not only unwelcome ... but those that are already [in the Netherlands] do not conform to a uniform idea of what should be a citizen’ [sic].¹³⁹ It also alleged that ‘this type of treatment denies primarily Muslims, but in fact also many others, the rights to freedom of religion, belief and expression and political thought.’¹⁴⁰ Dutch theologian Karen Steenbrink of Utrecht University also criticised the video on the grounds that it was ‘offensive to Muslims’ and

¹³⁶ Royal Decree of 14 April 2002, *Staatsblad* 2002, no. 197, Royal Decree of 15 March 2003 *Staatsblad* 2003, Royal Decree no. 118 on the entry in to force of the Act of 21 December 2000, *Staatsblad* 2000, no. 618.

¹³⁷ See ‘The Civic Integration Exam Abroad’ published by Immigratie-en Naturalisatiedienst (the Dutch Immigration and Naturalisation Service), available at http://www.ind.nl/en/Images/bro_inburgering_tcm6-105967.pdf (last visited 7 June 2007). In particular see page 23 which specifies that in addition to EU citizens, American, Canadian, Australian, New Zealand, Japanese, Norwegian and Swiss nationals are exempt from the test. See also ‘Holland Launches the Immigrant Quiz’ *The Sunday Times*, 12 March 2006 at <http://www.timesonline.co.uk/article/0,,2081496,00.html> (last visited 16 June 2006).

¹³⁸ ‘Dutch Immigration Kit Offers a Revealing View’ *The New York Times*, 17 March 2006 at <http://www.iht.com/articles/2006/03/16/news/dutch-5852942.php> (last visited 6 October 2006).

¹³⁹ See Arzu Merali of the Islamic Human Rights Commission quoted at <http://www.islamweb.net/ver2/archive/article.php?lang=E&id=123732> 6 April 2006, (last visited 16 June 2006).

¹⁴⁰ *ibid.* The film however received the backing of Mohammed Sini, chairperson of Islam and Citizenship (a national Muslim organisation) who described homosexuality as ‘a reality’ and who called on immigrants ‘to embrace modernity’. See ‘Netherlands Issues Immigration Test’ *Washington Times*, 16 March 2006 at http://www.washingtontimes.com/world/20060315-100027-7407r_page2.htm (last visited 23 October 2006).

noted that topless bathing is in fact rarely seen in the Netherlands'.¹⁴¹ Emecmo, a group which represents Moroccans in the Netherlands described the video as provocation rather than education and said it was clearly intended to stop Muslim immigration.¹⁴² This was denied by the government. Rita Verdonk the then immigration minister asserted that 'It is important to make clear demands of people. They need to subscribe to our European values, respect our laws and learn the language.'¹⁴³

Religion in general and Islam in particular have therefore been prominent elements in the debate around the new Dutch policy in relation to immigration. While part of the overall objective of these measures has been to decrease immigrant numbers (visa fees were also significantly increased), the central role accorded to gender and sexuality in the measures adopted demonstrate that an equally important objective of the policies in question has been to make acceptance of sexual liberalism, gender equality and the restriction of religious influence on public policy into prerequisites of Dutch citizenship. While it is clearly unable to determine the political and religious views of established citizens, the Dutch government has made it clear that, in so far as immigrants are concerned, Dutch citizenship is available only to those who are willing to accept these values or who are, at the very least, willing to place limitations on their desires to see religious norms hostile to such values reflected in public policy. The tests clearly make the holding of certain views by individual migrants the subject of a degree of state regulation. The focus on requiring acceptance of gay relationships or the freedom of women to wear revealing clothing indicates that what is being sought is acceptance on the part of individuals of the right of others to engage in conduct thought sinful by many religions (most notably mainstream Islam). A failure to adhere to such libertarian values can result in a denial of the right to live in the Netherlands.

As both the exemption of 'Western' immigrants from the tests and the reactions of Muslim leaders show, these requirements are either aimed at or prove most challenging for, Muslim immigrants and represent an implicit but clear assertion by the Dutch government that adherence to the values of many of the current interpretations of the Islamic religion are incompatible with Dutch citizenship. The European Commission's report on Islam and Fundamental Rights in the European Union¹⁴⁴ identifies 'questions of morality and sexuality' and 'sexual orientation in particular as the areas of 'highest divergence between

¹⁴¹ *ibid.*

¹⁴² n 137 above.

