

# 1

## The Scope, Sources, and Systems of Religion Law

The historical forces—political, religious, and social—which have shaped the religious complexion of modern Europe continue in one way or another to affect the character of national laws. This is the case with regard to the sources and subject-matter of national religion laws, the legal definitions of religion, and the postures which States have towards state-religion relations. The formal sources used by States to regulate religion are much the same as they were a century ago, but international law has now made its mark alongside domestic sources. The same applies to the subjects treated by national laws—religious freedom and the autonomy of religious organizations persist as regulated topics—but the rise of religious pluralism has led to an increase in laws on religious discrimination and hatred, for example. The emergence of the separation of church and State, and in many countries greater cooperation between government and religions (especially in the twentieth century), also account for the contemporary understanding that there are now three state-religion models at work in Europe: state-church; separation; and cooperation. Even the expressions used across Europe to represent state law on religion echo the historical role of Christianity: the terms ecclesiastical law, church law, confessional law, and the law of church and State being still the most common.<sup>1</sup> The following seeks to elucidate principles of religion law common to the States of Europe in terms of their scope, sources, and postures.

### The sources of religion law

States regulate religion by means of two basic sources: internal—national domestic laws; and external—international laws which have been domesticated by means of ratification or incorporation into national law (often with constitutional status). Identifying formal legal sources also reveals the subject-matter of religion law.

<sup>1</sup> eg in Spain, *el derecho eclesiástico del estado* is the law of the State which deals with all religions not simply Christian churches; in Denmark, *kirkeret* (church law) is used similarly; in Poland, law on religion is *prawo wyznaniowe*—confessional law; in Germany, it is *staatskirchenrecht*; but in England, ‘ecclesiastical law’ applies only to the established Church of England: N Doe, *The Legal Framework of the Church of England* (Oxford: Clarendon Press, 1996) ch 1.

### Internal sources: domestic religion laws

The principal domestic instruments which States employ to regulate religion are constitutions; sub-constitutional laws, case-law, or jurisprudence; and, in some countries, agreements, and regional laws.<sup>2</sup> European constitutions generally deal with the fundamentals of relations between the State and religion,<sup>3</sup> and, occasionally, the rule of law and religion.<sup>4</sup> In their treatment of fundamental rights they address religious freedom,<sup>5</sup> or aspects of this such as freedom of belief,<sup>6</sup> or freedom of worship,<sup>7</sup> as well as religious discrimination,<sup>8</sup> or the equality of religions.<sup>9</sup> Constitutions may also regulate religious organizations,<sup>10</sup> including national churches,<sup>11</sup> the funding of religion,<sup>12</sup> religious education in public schools,<sup>13</sup> and conscientious objection.<sup>14</sup> Equally, sub-constitutional laws (enacted under legislative powers conferred by the constitution, and often designed to complement it), treat a wide range of religious subjects, including: religious freedom,<sup>15</sup> religious organizations,<sup>16</sup> both topics sometimes addressed in a single statute,<sup>17</sup> religious

<sup>2</sup> We shall also see that States increasingly use quasi-legislation—informal rules to supplement formal laws on religion (such as circulars or guidance); see generally N Doe, ‘Ecclesiastical quasi-legislation’ in N Doe, M Hill, and R Ombres (eds), *English Canon Law* (Cardiff: University of Wales Press, 1998) 93.

<sup>3</sup> Cyprus: Const, Art 109; Ireland: Const, Art 44.2.2; Poland: Const, Art 25.

<sup>4</sup> Denmark: Const, Art 71: no person shall be committed to prison by reason of their religious conviction; Lithuania: Const, Art 28: religion does not justify the violation of law.

<sup>5</sup> Finland: Const, Art 11; Denmark: Const, Art 67; Greece: Const, Art 13; Ireland: Const, Art 44.2.1; Spain: Const, Art 16; Italy: Const, Art 19; Hungary: Const, Art 60; Latvia: Const, Art 99; Lithuania: Const, Arts 25, 26; Netherlands: Const, Art 6; Poland: Const, Art 53.

