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FREEDOM OF RELIGION AND BELIEF IN INTERNAL AND EXTERNAL EUROPEAN UNION POLICIES

Summary

The European Union (EU) has carved out a specific approach to the issues of religion and belief in its legislative framework and policies, which is largely aligned with the standards built through the interpretation of the European Convention on Human Rights. Litigation on the issue of freedom of religion and belief is on the rise before the Court of Justice of the European Union (CJEU), while in parallel the EU seems to be stepping up its efforts to tackle the given issue in its internal and external actions. The EU approach to the issue of freedom of religion or belief, remains somewhat fragmented, while its internal and external policies are not always mutually aligned. The paper provides an overview of EU's regulatory and monitoring framework related to the freedom of religion and belief in EU's internal and external policies, and outlines the developments in the CJEU caselaw concerning the prohibition of discrimination in the area of employment and in the context of the refugee status. The paper points out the limitations of the current EU approach.

Keywords: Freedom of religion or belief, European Union, Court of Justice of the European Union, Non-discrimination, Employment, Refugee, External action.

1. Introductory remarks

The European Union (hereinafter: EU) was founded on a model of “functional integration”, which means that it sometimes avoided direct regulation with “symbolically fraught matters”¹ such as religion, which is also closely related to identity. The EU has thus carved out a specific approach to the issues of religion and belief in its legislative framework

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¹ R. McCrea, “EU Law and Religion: Protecting a Privileged Position for Majority Faiths?”, in: *Freedom of Religion: An Ambiguous Right in the Contemporary European Legal Order* (eds. Hedvig Bernitz, Victoria Enkvist) Hart Publishing, Oxford 2020, 51.

and policies. This approach is largely aligned with the standards built through the interpretation of the European Convention on Human Rights (hereinafter: ECHR) by the European Court of Human Rights (ECtHR). However, due to the different nature of the two organisations –the EU and the Council of Europe (hereinafter: CoE) and the more immediate effect of the judgments of the Court of Justice of the European Union (hereinafter: CJEU), some authors² even go so far as to claim that the EU is currently developing its specific law on religion or that it is the new boss of religious freedom.³ While the latter may be too bold a statement, litigation on the issue of freedom of religion and belief is on the rise before the CJEU, while in parallel the EU seems to be stepping up its efforts to tackle the given issue in its internal and external actions. In doing so, it is trying to address in particular the rise of religion-based crimes and religious discrimination. What remains true is that the role played by religion in the EU is closely linked to issues like migration, multiculturalism, minority rights,⁴ and racial discrimination, all of which provoke heated debates in their own right.⁵ The EU's approach, as is the case in other policy areas (such as the rule of law⁶), remains somewhat fragmented, while its internal and external policies are not always mutually aligned in terms of the scope and reach of actions.

This paper will provide an overview of EU's regulatory and monitoring framework related to the freedom of religion and belief in EU's internal and external policies, and outline the developments in the CJEU case-law concerning the prohibition of discrimination in the area of employment and in the context of the refugee status; the latter two topics are selected due to their importance in the overall EU context. Special attention shall be given to the EU's approach toward the freedom of religion and belief in its internal and external policies.

² E. Ahlm, *An EU Law on Religion – A Recent Development*, <https://canopyforum.org/2021/03/12/an-eu-law-on-religion-a-recent-development>, 22. 7. 2023.

³ A. Pin, J. Witte, Jr., "Meet the New Boss of Religious Freedom: The New Cases of the Court of Justice of the European Union", *Texas International Law Journal* 55/2020, 223–268.

⁴ K. Henrard, "EU Law's Half-Hearted Protection of Religious Minorities Minority Specific Rights and Freedom of Religion for All", *Religions* 12/2021, 830–853.

⁵ R. McCrea, "Regulating the Role of Religion in Society in an Era of Change and Secularist Self-doubt: Why European Courts Have Been Right to Adopt a Hands-Off Approach", *Current Legal Problems* 1/2022, 111–135.

⁶ A. Knežević Bojović, V. Ćorić, "Challenges of Rule of Law Conditionality in EU Accession" *Bratislava Law Review* 1/2023, 41–62.

2. Freedom of religion in European Union internal policies and legislation

2.1. Primary European Union law

Freedom of religion is deeply entrenched in the fundamental values of the EU. The Preamble to the Treaty on the European Union (hereinafter: TEU) expresses this unequivocally as it states “Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law.”⁷ At the same time, it is worth noting that within the same sentence, the EU invoked European humanist inheritance, which has significant secularist elements.⁸

The overarching approach of the EU towards freedom of religion and belief is best understood from the wording of Article 17 of the Treaty on the Functioning of the European Union (hereinafter: TFEU), which states that the EU respects and does not prejudice that status of churches and religious associations or communities in its Member States (paragraph 1), and that it equally respects the status of philosophical and non-confessional organisations under national law (paragraph 2). Additionally, the EU makes a commitment in paragraph 3 of Article 17 to maintain an open, transparent and regular dialogue with these churches and organisations, while recognising their identity and their specific contribution.

What can be inferred from these provisions? Firstly, as there is no single model of church-state relations across the EU⁹, the EU recognises and respects the diversity of existing national models. Furthermore, the

⁷ On the debate preceding the adoption of the EU Constitutional Treaty, which resulted in this particular formulation that has been preserved in the TEU, see R.McCrea, “The Recognition of Religion within the Constitutional and Political Order of the European Union”, *LEQS Paper* No. 10/2009, 5

⁸ *Ibid.*

⁹ A Study produced by the EU Parliament distinguishes between two main broad constitutional models of regulation of church and state relations in various EU Member States: the denominational model, characterised by the presence of a state-established church and official religion, and the separationist model, based on the principle of separation between state, on the one hand, and churches and religion, on the other. It also identifies a number of sub-models. See A. Saiz Arnaiz *et al.* *Religious practice and observance in the EU Member States*, [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474399/IPOL-LIBE_ET\(2013\)474399_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474399/IPOL-LIBE_ET(2013)474399_EN.pdf), 22. 7. 2023. However, the classification of church-state relations is by no means that simple, as different scholars have defined varying typologies, as summarised by Nikolić in O. Nikolić, *Država, crkva i sloboda veroispovesti*, Institut za uporedno pravo, Beograd 2022.

EU's recognition of the freedom of religion is, at least formally, denomination-neutral¹⁰, while at the same time being a clear element of *acquis communautaire*.¹¹ Some authors point out that the EU is demonstrating characteristics of the cooperationist model of church–state relations.¹² Secondly, it is clearly pointed out that the EU also respects the status of philosophical and non-confessional organisations, meaning that the legitimacy of non-religious views is also recognised on par with religion.¹³ Thirdly, the EU takes into account the positions of religious and non-religious organisations in its decision-making process, as affirmed by the EU's commitment to opening a transparent and regular dialogue with churches, philosophical and non-confessional organisations.¹⁴ Some authors describe the EU's religious neutrality as “*laïcité neutre*, a *laïcité positive*”.¹⁵

The European Commission (hereinafter: Commission) and the European Parliament maintain a regular dialogue with churches, religious organisations and non-confessional organisations, as prescribed by Article 17 of the TFEU. The dialogue, initially set up as early as 1990¹⁶ is governed by the Guidelines on the implementation of Article 17 TFEU by the Commission. The Guidelines explicitly recognise “churches, religious associations or communities as well as philosophical and non-confessional organisations” as interlocutors in the dialogue. While no registration is mandatory on EU level, the organisations must be recognized or registered in one of the aforementioned capacities at the national level. Further, they should “adhere to European values”. The dialogue with the Commission is maintained through written exchanges, meetings, or specific events. Currently, the EU Vice-President Margaritis Schinas is

¹⁰ McCrea (2009), 11.

¹¹ G. Robbers, „Država i crkva u Evropskoj uniji”, u: *Država i crkva u Evropskoj uniji* (ur. Gerhard Robbers), Pravoslavni bogoslovski fakultet, Beograd, 2012, 12.