¹⁴³ See 'Europe Raises the Bar for Immigrants' *The Boston Globe*, 22 May 2006 at: http://www.boston.com/news/world/europe/articles/2006/05/22/europe_raises_bar_for_immigrants/ (last visited 1 May 2007).

¹⁴⁴ *Islam and Fundamental Rights in the European Union*, European Commission, Directorate-General Justice and Home Affairs, Final Report, October 2004 at: http://ec.europa.eu/dgs/policy_advisers/activities/dialogues_religions/docs/islam_droits_fondamentaux_final_25_10_2004_en.pdf (last visited 11 October 2007).

Muslims and non-Muslims¹⁴⁵ while Klausen's research has shown that otherwise moderate European Muslims find it difficult to accept the concept of gay rights,¹⁴⁶ yet such acceptance is exactly what the Dutch government now requires them to do on pain of denial of the right to immigrate to the Netherlands. Under this approach, the protection of the personal autonomy and freedom from religion of Dutch gays and lesbians is seen as requiring a degree of interference with the personal autonomy of those who cannot or will not confine their disapproval of homosexuality to the private sphere.

GERMANY

The Dutch approach to these issues has been very influential both on the policies of other member states and on the approach of EU policy and legislation in this area. In Germany changes in the nationality laws which came into force on 1 January 2000 loosened the link between blood line and nationality but made 'proof of commitment to the values of the Basic Law'¹⁴⁷ a prerequisite of citizenship. There is at least some evidence that elements of Islamic belief and practice are seen potentially inconsistent with these values. Klausen has noted how the requirement has been 'a sticking point' for many German Muslims. Moreover, the federal agency for the protection of the Constitution (*Bundesamt Für Verfassungsschutz*) has blacklisted Milli Görüs, one of the largest Muslim organisations in Germany describing its as an 'Islamist' organisation whose social work amongst the young is 'disintegrative...antidemocratic and antiwestern'.¹⁴⁸

The CDU Federal minister for the Interior Wolfgang Schäuble praised the new Dutch immigration regulations saying that Germany 'can learn from the Netherlands'.¹⁴⁹ Under German law individual states have power to assess whether potential citizens truly accept the principles of the Basic Law to which federal law requires them to sign an oath of allegiance. The state of Baden-Württemberg was the first to use these powers to propose a citizenship which examined the compatibility of the values of aspirant citizens with 'German values'.

¹⁴⁵ *ibid* 3.

¹⁴⁶ Klausen's survey of European Muslims who were actively engaged in civic life (a group which she acknowledges to be made up of a disproportionate number of moderate and more western-oriented Muslims) also showed little evidence of an acceptance of sexual liberalism on the part of European Muslims. Even interviewees who expressed views which were otherwise liberal were unequivocal in their opposition to greater toleration of homosexuality, with some going as far as suggesting that no secular state had the right to impose toleration of gays and lesbians on Muslims (J. Klausen, *The Islamic Challenge: Politics and Religion in Western Europe*, (Oxford and New York; Oxford University Press, 2005). See interview with young Danish Imam at 15 and 16, the opposition of the Muslim Council of Britain to gay rights at 34, the description of the opposition of 'the voluntarists' to all gay rights at 92). Hussein attributes some of the decline in support for the Labour Party amongst British Muslims to the Blair government's support for gay rights legislation (D. Hussein 'The Impact of 9/11 on British Muslim Identity' in R. Geaves, T. Gabriel, Y. Haddad and J. Idleman Smith (eds) *Islam and the West Post 9/11* (Ashgate: Aldershot, 2004) 120).

¹⁴⁷ *ibid* 21.

¹⁴⁸ *ibid* 43.

¹⁴⁹ See 'Testing the Limits of Tolerance' *Deutsche Welle* 16 March 2006 at: <http://www.dw-world.de/dw/article/0,2144,1935900,00.html> (last visited 16 June 2006).