<sup>6</sup> France: Const, 1958, Preamble: this refers to the Declaration of the Rights of Man and of the Citizen 1789 and to the preamble of the Const 1946 on freedom of belief; Art 2: France ‘assures the equality before the law of all its citizens without distinction of origin, race or religion. It respects all beliefs’.

<sup>7</sup> Denmark: Const, Art 68; Belgium: Const, Arts 19, 20; Italy: Const, Art 20; Luxembourg: Const, Art 19; Malta: Const, Art 40.

<sup>8</sup> Denmark: Const, Art 70; Cyprus: Const, Art 28; Spain: Const, Art 14(2); Ireland: Const, Art 44.2.3; Italy: Const, Art 3(1); Malta: Const, Art 32; Netherlands: Const, Art 1; Slovenia: Const, Art 14; Finland: Const, Art 6.

<sup>9</sup> Cyprus: Const, Arts 18, 23, 28; Italy: Const, Art 8.1.

<sup>10</sup> Austria: StGG, Art 15; Belgium: Const, Art 21; Cyprus: Const, Art 110; Ireland: Const, Art 44.2.5; Italy: Const, Art 7; Slovenia: Const, Art 7; Sweden: Const, Art 8.6.

<sup>11</sup> Denmark: Arts 4, 69; Finland: Const, Art 76; Malta: Const, Art 2; Greece: Const, Art 3.

<sup>12</sup> Luxembourg: Const, Art 106; Ireland: Const, Art 44.2.2.

<sup>13</sup> Germany: GG, Art 7; Netherlands: Const, Art 23; Poland: Const, Art 48.

<sup>14</sup> Slovenia: Const, 1991, Art 46; Finland: Const, Art 127(2).

<sup>15</sup> France: Law of 1905, Art 1: ‘The republic assures freedom of conscience. It guarantees the free exercise of religion subject only to the restrictions mentioned hereafter in the interest of public order’; Spain: LORF, Organic Law 7/1980 of 5 July.

<sup>16</sup> Austria: RCA 1874, FLSCC 1998 (BeKGG), Interconfessional Relations Act 1868.

<sup>17</sup> Czech Rep: Act no 3/2002 Sb; Hungary: Act 4/1990; Latvia: LORO 1995, Art 7; Poland: Law of 17 May 1989 (Dz U (OJ) 1989, no 29, Item 55; Portugal: Law 16/2001 of 22 June; Slovenia: ALPRC—OG, SRS, Nos 15/76, 42/86, 22/91; Slovakia: Act no 308/1991 Zb (amended by Act no 394/2000 Zz), Act no 192/1992 Zb; Finland: Act 453 of 2003; Spain: LORF, Law 7/1980 of 5 July, Art 7(1); Sweden: Religious Communities Act 1998, Lagen (1998:1593) and (1998:1591).

education,<sup>18</sup> religious property,<sup>19</sup> the financing of religion,<sup>20</sup> chaplaincies,<sup>21</sup> religious dress,<sup>22</sup> and religious marriages.<sup>23</sup> There are also laws of general applicability to wider fields with specific provisions which affect religion within those fields, such as: discrimination law and religious equality,<sup>24</sup> criminal law and the vilification of religion,<sup>25</sup> heritage and planning law and places of worship,<sup>26</sup> taxation law and religious exemptions,<sup>27</sup> education law and religious education,<sup>28</sup> abortion law and rights of medical personnel to refrain on religious grounds from participating in abortions,<sup>29</sup> and military law and conscientious objections to military service.<sup>30</sup>

Needless to say, judicial decisions are a fundamental source of law on religion for States which participate in the common law tradition, such as the United Kingdom, Ireland, and Cyprus.<sup>31</sup> However, case-law on religion is important across Europe,<sup>32</sup> including in States of the civilian tradition, like Italy and Spain,<sup>33</sup> and it is active in the States of central and eastern Europe, such as on the constitutionality of law on religion;<sup>34</sup> the jurisprudence of the German Constitutional Court is

<sup>18</sup> Latvia: LORO, Art 6; Lithuania: LORCA, Art 14; Portugal: Decree-Law 323/83 of 5 July, Ordinance 333/86 of 2 July, through to Decree-Law 329/98 of 2 November.