¹² N. Doe, “Towards a ‘Common Law’ on Religion in European Union”, *Religion, State & Society* 37/2009, 157. Also see V. Đurić, „Pravo EU i državno crkveno pravo” in: *Harmonizacija zakonodavstva Republike Srbije sa pravom Evropske unije*, (ur. Duško Dimitrijević, Brano Miljuš), Institut za međunarodnu politiku i privredu, Beograd 2012, 566.

¹³ As Marković points out, this pluralism does not allow for secularist devaluation of religion as such, and, at the same time, leaves no room for any type of exclusive religious fundamentalism. V. Marković, „Pojam sekularnosti — istorijski, pravni i aksiološko-etimološki aspekti”, *Bogoslovlje* 2/2020, 120.

¹⁴ For more see R. McCrea (2009), 111–135

¹⁵ G. Robbers, “Diversity of State-Religion Relations and European Union Unity”, *Ecclesiastical Law Journal* 7/2004, 315.

¹⁶ European Commission, Dialogue with churches, religious associations and non-confessional organizations, https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combating-discrimination/dialogue-churches-religious-associations-and-non-confessional-organisations_en, 20. 7. 2023.

responsible for the dialogue, whilst there is also the position of the Coordinator for the dialogue between the Commission and churches, religious associations, or communities as well as philosophical and non-confessional organisations. In the European Parliament, the dialogue under Article 17 is conducted by one of its vice-presidents, who organises meetings, conferences, and events in association with confessional and philosophical organisations.¹⁷ In summary, while the dialogue does show that the EU recognises the relevance of religious perspectives in policy-making, such influence is balanced by other humanist and secular influences coming from non-religious organisations – for instance, the International Humanist and Ethical Union.¹⁸

In addition to the TFEU, another important source of primary EU law expressly regulates the freedom of religion. The Charter of Fundamental Rights of the European Union (hereinafter: Charter) recognised the freedom of religion as a human right in its Article 10, paragraph 1 by stating that everyone has the right to freedom of thought, conscience and religion, which includes the right to change religion or belief, and the freedom to manifest religion or belief in worship, teaching, practice and observance, either alone or in a community with others. The wording of Article 10, paragraph 1 of the Charter mirrors that of Article 9 of the ECHR. The second paragraph of the same article recognises the right to conscientious objection, in accordance with relevant national laws of Member States. The Charter includes additional relevant articles pertaining to the freedom of religion. Firstly, in Article 14 the Charter reiterates the right of parents to ensure that the education and teaching of their children are in line with their religious and philosophical convictions, in accordance with the exercise of these rights as per the laws of the Member States. Secondly and notably, Article 21 of the Charter prohibits discrimination, *inter alia*, based on religion or belief. Thirdly, Article 22 of the Charter proclaims that EU shall respect cultural, religious, and linguistic diversity.

The provisions of the TFEU and the Charter have set the foundation for what is now commonly referred to as freedom of religion or belief in the EU (hereinafter: FoRB). The outcome of the provisions of the mentioned primary sources of law is what many scholars refer to as a balanced approach towards the religious (particularly Christian), humanistic

¹⁷ P. Perchoc *et al.*, *Religion and the EU's external policies Increasing engagement*, 3, [https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/646173/EPRS_IDA\(2020\)646173_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/646173/EPRS_IDA(2020)646173_EN.pdf), 17. 7. 2023.

¹⁸ R. McCrea (2009), 19. For more on the dialogue in its early stages see P. Annicchino, "Religion and EU Institutions," *Ecclesiastical Law Journal* 3/2013, 326–331.

and cultural influences and views.¹⁹ It should be noted, however, that this syntagm, which is in widespread use, is a formula which is not nominally rooted in the relevant EU documents, but one that has emerged as the best to encompass the essence of this freedom.²⁰

2.2. Secondary European Union law

The norms of the primary sources of EU law concerning the freedom of religion and belief are further operationalised in a plethora of secondary legislation. Even though the EU does not have a direct competence to regulate FoRB in its secondary legislation, it does regulate the issues relating to prohibition of discrimination, employment, taxation, animal welfare, and personal data protection, which are all closely connected to the exercise of the freedom of religion or belief. The body of EU secondary legislation is extensive and is continuously evolving. Therefore, a comprehensive list of norms that bear relevance to the FoRB would be difficult to identify, and any such identification would only be valid for a given period of time. Additionally, it would far exceed the scope of the present paper.²¹ That being said, it is important to highlight those pieces of secondary legislation which have so far given rise to the religion-based litigation before the CJEU. This paper shall focus on two sets of such legal instruments.

Firstly, it is worth mentioning the provisions of EU directives governing the minimum standards for the qualification and status of third country nationals or stateless persons as refugees. Both the 2004 Directive that is no longer in force²² and the current Directive adopted in 2011²³ mandated Member States, when assessing the reasons for persecution, to apply the concept of religion which in particular includes the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with

¹⁹ Marković points out that churches were intentionally singled to so that their relevance is recognised. See V. Marković (2020).

²⁰ For a detailed deliberation on the matter, see M. Ventura, “The Formula ‘Freedom of Religion or Belief’ in the Laboratory of the European Union” *Studia z Prawa Wyznaniowego* 23/2020, 7–54.

²¹ Useful overviews are provided in V. Đurić (2012).

²² 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 refugees or as persons who otherwise need international protection and the content of the protection granted *OJL* 304.

²³ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), *OJL* 337.

others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief. This means that in relation to this issue, the EU has taken a studiously-neutral²⁴ understanding of religion, which is also consistent with the principles of equality and non-discrimination.

The second important piece of EU secondary legislation is the so-called Employment Equality Directive.²⁵ This directive, adopted in 2000, governs the field of employment and occupation, vocational training and membership in employer and employee organisations. The directive sets out a general legal framework for non-discrimination on the grounds of religion or belief, disability, age or sexual orientation. It applies to both public and private actors. The Employment Equality Directive sets out only minimum requirements, meaning that EU Member States can provide for a higher level of protection. While the directive prescribes a general prohibition of indirect and direct discrimination, it does leave room for some exemptions. In the context of this paper, the most important one is found in paragraph 2 of its Article 4, which allows Member States to incorporate in their legislations (either that existing at the time of adoption of the directive or future legislation) their national practices existing at the date of the adoption of the directive that allow churches and other public or private organisations whose ethos is based on religion or belief to allow for a difference in treatment based on person's religion or belief, when it comes to occupational activities. Such difference in treatment, as per the directive, does not constitute discrimination where, given the nature of these activities or the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisations' ethos. The directive further requires the difference to be implemented taking account of Member States' constitutional principles and provisions, as well as the general principles of EU law.

This Directive has given rise to significant jurisprudence of the CJEU which will be covered in more detail further in the text. While the Directive has been in place for over two decades, it was assessed very soon that it sometimes fails to provide the desired equal treatment, while its scope was narrower than that covered in the Racial Equality Directive²⁶,

²⁴ N. Doe, F. Cranmer, "Religion and Law in Europe", in: *The Oxford Handbook of Religion and Europe* (eds. Grace Davie, Lucian N. Leustean), Oxford University Press, Oxford 2022, 3

²⁵ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *OJ L* 303.

²⁶ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *OJ L* 180.

which thus effectively provides better protection from discrimination on the grounds of race than on other grounds. In 2008, the Commission came up with a proposal for a Directive which sought to prohibit discrimination on the grounds of religion or belief, disability, age and sexual orientation in the areas of social protection, social advantages, education and goods and services, including housing.²⁷ However, due to the fact that its' required unanimity before the Council of Ministers, it was never promulgated. In the meantime, the Commission, the European Network of Equality Bodies (Equinet), the EU Fundamental Rights Agency (FRA) and individual Member States have all published guidance relevant to the application of the Employment Equality Directive to tackle the challenges identified in its implementation across various EU Member States.²⁸ To sum up, the prohibition of discrimination based on religion or belief in the area of employment in secondary EU legislation leaves a lot to be desired. The importance of consistent implementation of the Directive is particularly striking in the light of the rather polarised opinions on whether discrimination based on religion or belief in the EU is widespread in EU Member States – while 47% of respondents in a Eurobarometer survey think that it is, 48% believe it is rare.²⁹

Finally, it is worth recalling that the EU has recently adopted a very important instrument from its Rule of Law Toolbox - the Rule of Law Conditionality Regulation³⁰ (hereinafter: Regulation). The Regulation sets out the rules for the protection of the EU budget in the case of breaches of the principles of the rule of law, where such a breach “affects or seriously risks affecting that sound financial management or the protection of those financial interests of the Union in a sufficiently direct way”. For the purpose of its own implementation, the Regulation provides a definition of

²⁷ M. Bell, “Advancing EU Anti-Discrimination Law: the European Commission’s 2008 Proposal for a New Directive” *The Equal Rights Review* 3/2009, 7–18.