It was quickly followed by the State of Hesse which proposed a similar examination. Tests in both states were again clearly aimed at assessing the degree to which Muslims were willing to separate religious attitudes towards gender and sexuality to the private sphere and to accept liberal notions of individual self-determination. Questions in the Hesse examination for example, asked immigrants ‘A woman should not be allowed to move freely in public or travel unless escorted by a close male relative. What is your standpoint on this?’ and ‘What possibilities do parents have to influence their sons’ or daughters’ choice of partner? Which practices are forbidden?’¹⁵⁰ Similarly, the Baden-Württemberg test asked questions relating to forced marriage (‘What do you think of the fact that parents forcibly marry off their children?’), homosexuality (‘Does the holding of office by open homosexuals disturb you?’) and women’s rights (‘Do you think that a woman should obey her husband and that he can beat her if she is disobedient?’).¹⁵¹ As in the case of the Dutch tests, both German examinations focused on precisely the issues of gender and sexuality identified by the European Commission’s expert group as issues where attitudes of Muslims and non-Muslims differed to the greatest degree.¹⁵² They also focus on other issues seen as particularly relevant to Muslims. The Hesse test examine attitudes towards Israel (‘Explain the term Israel’s right to exist’) and Holocaust denial (‘if someone described the Holocaust as a myth or a fairytale, how would you respond?’)¹⁵³ while the Baden-Württemberg exam asked whether the September 11th hijackers were ‘terrorists or freedom fighters’.¹⁵⁴ Indeed in Baden-Württemberg the interior ministry justified the examinations on the basis that ‘there have been neutral surveys and studies that have shown there are discrepancies between Muslim beliefs and our Constitution.’¹⁵⁵ Furthermore, the requirement that applicants sit the examination was initially applied only to applicants from 57 majority-Muslim countries.¹⁵⁶

¹⁵⁰ See A. Etzioni ‘Citizenship Tests: A Comparative, Communitarian Perspective’ (2007) 78(3) 353 *The Political Quarterly*. For a full list of questions posed see ‘Becoming German: Proposed Hesse Citizenship Test’ *Der Spiegel* 5 September 2005 at: <http://service.spiegel.de/cache/international/0,1518,415207,00.html> (last visited 2 June 2006).

¹⁵¹ See <http://www.baden-wuerttemberg.de/de/Meldungen/171636.html> (last visited 11 October 2007).

¹⁵² See n 144 above.

¹⁵³ See ‘New Rules for Muslims in German State Blasted’ *Deutsche Welle*, 5 January 2006 at: <http://www.dwworld.de/dw/article/0,2144,1840793,00.html> (last visited 2 June 2006).

¹⁵⁴ See ‘Europe Raises Bar for Immigrants’ *Boston Globe*, 22 May 2006 at: http://www.boston.com/news/world/europe/articles/2006/05/22/europe_raises_bar_for_immigrants/ (last visited 2 June 2006)

¹⁵⁵ n 153 above.

¹⁵⁶ Etzioni, n 150 above. However, by 2007 the requirement that the applicant prove his or her attachment to liberal democratic values by means of an interview was made discretionary to be used “in order to dispel doubts about the applicant’s commitment to the liberal democratic order” see *Bekanntnis zur freihheitlichen demokratischen Grundordnung nach dem Staatsangehörigkeitsgesetz (StAG): Gesprächsleitfaden für die Einbürgerungsbehörden*, Stand 18.04.2007 available at <http://www.baden-wuerttemberg.de/de/Meldungen/171636.html> (last visited 11 October 2007). Applicants from Muslim-majority countries have, however, been required to undergo such interviews at higher rates than those from non-Muslim countries: see <http://www.baden-wuerttemberg.de/de/Meldungen/171636.html> (last visited 11 October 2007).

As in the Netherlands, the proposals were severely criticised for interfering with private attitudes and stereotyping Muslims.¹⁵⁷ Volker Beck, a leading member of the Green Party noted that the anti-gay attitudes of Baden-Württemberg's (Christian) interior minister meant that 'he himself would probably fail the test'.¹⁵⁸ The controversy generated by these tests prompted the Federal Parliament to take up the issue in February 2006 in order to arrive at a nationwide consensus. The CDU federal minister for integration policy Maria Böhmer argued that a federal policy was necessary and noted how 'the United States gives courses in the constitution, history, culture and values of the country'.¹⁵⁹ In May 2006 representatives of the federal and state governments worked out a series of uniformly applicable guidelines which fall short of introducing the kind of test proposed by the authorities in Baden-Württemberg and Hesse but which includes an 'integration course' which will focus on 'the German constitution and German values such as gender equality.' and which leave intact the right of individual states to determine, including by means of examinations such as those introduced in Baden- Württemberg, which immigrants have adopted German values sufficiently to merit citizenship. Although such tests are now discretionary and can be applied to applicants from a broader range of countries, applicants from Muslim countries have been required to undergo such examinations to a greater extent than applicants from non-Muslim countries.¹⁶⁰