²⁸ Report From The Commission To The European Parliament And The Council, Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (‘Racial Equality Directive’) and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (‘Employment Equality Directive’), <https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vjgm1ru98hxx>, 18. 7. 2023.

²⁹ Eurobarometer, *Special Eurobarometer 493 Report, Discrimination in the European Union*, 2019, 82, https://webgate.ec.europa.eu/ebsm/api/public/deliverable/download?do_c=true&deliverableId=71116, 22. 7. 2023.

³⁰ Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, *OJ L* 433I.

the rule of law, which includes the principles of non-discrimination and equality before the law. The two principles are, as can be deduced from the previous parts of this paper, closely connected to the freedom of religion and belief. In its seminal rulings upholding the Regulation, the CJEU underlined that the principle of non-discrimination is a part of the concept of the rule of law in its own right.³¹ In effect, this means that breaches of the principles of equality and non-discrimination based on religion or belief in a Member State, or a lack of effective judicial protection of the FoRB, provided they affect or seriously risk affecting the sound financial management of the EU budget or the protection of the financial interests of the EU in a sufficiently direct way, could trigger the procedure under the Conditionality Regulation – although it would be unlikely that this would be the only grounds for triggering such a procedure. While the EU has been vocal about the backsliding with regard to the rule of law in general, it remains somewhat reserved in reaction when it comes to issues that have a religious background but concern topics that are not within the purview of the EU. For instance, the jurisprudential reintroduction of strict abortion legislation in Poland undoubtedly has underlying religious motivations³², but it was only the European Parliament that actively reacted to this change within the wider context of “systemic collapse of the rule of law” and increasing threats to women.³³

2.3. *Current legislative developments relevant to freedom of religion or belief*

As pointed out earlier in the text, EU secondary legislation governing equality in relation to freedom of religion and belief is insufficient, while efforts for its’ improvement have so far not been successful. In 2021, the Commission developed a report on the implementation of the Racial Equality Directive and the Employment Equality Directive³⁴ which

³¹ *Hungary v. Parliament and Council*, ECLI:EU:C:2022:97, para. 229; C-157/21 Judgment of 16 February 2022, *Poland v. Parliament and Council*, ECLI:EU:C:2022:98, para. 324

³² M. Bucholc, “Abortion Law and Human Rights in Poland: The Closing of the Jurisprudential Horizon”, *Hague Journal on the Rule of Law* 14/2022, 73–99.

³³ European Parliament press Release, <https://www.europarl.europa.eu/news/en/press-room/20211108IPR16844/poland-no-more-women-should-die-because-of-the-restrictive-law-on-abortion>, 30. 7. 2023.

³⁴ Report from the Commission to the European Parliament and the Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (‘the Racial Equality Directive’) and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (‘the Employment Equality Directive’)

identified some open issues with regard to both the EU-level protection and the challenges in implementation of the current legal framework. To try and address this stalemate, in late 2022, the Commission adopted proposals for two directives, one of which is set to strengthen the protection guaranteed under Article 19 of the Charter - the proposed 2022/0401 (APP) Directive.³⁵ The aim of this proposal is to establish binding standards for equality bodies and extend their powers in the fields not previously mandatorily covered under EU law. Namely, some existing EU directives in the field of non-discrimination do regulate equality bodies³⁶ but the directive which covered the freedom of religion or belief is not one of them. This means that it was up to the Member States to assign such powers to their national equality bodies, but there was no EU-level obligation of doing so. Furthermore, the EU does not monitor the work of these bodies. The proposed Directive addresses the mandate, tasks, independence, structure, powers, accessibility and resources of national equality bodies. The Directive expects Member States to grant equality bodies legal standing, allowing them to take and support cases before the courts, also by acting in their own name in the collective interest. Further, it envisages that national equality bodies are to be granted investigative powers and may also be granted the power to make legally binding and enforceable decisions.³⁷ While the proposal is a welcome step in the right direction, it is still focused on only one, albeit important, facet of the exercise of the freedom of religion or belief. This means that it does not extend the scope of secondary EU legislation to address in more detail the prohibition of discrimination on the grounds of religion or belief in other fields, as proposed in the 2008 directive. Consequently, its' impact, even if adopted, will be limited.

³⁵ Proposal for a Council Directive on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and deleting Article 13 of Directive 2000/43/EC and Article 12 of Directive 2004/113/EC, COM(2022) 689 final.

³⁶ Council Directive 2000/43/EC, Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, *OJ L*, 373. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation *OJ L* 204 and Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC *OJ L* 180.

³⁷ *Towards-a-new-gold-standard-for-equality-bodies-and-equal-societies*, <https://equine-europe.org/towards-a-new-gold-standard-for-equality-bodies-and-equal-societies/>, 20. 7. 2023.

3. Jurisprudence of the CJEU in the field of freedom of religion or belief

The litigation before the CJEU relating to the freedom of religion or belief has been on the rise since 2017. Before that period, it was rather scarce, despite the promulgation of this freedom in the Charter. While the total body of caselaw before the CJEU relevant for the freedom of religion or belief is not comprehensive, it does establish the CJEU as an important actor in the given field. As the case is with CJEU caselaw with regards to other human rights, it does rely considerably on the previous decisions made by the ECtHR. In the following paragraphs, the authors will outline the line of reasoning employed by the CJEU in judgments passed that relate to the status of refugees and non-discrimination in employment.

3.1. Status of refugees based on religion or belief

There are two seminal cases adjudicated by the CJEU that can be used to ascertain the EU's position with regards to granting of the status of refugees based on religion or belief. The first is the case of the *Federal Republic of Germany vs. Y and Z*,³⁸ which was raised before the CJEU in a preliminary reference procedure by the German Federal Administrative Court. The case concerned two Pakistani citizens who claimed that their membership in Ahmadiyya religious community had forced them to leave Pakistan and who have consequently applied for asylum and protection in Germany as refugees, and were denied such status.³⁹ They challenged the said decisions. In order to clarify whether the threat of persecution for belonging to certain religious minority falls within the ambit of the 2004 EU Directive that set standards for the qualification and status of third-country nationals and stateless persons, preliminary procedure was initiated before the CJEU. In its decision, the CJEU first posited that not all kinds of acts which interfere with the right of freedom of religion are eligible to amount to persecution. The CJEU set the meaning of "severe violation" to be comparable to a violation of an EHCR non-derogable right listed in Article 15 of the ECHR.⁴⁰ The CJEU took the

³⁸ C-71/11 and C-99/11 *Germany v. Y and Z*, *Judgment of the Court* (Grand Chamber) of 5 September 2012, ECLI:EU:C:2012:518.

³⁹ A. Taylor, "The CJEU as an Asylum Court: What Role for Human Security Discourses in the Interpretation of Persecution In the Qualification Directive?", in: *The Common European Asylum System and Human Rights: Enhancing Protection In Times of Emergencies* (eds. Claudio Matera, Amanda Taylor), Centre for the law of EU external policies, The Hague 2014, 81.

⁴⁰ S. Velluti, *Reforming the Common European Asylum System – Legislative Developments and Judicial Activism of the European Courts*, Springer, New York 2014, 95.

position that EU law protects both public and private expression of religion, contrary to the position that was initially taken by the German court.⁴¹ Furthermore, the court also added to its conclusion that an act amounts to persecution where the subject, as a consequence of exercising his right to religious freedom, runs a real risk of inter alia being subject to torture, inhuman or degrading treatment or persecution.⁴² In addition, the CJEU introduced a consequential test,⁴³ namely, it underlined that prohibitions on public worship and threats of repression and punishment can constitute persecution under EU law as long as they pose concrete, not theoretical threats to an individual.

In *Bahtiyar Fathi v Predsedatel na Darzhavna agentsia za bezhantsite*⁴⁴ the CJEU again offered guidance to national courts on how to assess the claims of religious persecution made by refugee applicants – this time as regulated by the 2011 Directive. In this case, Fathi was an Iranian Kurd, who applied for refugee protection in Bulgaria. Unlike Y and Z, he did not identify as a member of a traditional religious community, but rather identified as a Christian.⁴⁵ Fathi claimed he had been detained and questioned by Iranian secret service due to watching and participating in a TV programme on a Christian channel that was prohibited in Iran. The Bulgarian authorities did not find his persecution claims plausible and have consequently rejected his refugee application. The Bulgarian court from which Fathi sought annulment of the decision filed a preliminary reference to the CJEU. In its judgment, the CJEU reaffirmed its broad interpretation of the concept of religion, including the holding or theistic, non-theistic and atheistic beliefs, and participation or abstention from formal worship. Consequently, the CJEU posited that the fact that a person is not a member of a

⁴¹ Namely, the German court distinguished between private and public sphere of freedom of religion, holding that the right to manifest one's faith in private was covered by its private sphere and as such did not fall within the core area of the freedom of religion. See. F. Ippolito, "The Contribution of the European Courts to the Common European Asylum and Its Ongoing Recast Process", *Maastricht Journal of European and Comparative Law* 2/2013, 277.

⁴² C-56/17 *Bahtiyar Fathi v Predsedatel na Darzhavna agentsia za bezhantsite* Judgment of the Court (Second Chamber) of 4 October 2018, ECLI:EU:C:2018:803

⁴³ V. Ćorić, A. Knežević Bojović, M. Matijević, "The Interpretation of the Law Rather than the Law Itself, is What Matters Most in Asylum Cases – How to Improve the Roles of European Courts in the Interpretation and Application of the Asylum Law", in: *3rd International Academic Conference on Human Security. University of Belgrade* (eds. Svetlana Stanarević, Ivica Đorđević, Vanja Rokvić), Faculty of Security Studies, Belgrade 2017, 86

⁴⁴ C-56/17 *Bahtiyar Fathi v Predsedatel na Darzhavna agentsia za bezhantsite* Judgment of the Court (Second Chamber) of 4 October 2018, ECLI:EU:C:2018:803

⁴⁵ Para. 73 of the judgment.

religious community cannot, in itself, be decisive in the assessment of the concept of religion, and that an applicant for international protection based on religious persecution cannot be required to make statements or produce documents in order to substantiate all components of the concept of ‘religion’, referred to in the relevant Directive.⁴⁶ The CJEU also underlined that the penalties that the applicant would face in this particular case had to be either applied in practice or consist of a real threat.

In summary, the two cases show that under EU law, the claimant must substantiate the persecution claims, while the state must thoroughly consider what aspects of religious beliefs, practices or the personality of the claimant might trigger persecution.⁴⁷

3.2. Employment equality and freedom of religion and belief

The body of relevant CJEU caselaw on freedom of religion or belief in the area of employment and non-discrimination seems most interesting. The jurisprudence concerns two sets of issues – the religious dress in the workplace and the occupational requirements of churches and other organisations.

When it comes to the issue of religious apparel, the CJEU initially produced two notable, yet to an extent divergent judgments. The first judgment was passed in *Achbita* case,⁴⁸ which concerned a dispute between a global security company and its employee, Ms. Achbita. had already been employed in the company when she started wearing a hijab. The company claimed that this was in contravention to the company dress code, which required employees to avoid wearing any religious signs or apparel. Upon refusing to stop wearing the hijab, Ms. Achbita was fired, and consequently sued her employer, invoking religious discrimination as grounds for termination of employment. In a preliminary reference procedure initiated by the relevant Belgian court, the CJEU was asked whether the prohibition for a female Muslim to wear a headscarf at the workplace constituted direct discrimination if the employer’s rules prohibited all employees from wearing outwards signs of political, philosophical and religious beliefs at the workplace, in the context of Employment Equality directive. In its judgment, the

⁴⁶ Para. 82 of the judgment.

⁴⁷ J. Witte Jr, A. Pin, “Faith in Strasbourg and Luxembourg? The Fresh Rise of Religious Freedom Litigation in the Pan-European Courts”, *Emory Law Journal* 3/2021, 621.

⁴⁸ Case C-157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* Judgment of the Court (Grand Chamber) of 14 March 2017 ECLI:EU:C:2017:203

CJEU did not find the termination constituted direct discrimination, as the employer's neutral dress code did not target any specific faith. The CJEU further asserted that the termination also did not constitute indirect discrimination, since the company had a legitimate interest in pursuing a policy of religious neutrality.⁴⁹ It is interesting to note that the CJEU also invoked the caselaw of the ECtHR to support this position.⁵⁰ However, it is worth recalling that in the cited ECtHR case, that court in fact upheld the right of Ms. Eweida to wear a small necklace with a crucifix at her workplace.⁵¹ The CJEU judgment in *Achbita* can be seen as a clear stance in favour of religious neutrality. However, some critics underline that the CJEU failed to take into consideration how such a ban disproportionality affects Muslim women, and thus constitutes intersectional discrimination, as the wearing of headscarf is closely connected not only to religion, but also to nationality and gender.⁵² Further, the CJEU was criticised for applying a so-called single-axis in its understanding of direct discrimination, which prevents intersectional discrimination from being recognised as direct discrimination.⁵³

In the second relevant case, *Bougnaoui v. Micropole*⁵⁴, Ms. Bougnaoui also wore a hijab to work, but in this case, her employer did not have a clear policy on religious apparel, nor an applicable dress code. While in the course of employment, Ms. Bougnaoui was warned that wearing a headscarf might pose a problem when she was in contact with the customers, she wore it without interruption for some time while working for the company. However, she was fired after one of the company's customers complained that "the wearing of a veil had upset a number of its employees" and requested that there would be no veil next time. The question asked to the CJEU, interestingly, did not concern the issue of discrimination, but rather,

⁴⁹ Para. 37 of the judgment.

⁵⁰ Case of *Eweida and others v. the United Kingdom*, Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10, Judgment of 15 January 2013, ECLI:CE:ECHR:2013:0115JUD004842010, para. 94.

⁵¹ In this case, the ECtHR also applied the principle of reasonable accommodation. For more details, see J. Rajić Čalić, M. Stanić, „Nošenje verskih obeležja na radnom mestu, razumno prilagođavanje i slučaj Eweida”, in: *Preispitivanje klasičnih ustavnopravnih shvatanja u uslovima savremene države i politike*, (ur. Miroslav Đorđević), Institut za uporedno pravo, Beograd 2021, 363–373.

⁵² C. Donegan, “Thinly veiled discrimination: Muslim women, intersectionality and the hybrid solution of reasonable accommodation and proactive measures”, *European journal of legal studies* 2/2020, 146

⁵³ E. Cloots, “Safe Harbour or Open Sea for Corporate Headscarf Bans? Achbita and Bougnaoui” *Common Market Law Review* 2/2018, 602

⁵⁴ Case C-188/15 *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA*, Judgment of the Court (Grand Chamber) of 14 March 2017, ECLI:EU:C:2017:204

whether the wish of the customer no longer to have the service provided by an employee wearing an Islamic headscarf constitutes an occupational requirement within the meaning of the Employment Equality Directive.⁵⁵ The CJEU went on to decide that genuine and determining occupational requirement', within the meaning of that provision, refers to a requirement that is objectively dictated by the nature of the occupational activities, and cannot cover subjective considerations, such as the will of the customer not to have the service provided by someone wearing a headscarf. While in this particular case the position of the Muslim woman wearing a headscarf at the workplace was upheld, the CJEU line of reasoning did not change with regards to the employers' limitations on religious apparel – they are legitimate and allowed, provided that they are clear, consistent and do not violate the non-discrimination norms.