OTHER MEMBER STATES

The French government has adopted a similar approach. As far back as the year 2000, the government began to seek assurances from Muslim groups in relation to their commitment to 'French Values'. In January of that year the minister for the interior Jean Paul Chevènement concluded an agreement with Muslim organisations which sought to establish principles on which a structured relationship with state institutions could be based. The French Government proposed that all Muslim groups participating in the exercise would be obliged to sign up to a statement of 'Fundamental Principles'¹⁶¹ which:

¹⁵⁷ See 'How To Be a German', *Inter Press Service News Agency*, 31 May 2006 at: <http://www.ipsnews.net/news.asp?idnews=33203>. (last visited 3 June 2006)

¹⁵⁸ n 152 above.

¹⁵⁹ See 'The Search for Identity Continues' *Der Spiegel* 9 May 2006 at: <http://www.spiegel.de/international/0,1518,415207,00.html> (last visited 10 October 2007).

¹⁶⁰ *ibid.* For details of the 2007 versions of the "guidelines for discussion" ("Gesprächsleitfaden") used by the Baden-Württemberg authorities in the interviews ("Einbürgerungsgespräche") which assess the applicant's commitment to the liberal democratic order ("Bekanntnis zur freiheitlichen demokratischen Grundordnung") see *Bekanntnis zur freiheitlichen demokratischen Grundordnung nach dem Staatsangehörigkeitsgesetz (StAG): Gesprächsleitfaden für die Einbürgerungsbehörden*, Stand 18.April 2007 at: <http://www.baden-wuerttemberg.de/fm/2028/Ge%E4nderter%20Gespr%E4chsleitfaden.pdf> (last visited 11 October 2007). For statistics on the use of interviews in applications for citizenship see: <http://www.baden-wuerttemberg.de/de/Meldungen/171636.html> (last visited 11 October 2007).

¹⁶¹ See S. Ferrari 'The Secularity of the State and the Shaping of Muslim Representative Organizations in Western Europe' in J. Cesari and S. McLoughlin (eds) *European Muslims and the State* (Aldershot: Ashgate, 2005) 16-17. The statement was called '*Principes et fondements juridiques régissant les rapports entre les pouvoirs*

Solemnly confirmed their attachment to the fundamental principles of the French Republic and especially [...] to freedom of thought and religion, to Article 1 of the Constitution which affirms the secular character of the Republic and the respect this principle accords to all beliefs and finally to the provisions of the law of 9 December 1905 concerning the separation of the churches and the State ¹⁶²

Other religious groups were not required to make similar declarations. Chevènement justified this targeting of Islam on the grounds that the country was faced with an ‘exceptional’ situation and that unlike Christianity, Islam:

has experienced neither the Renaissance or the Reformation. Certainly, Islam does distinguish between the religious and temporal domains. However, there is no shortage of Muslims to show that this distinction calls for a level of coordination [between the two domains] and consequently permanent involvement of religion in the temporal sphere.¹⁶³

Cesari notes that several Muslim organisations considered that this request showed that they were viewed with suspicion by the French authorities.¹⁶⁴

In 2003 media attention in relation to the question of the role of Islam in French society focused on a law to ban the wearing of ‘ostentatious’ religious symbols in public schools which was widely seen as targeting the Muslim headscarf. However, in the course of proposing this ban to parliament, then Prime Minister, Jean-Pierre Raffarin placed the issue of the headscarf into the wider context of immigration, citizenship and common values saying ‘Integration is a process that presupposes a mutual wish to [integrate], a shift towards certain values, a choice of a way of life, a commitment to a certain view of the world

public et le culte musulman en France’ and is available at www.pourinfo.ouvaton.org/immigration/dossierchenement/chevenement.htm. Cesari also notes that: ‘Many Muslim representatives considered the request to sign this declaration a demonstration of suspicion and lack see: J. Cesari 2002 ‘Islam in France: The Shaping of a Religious Minority’ in Y. Yazbeck Haddad *Muslims in the West from Sojourners to Citizens* (Oxford: Oxford University Press, 2002) 40.