In 2021, the Grand Chamber of the CJEU passed a judgment in two joined cases,⁵⁶ building on its previous caselaw concerning the issue of wearing headscarves at work for religious reasons. As underlined by former Advocate General Sharpston, the cases were joined and allocated to the CJEU Grand Chamber because the questions asked through the preliminary references in the two given cases showed that the judgment in *Achbita* was unclear and left national courts and employers wondering how it should be applied.⁵⁷

The facts of the two cases can be summed up as follows. Ms. IX was a carer who worked for Wabe, a company that ran childcare centres in Germany. She started working at the company in 2014. In 2018, Wabe adopted an internal policy of neutrality with regard to religion, belief and politics, according to which, employees were required to observe strictly the requirement of neutrality that applies in respect of parents, children and third parties.⁵⁸ The policy expressly stated that employees were not to wear any signs of their political, philosophical or religious beliefs that are visible to parents, children and third parties in the workplace. Ms. IX showed at her workplace twice wearing a headscarf. Upon refusing to remove it, she was temporarily suspended and issued a formal warning. In the same period, another worker had been asked to remove a cross she was wearing around her neck. Upon refusing to remove it, she was temporarily suspended. Ms. IX brought an

⁵⁵ Paragraph 19 of the judgment.

⁵⁶ Joined Cases C-804/18 *IX v WABE eV* and C-341/19 *MH Müller Handels GmbH v MJ* Judgment of the Court (Grand Chamber) of 15 July 2021, ECLI:EU:C:2021:594

⁵⁷ E. Sharpston, Shadow Opinion of former Advocate-General Sharpston: headscarves at work (Cases C-804/18 and C-341/19), <http://eulawanalysis.blogspot.com/2021/03/shadow-opinion-of-former-advocate.html>, para 79, 22. 7. 2023.

⁵⁸ *Ibid.*, para. 25.

action before the referring court seeking an order that WABE remove from her personal file the warnings concerning the wearing of the Islamic headscarf. She claimed that, despite the general character of the rule prohibiting the wearing of visible political, philosophical or religious signs, the rule in fact directly targeted the wearing of the Islamic headscarf, thus constituting direct discrimination. She also pointed to the intersectional character of the ban, claiming it had a greater impact on women with migration background. The relevant German court sought a preliminary ruling from the CJEU, asking whether the employer's policy mandating the employees not to wear any visible sign of political, ideological or religious beliefs constituted discrimination on the grounds of religion, either direct or indirect.

The second case concerned MJ, a sales assistant and a cashier with MH. She had worn an Islamic headscarf at work and, after refusing to remove it, was transferred to another post that allowed her to wear one. In 2016, MH introduced an internal policy which prohibited the use of conspicuous, large-sized political, philosophical or religious signs in the workplace.⁵⁹ MJ was issued an instruction to that effect. She then brought an action before the national courts seeking a declaration that that instruction was invalid and compensation for the damage suffered. The referring court asked the CJEU whether indirect unequal treatment on grounds of religion based on an internal rule would be justifiable only if it is prohibited to wear any visible sign of religious, political or other philosophical beliefs, and not only such signs as are prominent and large-sized.

The CJEU reaffirmed the position it took in *Achbita*, repeating that an internal rule prohibiting workers from wearing any visible sign of political, philosophical or religious beliefs in the workplace does not constitute, with regard to workers who observe certain clothing rules based on religious precepts, direct discrimination on the grounds of religion or belief, provided that that rule is applied uniformly.⁶⁰ The CJEU then went on to elaborate that a difference of treatment indirectly based on religion may be justified by the employer's desire to pursue a policy of political, philosophical and religious neutrality in the workplace, in order to take account of the wishes of its customers or users, provided it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. The CJEU reminded that the concept of a legitimate aim and the appropriate and necessary nature of the means taken to achieve it must be interpreted strictly⁶¹ and then went to assert that the policy can be regarded as being objectively justified

⁵⁹ *Ibid.*, para. 36.

⁶⁰ *Ibid.*, para. 55.

⁶¹ *Ibid.*, para. 61.

only where there is a genuine need on the part of that employer, which must be demonstrated by the employer. In a nutshell, the CJEU underlined that, if an employer restricts the worker's freedom of religion by imposing neutrality rules, the employer must prove economic harm as part of the justification and proportionality test for indirect discrimination.

Finally, the CJEU next asserted that a prohibition which is limited to the wearing of conspicuous, large-sized signs of political, philosophical or religious beliefs is liable to constitute direct discrimination on the grounds of religion or belief.⁶²

In examining whether an employer's neutrality policy is sufficient to justify objectively a difference of treatment indirectly based on religion or belief, the CJEU took a position that the prevention of social conflicts and the presentation of a neutral image of the employer vis-à-vis customers may correspond to a real need on the part of the employer, which it is for the latter to demonstrate. The CJEU then went on to assert, the wearing of visible signs of political, philosophical or religious beliefs with the aim of ensuring a policy of neutrality within that undertaking can be justified only if that prohibition covers all visible forms of expression of political, philosophical or religious beliefs. Consequently, the CJEU failed to make a distinction between large and small religious symbols, thus preventing the creation of different categories of religious symbols deserving of different legal protections.⁶³ Some authors have questioned the consistency of the CJEU conclusions, pointing out that the uniform neutrality rule has the potential to have a greater effect on people with religious, philosophical or non-denominational beliefs which require the wearing of particular symbols than on those without a religion or those whose religion does not prescribe the wearing of certain symbols⁶⁴ Other scholars again criticised the CJEU's reluctance to address the issue of discrimination based not only on religion but also on gender and ethnicity.⁶⁵

The CJEU ruled on the occupational requirement in two more interesting cases, where religious affiliations of employees or potential

⁶² *Ibid.*, para. 78.

⁶³ S. Kholwadia, "EU Headscarf Bans: The CJEU's missed opportunity for reflection on neutrality in *IX v Wabe* and *MH Müller Handels v MJ*", <https://ohrh.law.ox.ac.uk/eu-headscarf-bans-the-cjeus-missed-opportunity-for-reflection-on-neutrality-in-ix-v-wabe-and-mh-muller-handels-v-mj/>, 29. 7. 2023.

⁶⁴ M. van den Brink, 'Pride or Prejudice?: The CJEU Judgment in *IX v Wabe* and *MH Müller Handels GmbH*', *Verfassungsblog*, 20 July 2021, <https://verfassungsblog.de/pride-or-prejudice/>, 25. 7. 2023.

⁶⁵ E. Howard, "Headscarves and the CJEU: Protecting fundamental rights and pandering to prejudice, the CJEU does both", *Maastricht Journal of European and Comparative Law* 5/2021, 245–262.

employees were considered. In *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV*⁶⁶ the case revolved around a job advertised by a Protestant institution, which stated that the candidates had to be members of a Protestant church or a church belonging to the Working group of Christian Churches in Germany.⁶⁷ Ms. Egenberger applied for the job despite not having any religious affiliation; she was shortlisted but not offered an interview. Consequently, she challenged the religious affiliation requirement for the job, invoking the relevant EU directive. The CJEU, judging on the preliminary reference from the German court, first underlined that the Member States and their courts must in principle refrain from assessing whether the actual ethos of the church or organisation concerned is legitimate, but must nonetheless ensure that there is no infringement of the right of workers not to be discriminated against on grounds *inter alia* of religion or belief. The CJEU provided clear instructions for the Member States' courts on how to assess in any given case the whether the right to religious autonomy exercised by the churches in imposing occupational requirements is genuine, legitimate and justified. The CJEU however refrained from making such assessment itself, instead leaving it to the national court.⁶⁸ The *IR v JQ*⁶⁹ case concerned a termination of employment by a religious organisation, also on the grounds of occupational requirements. In this case, the employee, IR, who worked for a nonprofit organisation and who was a Catholic, was fired after the employer, JQ, learned that he had divorced and re-married in a civil ceremony, without having his first, canonical marriage, annulled. When adjudicating in the preliminary reference proceedings, the CJEU again underlined that it was up to the domestic judge to ascertain whether the employer's policy in the particular case was a genuine, legitimate and justified occupational requirement. The CJEU, however, this time went on to assert⁷⁰ that adherence to that notion of marriage did not appear to be necessary for the promotion of JQ's ethos and consequently did not appear to be a genuine requirement of

⁶⁶ Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* Judgment of the Court (Grand Chamber) of 17 April 2018 ECLI:EU:C:2018:257

⁶⁷ For more on churches in Germany see G. Robbers, "Church and state in Germany", in: *State and Church in the European Union* (ed. Gerhard Robbers), Nomos, Baden-Baden 2019, 109–124.

⁶⁸ Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* Judgment of the Court (Grand Chamber) of 17 April 2018 ECLI:EU:C:2018:257, para. 74.

⁶⁹ Case C-68/17 *IR v JQ* Judgment of the Court (Grand Chamber) of 11 September 2018, ECLI:EU:C:2018:696

⁷⁰ *Ibid.*, para. 57.

that occupational activity. The CJEU however stressed that this assertion was a matter for the referring court to verify.

Contrary to the cases substantively relating to religious apparel, in the two occupational requirement cases the CJEU has only clearly demanded clear justifications for any employment and labour policies where occupational requirements were invoked, and that a balance should be judged objectively, not only by self-perception of the employer,⁷¹ but left it to the national courts to ascertain whether derogations from the Employment Equality Directive were lawful or not. The approach taken by the CJEU is in considerable contrast to the one utilised by courts in the United States, where precedence is given to religious freedom and exceptions from the non-discrimination provisions in similar cases were interpreted widely.⁷²

This line of reasoning is understandable in light of the fact that the occupational requirements derogation is a matter that is left within the purview of the Member States. Nevertheless, the case law also shows that CJEU is somewhat reluctant to address the matter directly and firmly, which may be attributed to the sensitive nature of the FoRB.

It is also worth mentioning the CJEU decision in *Cresco*⁷³ which concerned an Austrian law governing, *inter alia*, public holidays. According to the said law, members of certain Christian faiths, expressly referred to in the law, were allowed not to work on Good Friday, or, in case they worked, they were entitled to be paid as if they worked during a public holiday.⁷⁴ Other employees were not entitled to such an increase in pay. One of the employees of *Crisco*, who worked on a Good Friday, and who was not a member of any of the churches mentioned in the given law, claimed that he was discriminated against since he was not paid additionally. Following a preliminary reference from the relevant Austrian court, the CJEU first asserted that the legislation in question did differentiate between employees directly based on religion⁷⁵ and that such differentiation was not justified and therefore constituted direct discrimination in the meaning

⁷¹ L. Vickers, “Religious Ethos, Employers and Genuine Occupational Requirements Related to Religion: The Need for Proportionality”, *International Labor Rights Case Law* 1/2019, 77.

⁷² S. J. Levine, “Recent Applications of the Supreme Court’s Hands-Off Approach to Religious Doctrine: From Hosanna-Tabor and Holt to Hobby Lobby and Zubik”, in: *Law, Religion, and Health in the United States* (eds. Holly Fernandez Lynch, I. Glenn Cohen, Elizabeth Sepper), Cambridge University Press, Cambridge 2017, 75–86.

⁷³ Case C-193/17 *Cresco Investigation GmbH v Markus Achatzi*, Judgment of the Court (Grand Chamber) of 22 January 2019, ECLI:EU:C:2019:43

⁷⁴ *Ibid.*, para. 12.

⁷⁵ *Ibid.*, 40.

of *Employment Equality Directive*.⁷⁶ The CJEU went on to assert that the measures provided by the Austrian national legislation cannot be regarded to be necessary for the protection of rights and freedoms of others, nor to be intended to compensate for disadvantages linked to religion. Finally, as the CJEU does not have the power to put any national legislative acts out of force, it explicitly stated that a private employer who is subject to such legislation is also under the obligation to grant his other employees a public holiday on Good Friday or a double pay if they worked, even if they are not explicitly covered by the provisions of the law⁷⁷ thus effectively extending the scope of a law of a Member State.

4. Monitoring the exercise of freedom of religion or belief within the European Union

The EU has developed a plethora of mechanisms for monitoring the implementation of the norms it adopts that are relevant to the rule of law and the exercise of the freedoms enshrined in the Charter.⁷⁸ The respect for human rights is deeply intertwined with human rights in as much as “Rule of Law would be an empty shell without permitting access to human rights”.⁷⁹ In the EU context, some scholars observed that the rule of law does not appear as a “stand-alone” principle but rather as an “umbrella principle,”⁸⁰ usually along with the principles of democracy and the respect for fundamental rights. Notwithstanding, the mechanisms for monitoring the two closely connected notions within the EU are not developed on the same level, nor do they necessarily complement each other. Certainly, the most important mechanism for monitoring the exercise of human rights guaranteed by the Charter is the annual report on fundamental-rights issues. The development of this report is clearly set out as one of the tasks of

⁷⁶ *Ibid.*, 51.

⁷⁷ *Ibid.*, 89.

⁷⁸ For more on mechanism related to monitoring the rule of law see A. Knežević Bojović, V. Ćorić, (2023), 41–62; A. Jakab, L. Kirchmair, L. “How to Develop the EU Justice Scoreboard into a Rule of Law Index: Using an Existing Tool in the EU Rule of Law Crisis in a More Efficient Way”, *German Law Journal* 6/2021, 936–955.; K. Lenaerts, “New Horizons for the Rule of Law Within the EU”, *German Law Journal* 1/2020, 29–34.; L. Pech, “The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox”, <https://reconnect-europe.eu/wp-content/uploads/2020/03/RECONNECT-WP7-2.pdf>, 15. 5. 2023

⁷⁹ Venice Commission of the Council of Europe, *The Rule of Law Checklist*, 13

⁸⁰ P. Leino, “Rights, Rules and Democracy in the EU Enlargement Process: Between Universalism and Identity”, *Austrian Review of International and European Law* 1/2004, 53–80

the FRA.⁸¹ FRA is also tasked with collecting, recording, analysing and disseminating relevant, objective, reliable and comparable information and data in order to fulfil its mandate, which is to support both EU institutions and Member States in fully respecting human rights. This task is not exhausted in publishing of the annual reports; quite to the contrary, FRA collects information through a multitude of mechanisms, including qualitative surveys, and publishes topical reports.⁸² The EU's annual rule of law reports do not directly cover human-rights issues, as they are focused on four pillars: justice systems, anti-corruption framework, media pluralism and media freedom, and other institutional issues related to checks and balances⁸³ but they do cover some aspects of certain human rights. In developing Rule of Law Reports, the Commission relies on "relevant materials" developed by the FRA,⁸⁴ but also other sources of information and data.

The annual fundamental rights reports developed and published by the FRA in the 2019-2023 period follow a similar general structure, whereby they examine eight broader topics, namely equality and non-discrimination; racism, xenophobia and related intolerance; Roma equality and inclusion; asylum, visas, migration, borders and integration; information society, privacy and data protection; rights of the child; developments in the implementation of the Convention on the Rights of Persons with Disabilities. The reports also cover the implementation of the Charter in Member-States and the issues in focus, e.g. the implementation of sustainable development goals in the EU, as the case was in the 2019 report, or the coronavirus pandemic in the 2021 report. This means that the freedom of religion or belief is not featured in the annual reports as a stand-alone, separate topic; rather, it is covered as a cross-sectional topic, which may complicate the analysis of its exercise on a comprehensive level.

EU has made additional efforts to counter specific religion-related issues. More explicitly, in 2015, as announced in the First Annual Colloquium on Fundamental Rights held in October 2015, the EU Commission

⁸¹ Article 4, paragraph 1, point e), Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights and Council Regulation (EU) 2022/555 of 5 April 2022 amending Regulation (EC) No 168/2007 establishing a European Union Agency for Fundamental Rights, *OJL* 108.

⁸² For more information on FRA planned activities see FRA Single Programming Document 2023-2025, http://fra.europa.eu/sites/default/files/fra_uploads/spd_2023-2025_final_en.pdf, 31. 7. 2023.

⁸³ EU Rule of Law Report Methodology 2023, https://commission.europa.eu/document/72ff8a72-5d69-49ba-8cb6-4300859ee175_en, 31. 7. 2023.