¹⁶² Ferrari, *ibid.* My own translation. The original French version reads: ‘conferment solennellement leur attachement aux principes fondamentaux de la République française et notamment [...] à la liberté de pensée et à la liberté de religion, à l’art. 1 de la constitution affirmant le caractère laïc de la République et respect par celle-ci de toutes les croyances et enfin aux dispositions de la loi du 9 décembre 1905 concernant la séparation des Églises et de l’État’

¹⁶³ My own translation. The original French version is: ‘à la différence du christianisme, n’a connu ni la renaissance ni la Réforme. Certes, l’Islam distingue le domaine religieux et le domaine mondain. Mais il ne manque pas de musulmans pour faire observer que cette distinction appelle une coordination et, par conséquent, une implication permanente du religieux dans le mondain.’ From speech of Minister Chevènement of 28 January 2000 available at www.pourinfo.ouvaton.org/immigration/dossierchenement/chevenement.htm. See Ferrari *ibid.*

¹⁶⁴ Many Muslim representatives considered the request to sign this declaration a demonstration of suspicion and lack of trust, see J. Cesari ‘Islam in France: The Shaping of a Religious Minority’ in Y. Yazbeck Haddad, *Muslims in the West from Sojourners to Citizens* (Oxford: Oxford University Press, 2002) 40.

proper for France.¹⁶⁵ At the same time he announced that the government would be introducing a ‘contract’ for immigrants under which learning the French language and ‘attachment’ to France and French values would be preconditions for the granting of residence permits.¹⁶⁶ The announcement of measures to encourage immigrants to adopt French values at the same time as legislation targeting the headscarf on the basis of its incompatibility with secular values was being introduced, gives the clearest possible indication of the thinking of the French authorities. Along with their colleagues in other EU member states, they viewed (rightly or wrongly) elements of Islam (and in particular those relating to gender and sexuality), as incompatible with native values. Furthermore, the solution to such incompatibility lay in the adoption by immigrant communities of the secular values whose acceptance was to become prerequisite of citizenship. Thus in a move which certain commentators have seen as at least partly prompted by the importance accorded to integration in the EU directives on long term residents and family reunification,¹⁶⁷ France amended its 1945 law to require immigrants to satisfy a condition of ‘Republican Integration’.¹⁶⁸

The trend towards incorporating an acceptance of the idea of the right of freedom from religion as part of citizenship can also be seen in other member states. In 2002 for example, Austria introduced a compulsory ‘Integration Agreement’ as part of reforms of its Aliens Act¹⁶⁹ while in 2005 Britain introduced a ‘Life in the UK Test’ which examines the knowledge of applicants for British citizenship of British values, culture and history. Included in the tests are questions probing acceptance of principles such as the gender equality and importance of tolerance.¹⁷⁰ In late 2006, then Prime Minister Tony Blair stressed the importance of these principles in a speech in which he criticised a ‘new and virulent form of ideology associated with a minority of our Muslim community’ and warned migrants that ‘our tolerance is part of what makes Britain, Britain. Conform to it; or don't come here’.¹⁷¹

These laws have focused on actual or perceived resistance amongst Muslim populations to gender equality and sexual liberalism which have become emblematic of wider fears around the willingness of some Muslims to respect the notion of an individual right to a zone of freedom from religious norms. The response of some European governments has been to stipulate acceptance of

¹⁶⁵ Klausen n 146 above 176.

¹⁶⁶ *ibid* 123-124. These measures were introduced in April 2006.

¹⁶⁷ See S. Barbou des Places and H. Oger ‘Making the European Migration Regime: Decoding Member States’ Legal Strategies’ (2004) 6(4) *European Journal of Migration and Law* 361.

¹⁶⁸ See article 6(3) of Loi no. 2003-1119 du 26 novembre 2003 relative a la maitrise de l’immigration, au séjour des étrangers en France et a la nationalité, *Journal Officiel* no 274, 27 novembre 2003.

¹⁶⁹ n 167 above.