⁸⁴ *Ibid.*

appointed two coordinators: on combating antisemitism⁸⁵ and anti-Muslim hatred.⁸⁶ The coordinators are set to help develop a holistic response to the issues of antisemitism and anti-Muslim hatred, and serve as the main points of contact for these communities and relevant organisations. Consequently, given the raised profile of the issues in EU internal policies, antisemitism and anti-Muslim hatred are featured prominently in the annual Fundamental Rights Reports. However, this does not mean that the said reports refrain from providing insights or recommendations for action that would address other religions or beliefs. For instance, the 2023 Fundamental Rights Report features FRA Opinion 3.1. recognises that, under EU secondary law, some of the grounds for prohibited discrimination – specifically sex and racial and ethnic origin – enjoy wider protection than others, such as religion or belief, which results in “an artificial hierarchy of grounds, which limits the breadth and scope of EU-level protection against discrimination”.

Having this in mind, it seems that the EU comprehensive monitoring mechanisms focus on the hatred faced by members of two specific religions, and the issue of equality and non-discrimination, while not as much attention is given to reporting on the exercise of other rights, such as the right to education in line with one’s religion or belief.

5. Freedom of religion or belief in European Union external policies

Freedom of religion or belief is an increasingly important area of EU external policies. Firstly, it is well known that respect for democracy, the rule of law, and human rights is a requirement for EU membership. This requirement is defined in the Copenhagen Criteria⁸⁷ and is clearly formulated in Article 49 of the TEU, which states that any European state which respects

⁸⁵ EU Commission, *Coordinator on combating antisemitism and fostering Jewish life*, https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/combating-antisemitism/coordinator-combating-antisemitism-and-fostering-jewish-life_en, 31. 7. 2023.

⁸⁶ EU commission, *Combating anti-Muslim hatred*, https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/combating-anti-muslim-hatred_en, 31. 7. 2023.

⁸⁷ The Copenhagen criteria link accession and membership in the EU to “political” conditionality concerning the stability of institutions guaranteeing democracy, rule of law, and protection of human and minority rights, coupled with a functioning market economy and the ability to take on the obligations of membership, including the capacity to effectively implement the body of EU law. The Copenhagen criteria were established by the Copenhagen European Council in 1993 and further strengthened by the Madrid European Council in 1995. Accession criteria (Copenhagen criteria), <https://eur-lex.europa.eu/EN/legal-content/glossary/accession-criteria-copenhagen-criteria.html>. 5. 5. 2023.

the values referred to in Article 2 of the EU and is committed to promoting them may apply to become a member of the EU. The said values are human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. It is therefore clear that the respect for the freedom of religion or belief is one of the human rights examined in the course of the EU accession process. This is also clearly seen from the regular annual reports from the Commission on countries' progress towards EU accession, which included an examination of the state of play and progress with regards to human rights, including, where applicable, the developments regarding the exercise of the freedom of religion or belief, either in a positive⁸⁸ or a negative context.⁸⁹ The increasingly complex methodology of the EU accession process and the related reporting exercises⁹⁰ have continued to address this issue to date. Currently, the freedom of thought, conscience and religion is regularly assessed in Commission's reports as a subsection of the Chapter 23: Judiciary and Fundamental Rights, under the Fundamental rights' section.⁹¹ The examination of the exercise of the freedom of religion or belief is not merely perfunctory. Quite to the contrary, the criminalisation of homosexuality in Romania in 1990s, which was strongly supported by the Orthodox Church, was repealed only following strong EU conditionality.⁹² Similarly, the attempts made by the Turkish authorities at criminalising adultery in 2004, were criticised by the EU as an introduction of Islamic elements into the Turkish legal system which is out of step with Europe and unacceptable to the EU.⁹³ More recently, the Commission's 2019 annual report on North Macedonia⁹⁴ noted that the ECtHR ruled

⁸⁸ See, for instance Regular report from the Commission on Malta's progress towards accession 2000. COM (2000) 708 final, 8 November 2000.

⁸⁹ See, for instance, Regular report from the Commission on Romania's progress towards accession 1998. COM (98) 702 final, 17 December 1998. For more on the experiences of the ten states which joined in the EU in 2004 see A. Čavoški *et al.* *Pristupanje državne zajednice Srbija i Crna Gora Evropskoj uniji Iskustva- deset novoprimitljenih država*, Institut za uporedno pravo, Beograd 2005.

⁹⁰ See A. Knežević Bojović, V. Ćorić (2023), 41–62.

⁹¹ See, for instance Serbia 2022 Report SWD (2022) 338 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022SC0338>, 12. 7. 2023. ; Albania 2022 Report SWD(2022) 332 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022SC0332>, 12. 7. 2023.

⁹² However, the EU did not see this issue as one of religion or belief, even though it was closely connected to the position of a key religious organisation in the country – it was rather seen as a more general question of human and minority rights. R. McCrea, *Religion and the public order of the European Union*. PhD thesis, London School of Economics and Political Science, London 2009, 232.

⁹³ R. McCrea (2009b), 235; R. McCrea (2020), 53.

⁹⁴ North Macedonia 2019 Report SWD(2019) 218 final

in 2018 that North Macedonia violated the Convention by refusing to renew the registration of the Tetovo-based Bektashi Community. As can be seen, the issues closely connected to religious beliefs were seriously addressed in the EU accession process and had the potential to slow down the process.

The EU's external actions concerning religion or belief are not exhausted in the accession process – over the past decade, this issue has been one of increased engagement and institutionalisation, albeit as a 'quasi outcome' of human rights policy.⁹⁵

In 2013, the EU adopted Guidelines on the promotion and protection of freedom of religion or belief (hereinafter: Guidelines).⁹⁶ They were set as a model to give practical and publicly available instructions to EU diplomats on the ground on the one hand, and to embody European unity as regards major principles with regard to the FoRB, on the other.⁹⁷

The Guidelines proclaimed that the EU is determined to promote, in its external human rights policy, freedom of religion or belief as a right to be exercised by everyone everywhere, based on the principles of equality, non-discrimination and universality. The Guidelines provide the definition of the key concepts related to the freedom of religion or belief, invoking key universal human-rights documents, namely the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. They also define eight priority areas or topics of EU action in this regard⁹⁸ and outline possible EU course of action. The Guidelines also recognise multilateral fora as frameworks for promoting the freedom of religion or belief globally. For instance, the European External Action Service (hereinafter: EEAS), which is the diplomatic service of the European Union has founded, jointly with the U. S. State Department, the Transatlantic Policy Network on Religion & Diplomacy.⁹⁹ It aims, *inter alia* to foster communication, coordination and collaboration among officials and also to improve the abilities of its participants to analyse religious dynamics and engage religious actors when pursuing various policy objectives.

⁹⁵ F. Foret, *How the European External Action Service deals with religion through religious freedom*, EU Diplomacy Paper 7/2017, 1–28.

⁹⁶ Foreign Affairs Council meeting Luxembourg, 24 June 2013.

⁹⁷ F. Foret, "Religion and the European External Action Service", in: *The Oxford Handbook of Religion and Europe* (eds. Grace Davie, Lucian N. Leustean), Oxford University Press, Oxford 2022, 348

⁹⁸ These are: violence, freedom of expression, promotion of respect for diversity and tolerance, discrimination, changing or leaving one's religion or belief; manifestation of religion or belief, Support and protection for human rights defenders including individual cases and support for – and engagement with - civil society.

⁹⁹ Transatlantic policy network on religion and diplomacy, <https://berkeleycenter.georgetown.edu/projects/transatlantic-policy-network-on-religion-and-diplomacy>

The Guidelines were generally welcomed and observed as a tool that fosters internal and external coherence in human rights policies for advancing freedom of religion or belief.¹⁰⁰

In 2016, the then European Commission President Jean-Claude Juncker appointed the first EU special envoy for the promotion of freedom of religion or belief outside the EU.¹⁰¹ The position was formed following a recommendation of the European Parliament.¹⁰² The one-year renewable position was envisaged be one of a Special Adviser to the Commissioner for International Cooperation and Development. The position, initially held by Jan Figel, was

Subsequently, in 2019, the European Parliament adopted a resolution on the EU guidelines and the mandate of the EU special envoy for the promotion of freedom of religion or belief outside the EU.¹⁰³ The Resolution expressed that the appointment of the Special Envoy was a clear recognition of the freedom religion or belief within the EU foreign policy and external action human rights agenda. In the Resolution, the Parliament also called on the Council and the Commission to carry out a transparent and comprehensive assessment of the effectiveness and added value of the position of the Special Envoy and, based on that, to adequately support the Special Envoy's institutional mandate, capacity and duties. This call from the European Parliament is particularly poignant as, since the end of mandate of Jan Figel in 2020, the leadership of the EU has not given stability in this post for almost three years.¹⁰⁴ The religious reform advocates were critical of what was perceived as EU's reluctance to fill the position, and have welcomed the new appointment, while also calling for a clear mandate of the new Special Envoy.¹⁰⁵

¹⁰⁰ Paragraph 69; A. Portaru, "The EU Guidelines on Freedom of Religion or Belief at Their Fifth Anniversary: Implementation Lagging Behind?", in: *European Yearbook on Human Rights* (eds. Wolfgang Benedek *et al.*), Intersentia, 2018, 203.

¹⁰¹ President Juncker appoints the first Special Envoy for the promotion of freedom of religion or belief outside the European Union, https://ec.europa.eu/commission/presscorner/detail/es/IP_16_1670, 22. 7. 2023. The post was taken by a former EU Commissioner, Jan Figel.

¹⁰² European Parliament resolution of 4 February 2016 on the systematic mass murder of religious minorities by the so-called 'ISIS/Daesh' (2016/2529(RSP))

¹⁰³ European Parliament resolution of 15 January 2019 on EU Guidelines and the mandate of the EU Special Envoy on the promotion of freedom of religion or belief outside the EU (2018/2155(INI)), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52019IP0013>, 29. 7. 2023.

¹⁰⁴ EU appoints Frans Van Daele to promote religious freedom, https://risu.ua/en/european-union-appoints-frans-van-daele-to-promote-religious-freedom_n134746, 29. 7. 2023.

¹⁰⁵ ADF International, EU finally appoints religious freedom envoy after almost 3 years wait <https://adfinternational.org/special-envoy/> 10. 7. 2023. Following a period of five

After the first five years of implementation of the EU Guidelines on Freedom of Religion or Belief, analysts underlined that there was still work to be done, such as increasing EU efforts to train officials on FoRB and on monitoring violations in countries worldwide.¹⁰⁶

The EU's activity in promoting the freedom of religion or belief in its external policies¹⁰⁷ currently does not seem to be fully aligned with the practices of some of its member states. Some scholars have pointed out that the focus on religious issues in the EU external action service was more a result of a pragmatic than normative approach, born out of necessity¹⁰⁸ and as a tool to reinforce the profile of the EU in international relations, but with modest added value.¹⁰⁹

6. Conclusion

The issue of freedom of religion or belief is becoming an increasingly important one in both internal and external EU policies. However, this observation comes with a number of caveats, underscored by the fragmented approach to regulation, jurisprudence, and monitoring relating to the FoRB on the internal EU level, and limited action on an external level. Moreover, the two are not necessarily mutually aligned. While the primary EU law affirms FoRB as one of the fundamental values of the EU, the secondary legislation leaves a lot to be desired. The issues of relevance to FoRB are governed by regulations and directives which cover specific policy fields or topics e.g. employment or refugee status, while attempts at extending, for instance, prohibition of discrimination based on FoRB to areas other than employment, have been stalled for the past fifteen years. Further, the secondary EU legislation leaves sufficient room for Member States to regulate derogations or exceptions from the general rules

months in 2021, the post was vacant for almost three years, until December 2022, when Frans van Daele was appointed.

¹⁰⁶ A. Shepherd, *Diplomacy and Determination: Five Years of the EU Guidelines on Freedom of Religion or Belief* FoRB in Full, 16. 4. 2018, www.forbinfull.org/2018/04/16/diplomacy-and-determination-five-years-of-the-eu-guidelines-on-freedom-of-religion-or-belief, 26. 7. 2023.

¹⁰⁷ For instance, under the framework of EU-China Human Rights Dialogue, https://www.eeas.europa.eu/node/60561_en. For more on this specific issue see M. R. Taylor "Inside the EU–China Human Rights Dialogue: assessing the practical delivery of the EU's normative power in a hostile environment", *Journal of European Integration* 3/2022, 365–380; D. Trailović. „Politika ljudskih prava Evropske unije i kineski suverenizam: slučaj Sindanga”. *Međunarodni problemi* 1/2021, 5–86.

¹⁰⁸ F. Foret (2022), 349.

¹⁰⁹ F. Foret (2017), 1–28.

established therein, thus allowing a variety of norms and practice on Member-State level. When it comes to the CJEU, so far, in its jurisprudence, the CJEU has mostly examined relevant EU secondary legislation, while examining the various facets of FoRB as guaranteed by the Charter in a rather cursory manner. In its caselaw so far, the CJEU seems to be implementing a policy of a rather strict religious neutrality, which is sometimes seen as even detrimental to members of certain religious groups. In other words, as observed by Witte and Pin¹¹⁰ sometimes this religious neutrality comes at the cost of accommodations for religious minorities who operate outside of the cultural mainstream. The EU has developed mechanism for monitoring the state of play with regards to human rights, including the FoRB. However, so far the monitoring exercises have focused mainly on the one end of the spectrum of religious intolerance – namely anti-Semitism and hatred towards Muslims. The full scope of exercise of both *forum internum* and *forum externum* of the FoRB is not comprehensively examined, meaning that some issues may stay under the monitoring radar and consequently, are less likely to be properly addressed.

On the other hand, the EU has been putting additional focus on FoRB in its external policy, both in the framework of EU accession negotiations and under the wider framework of its external action. While success has been observed in individual cases, the overall impression is also that there is ample opportunity for improvement. The recently published report entitled Religious freedom concerns in the EU published by the United States Commission on International Religious Freedom puts it rather bluntly, underlining that while the EU and many of its member states are active in the promotion of religious freedom abroad, some EU countries have maintained or implemented laws and policies that restrict the rights of religious minority groups or impact them in a discriminatory manner. While the said report singles out legislations and practices in specific EU member state rather than point to deficiencies in the overarching EU framework, this criticism is a testament to the limits of the EU powers in the field of exercise of this particular human right.

¹¹⁰ A. Pin, J. Witte, Jr (2020), 57.

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СЛОБОДА ВЕРОИСПОВЕСТИ ИЛИ УВЕРЕЊА У УНУТРАШЊИМ И СПОЉНИМ ПОЛИТИКАМА ЕВРОПСКЕ УНИЈЕ

Сажетак

Услед своје ограничене надлежности у области слободe вероисповести или уверења, Европска унија (ЕУ) је у својим политикама и законодавству изградила специфичан приступ питању слободe вероисповести или уверења; он је у значајној мери усклађен са стандардима изграђеним кроз тумачење Европске конвенције о људским правима. Током последњих година питање слободe вероисповести или уверења појављује се као све значајније пред Судом правде ЕУ. Истовремено, чини се да се ЕУ све интензивније бави овом темом у својим унутрашњим и спољним политикама. Ипак, приступ ЕУ питању слободe вероисповести или уверења остаје донекле фрагментаран, а њена унутрашња и спољна политика у тој области нису увек међусобно усклађене. У раду се даје преглед регулаторног оквира ЕУ у односу на слободу вероисповести и уверења, механизме напора над остваривањем овог права у оквиру саме ЕУ и активности ЕУ у вези са овим питањем у њеним спољним политикама. Ауторке такође указују на развој јуриспруденције Суда правде ЕУ у односу на забрану дискриминације по основу вероисповести у области рада и у контексту избегличког статуса. У раду се указује на ограничења приступа ЕУ питању слободe вероисповести или уверења.

Кључне речи: слобода вероисповести или уверења, Европска унија, Суд правде Европске уније, забрана дискриминације, радни односи, избеглице, спољна политика.

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