¹⁷⁰ See: ‘Core British Values’ BBC News, 17 May 2006 http://news.bbc.co.uk/2/hi/programmes/politics_show/4988946.stm (last visited 27 November 2006) and also ‘New UK Citizenship Testing Starts, BBC News, 1 November 2005 at http://news.bbc.co.uk/2/hi/uk_news/politics/4391710.stm (last visited 27 November 2006).

¹⁷¹ See: ‘Conform to Our Society Says PM’ *BBC News* 8 December 2006 available at http://news.bbc.co.uk/2/hi/uk_news/politics/6219626.stm (last visited 11 December 2006).

liberal values in these areas as a prerequisite of citizenship in order to test the willingness of Muslim immigrants to renounce any desire to use religious precepts as a basis for public policy (on the basis that it is in relation to areas such as gender and sexuality that religiously inspired views are strongest) and to accept the kind of limitations on public religion which have evolved in Europe over recent centuries. These countries see in the religious views of certain migrants, a threat to the liberal, a-religious nature of their societies and the rights to privacy and individual self-determination which such societies uphold. Their desire to protect this liberal a-religiosity (which is seen as important both culturally and as a means to protect certain groups such as women and homosexuals), renders the private views of potential citizens and residents a legitimate subject of legal regulation. Therefore, the linking of acceptance of the principle of freedom from religion to the granting of citizenship or residence rights, potentially interferes, in the name of protecting the privacy and autonomy of one set of citizens, with the privacy and autonomy of those who hold views which are condemnatory towards the conduct of others.

These developments have influenced EU law in this area in two ways. First, EU legislation has been careful not to impinge upon the ability of member states to regulate the religious beliefs of migrants.¹⁷² Second in both substantive legislation¹⁷³ and in its broader statements of policy¹⁷⁴ the Union has endorsed the view of a failure to adopt certain 'European Values' and to confine one's religious convictions to the private sphere, as a threat to public policy justifying legal intervention. Furthermore, EU law has in turn influenced national laws with certain member states using what has been termed the 'alibi' of restrictive European legislation in relation to integration matters to introduce such an approach into national law.¹⁷⁵

CONCLUSION

The European Union therefore appears to have decided that certain limitations on religious influence over law and politics are necessary elements of membership of the Union. In particular it has evidenced a concern that certain kinds of religion might pose a threat to core elements of a liberal democratic public order such as pluralism in the public sphere as well as to the key liberal democratic values of personal autonomy, equality and respect for privacy. The history of the Crusades and Inquisition as well as more contemporary examples such as law and government in modern day Saudi Arabia and Iran, show that religion can both provide the basis for many serious violations of human rights and exercise a

¹⁷² See the provisions of the family reunification and long-term residents directives allowing for the imposition of integration conditions by individual member states above.

¹⁷³ See discussion of the grounds for refusing status in the directives above.

¹⁷⁴ See JHA council policy statement n 83 above.

¹⁷⁵ n 167 above.

degree of control of the political and personal spheres which is incompatible with liberal democratic values. As the judgment of the Court of Human Rights in *Refah* rightly pointed out, the enactment of ‘divine’ law as the basis of the legal system is inconsistent with the openness to change and pluralism necessary in the liberal democratic system. As a self-declared ‘Community of Values’ the EU is entitled and possibly obliged to ensure that those states that seek to join it impose the limitations on religious influence over law and politics necessary for liberal democratic values to thrive and, as shown by its dealings with Romania and Turkey, it has used the Copenhagen Criteria on Enlargement to do so.

In the area of immigration the approach Union has shown similar concerns. It has encouraged Member States to require migrants to the Union to indicate that they accept the primacy of liberal values over the conservative, interventionist and arguably patriarchal approaches of many religions to issues of gender and sexuality as a prerequisite to the granting of residence rights or citizenship. This approach does involve a significant degree of interference with religious liberty and with the private views of individual migrants. However, in an approach analogous to the ‘Militant Democracy’ espoused by the Court of Human Rights in *Refah*, the Union has permitted Member States to interfere with private views and individual autonomy in order to secure respect for these principles in relation to issues such as gender and sexuality. Indeed, in the context of migration, states regularly select migrants on the basis that they have certain desirable traits (the youthful, highly skilled and those with cultural or ethnic ties to certain states are often granted favourable treatment under immigration laws). Although the authorities need to take greater care not to stigmatise certain than some have to date and to avoid sectarian rhetoric, it is not inherently objectionable for EU Member States to select migrants on the basis of commitment to certain basic values such as gender equality or tolerance of different sexual orientations.

However, the manner in which the Union has upheld these limitations on religion is deeply problematic. Both in relation to Enlargement and migration EU law and policy has treated Islam as inherently less compatible with liberal democratic norms than the Christian denominations which are more culturally and historically entrenched at Member State level. This attitude is seen both in the different approaches adopted by the Union in its dealings with Romania and Turkey and in the selective application of values tests to Muslim migrants. It is also seen in the wider European (as opposed to EU) context in the judgment of the Court of Human Rights in *Refah* and the requirement imposed on French Muslim groups that they indicate a commitment to the French form of secularism as a condition of the establishment of a structured relationship with the French State. The Union’s approach in these areas appears based on the notion that Islam is inherently disposed towards authoritarianism and sexism to a greater degree than other religions. As noted above, many commentators think that this is in fact the case and that Islam is less compatible with Western liberalism than other faiths. However, even if this were true, the Union’s method of dealing with such concerns would still be fundamentally flawed. Rather than setting out standards

with which all religions must comply, the EU has chosen to assume compatibility between Christianity and the model of liberal democracy to which the Union attached while subjecting Muslims to rigorous examination of their secular bona fides. It may well be that were uniform standards to be applied across the board, Muslims would struggle to a greater degree than adherents of other religions to reconcile themselves with the limitations on religious influence over law and society inherent in the EU's version of liberal democracy. Indeed, given that the contemporary relationship between religion and the state in Europe is to a large degree the result of the accommodation which emerged between the Christian Churches and the European secular state following centuries of conflict, it would be surprising if adherents of mainstream European Christian denominations did not find it easier to reconcile the demands of the liberal democratic state with those of their religion. Thus maintenance of the limitations on religion which have evolved out of Europe's particular historical experience may involve interference with individual rights to privacy may indeed be indirectly discriminatory in that they set down standards which adherents of religions which have been less influenced by European history may find harder to satisfy. However, the approach which the Union has adopted, and which it has facilitated several member states in adopting, goes beyond this and is *directly* discriminatory in that it applies these secularist standards either to Muslims alone, or to Muslims to a greater degree than Christians. To do so is to view both religions as a monolithic blocs,¹⁷⁶ to deny the individuality of individual believers and thus to engage in discrimination of the crudest kind.

The failure of the Union to apply these limitations on religious influence in a uniform way to various religious denominations is indicative of the contradictions at the heart of the European approach to religion. Europe has developed a very secularised political order in which religious groups exercise less influence than in almost all other areas of the world and where adherence to religious morality in areas such as sexual behaviour has, to a great degree, become a matter for individual decision and not regulation by the state.¹⁷⁷ These limitations on religious influence have emerged out of a centuries-long process of conflict and accommodation between the Christian Churches and European States. This process has been largely incremental, partial and its terms are still contested. In most Member States for example, certain Christian denominations have retained important symbolic, cultural and institutional roles while many denominations continue to seek to influence the law in areas related to religiously important questions such as abortion, marriage and sexual morality. This contested and

¹⁷⁶ Indeed several commentators have noted that rejection of 'live and let live' privatised religion is not restricted to Muslim immigrants by any means but is in fact prevalent amongst immigrants of many religions. See G. Davie 'Religion in Britain: Changing sociological assumptions' *Sociology*, 34/I:113-128. She further argues that the difference in attitude to religion of native Europeans and immigrant communities 'has led to persistent and damaging misunderstandings' (*ibid*). See also P. Norris and R. Inglehart, *Sacred and Secular: Religion and Politics Worldwide* (Cambridge: Cambridge University Press, 2004).

¹⁷⁷ See C. Crouch, 'The Quiet Continent: Religion and Politics in Europe' in D. Marquand and R. L. Nettle (eds) *Religion and Democracy* (Oxford: Blackwell Publishers, 2000).

evolutionary settlement is also historically specific to Europe. It has allowed certain religions to retain official roles which far exceed their actual influence and has allowed Churches to retain a certain political role albeit one which is moderated by implicit assumptions about the nature of the relationship between religion and the state (most notably the state's supremacy in the temporal arena).¹⁷⁸ These very features make it ill-suited to deal with the consequences of a more multicultural age in which religions whose attitudes to the role of religion in law and politics have not been shaped by the same experiences of those of mainstream European Christianity play an increasing role in European life.

Europe is entitled to uphold the limitations on religion which are inherent in its liberal democratic and egalitarian system. Certain religions, including Islam, may or may not represent a threat to those values and the Union, as a 'Community of Values', is entitled to require that States who wish to join such a community uphold limitations on religious influence necessary for such values to thrive and survive. The adherents of certain religions, such as Islam, may find that the membership of the European political and legal order requires them to adjust to a degree of secularity to which mainstream versions of their faith either object or are unaccustomed. However, the imposition of such standards by means of values tests for migrants or the removal of 'Islamic elements' from the Turkish legal system involves an approach which differs significantly from the evolving, contested and partial nature of the secularity which characterise Europe's relations with its 'native' Christian denominations. Accordingly, the Union is faced with three choices, it can adopt what Fukuyama termed the 'old-style multicultural'¹⁷⁹ approach and prioritise the religious and cultural freedom of migrants at the expense of its liberal values. This approach however would appear to be unpalatable to European electorates who have given strong support to parties campaigning against just such policies in recent years. It can, as it appears to have been doing to date, apply more secularist standards to religions whose mass presence in Europe is a more recent phenomenon and require their adherents to sign up to the supremacy of liberal values in a range of areas while allowing the adherents of more historically and culturally entrenched religions to accommodate themselves to secularist and liberal principles (in so far as their religions may be incompatible with such principles) in a gradual and incremental fashion and in such a way that the institutional and symbolic role of such religions in the public sphere is retained. This approach however is directly discriminatory in that it involves the application of standards to the adherents of different religions in a partial and unequal manner. Furthermore it risks deepening suspicion amongst Muslims that the Union's moves to uphold certain values are merely a smokescreen for a more discriminatory, nativist agenda. A third option involves the upholding of liberal democratic values through requiring explicit acceptance of

¹⁷⁸ See for instance O. Roy, *Secularism Confronts Islam* (New York: Columbia University Press, Eng trans, 2007) 19-22.

¹⁷⁹ n 135 above.

limitations on religious influence over the public and private spheres from adherents of all religions. Such an approach may indeed prove to be more difficult for adherents of those religions, such as Islam, which did not participate in the historical struggles which established the basic contours of settlement between religion and the state in Europe. However, it would also call into question the privileges retained by certain religions as a result of the partial and incremental nature of the secularisation that has occurred in most European countries. Such an approach has been seen in the German state of Berlin where concerns around the wearing of the Muslim headscarf by female civil servants led to a ban on all religious symbols in public buildings.¹⁸⁰ This however would involve a significant shift in the predominant European approach to religion which has to date been characterised in many countries by an attachment to and recognition of the cultural and symbolic role of certain denominations in national life. The EU has to date shown no inclination to do so, indeed at the time of the Amsterdam Treaty it explicitly declared that it would not interfere with the status of churches at national level.¹⁸¹ Accordingly the version of secularism upheld by EU law is likely to continue to be one that exhibits clear bias towards the culturally-entrenched Christian denominations and bias against 'outsider' religions such as Islam.

¹⁸⁰ Germany's former Federal President Johannes Rau warned that banning the headscarf would lead to widespread secularisation of German public life. See: '*Religionsfreiheit heute - zum Verhältnis von Staat und Religion in Deutschland*' Rede von Bundespräsident Johannes Rau beim Festakt zum 275. Geburtstag von Gotthold Ephraim Lessing in der Herzog-August-Bibliothek zu Wolfenbüttel. wolfenbüttel, 22 January 2004. Available at: www.bundespraesident.de, and also news report at <http://news.bbc.co.uk/2/hi/europe/3421937.stm> (last visited 12 October 2006). This view was echoed by a member of the Bundestag interviewed in Klausen's *The Islamic Challenge* that the presence of large numbers of Muslims in Europe was in fact pushing the continent towards greater secularism and separation of church and state (n 146 above, 179).

¹⁸¹ See n 1 above.