<sup>19</sup> Lithuania: LORCA, Arts 13, 16, 17, 18 (property and labour relations); Slovakia: Act no 282/1993 Zz; and for financing of churches and ministers' salaries, Government Decree no 578/1990 Zb.

<sup>20</sup> France: Law of 1905, Art 2; Hungary: Act 32/1991 (property), Act 124/1997 (finance); Sweden: Act on Levies to Religious Denominations, Lagen (1999:291) and Act on Contributions to Denominations, Lagen (1999:932); other than to the Church of Sweden.

<sup>21</sup> Portugal: DL 79/83 of 9 February, 345/85 of 23 August, 34-A/90 of 24 January, 93/91 of 26 February.

<sup>22</sup> France: Law of 15 March 2004 on the display of religious symbols in public schools.

<sup>23</sup> Sweden: Act on Officiating of Marriages within Denominations other than the Church of Sweden, Lagen (1993:305); UK: Marriage Act 1949; see also Divorce (Religious Marriages) Act 2002.

<sup>24</sup> Denmark: Const, Art 70; Act on Prohibition of Discrimination in the Labour Market (459/1996).

<sup>25</sup> Malta: PC, Arts 163–165; Belgium: PC, Arts 143, 144, 268; Luxembourg: PC, Arts 145, 268.

<sup>26</sup> Malta: Act VI of 2002; Ireland: Planning and Development Act 2000, s 4(2), Regs 2001 (SI no 600) Art 10; Sweden: Cultural Heritage Act, Lagen (1988:950).

<sup>27</sup> Greece: LD 1249/1982; UK: Sharing of Church Buildings Act 1969.

<sup>28</sup> Austria: RelUG, s 1(2), PrivSchG, s 20; Luxembourg: Law of 31 May 1982.

<sup>29</sup> Austria: Strafgesetzbuch, s 97 (abortion), FortpflanzungsG, s 6 (medically assisted procreation).

<sup>30</sup> Austria: ZivildienstG, s 291; Greece: Law 1763/1988, Art 6; Portugal: Law 7/92 of 12 May.

<sup>31</sup> eg Ireland: *McGrath and O Ruairc v Trustees of the College of Maynooth* [1979] ILRM 166: the autonomy of religious organizations; *Campaign to Separate Church and State Ltd v Minister for Education* [1998] 3 IR 321, [1998] 2 ILRM 81: funding chaplains in schools.

<sup>32</sup> Denmark: HC, Case U 2000.2350: religious headscarves in the work place; Netherlands: SC, HR, 19 January 1962, NJ 1962, 107: the then existing constitutional prohibition on religious processions was held compatible with ECHR, Art 9; Greece: COS, Decision 1444/1991 on the Ancient Calanderists.

<sup>33</sup> Italy: CCt, Decision no 195, 27 April 1993 (on the Church of Scientology); Spain: CCt, Judgment 46/2001, 15 February (defining religion); Portugal: CCt, Decisions 92/84 of 7 November, 423/87 of 26 November, and 174/93 of 17 February; and France: CCl, Decision CC, no 77–87 DC 23.11.1977 (religious freedom).

<sup>34</sup> Czech Rep: CCt, 27 November 2002 no Pl US 6/02, overturning elements of a 2002 Act on registration of religious organizations; Lithuania: CCt, Ruling, 13 June 2000 no 49-1424: 'naming churches . . . as traditional is not an act establishing them as [such]' but simply states their factual status in society; Slovenia: CCt, Decision no U-I-68/98 (November 2001); and no Rm-1/02-21 (November 2003): the agreement with the Holy See was consistent with the constitution; Slovakia: CCt, Decision no Pl U 18/95 24 May 1995 on exemption from military service under Const, Art 25(2)); CCt, Decision no III US 156/05–5, 1 June 2005 on employment law and churches.

particularly rich in this field.<sup>35</sup> Agreements between a State and a religious organization, such as the Holy See,<sup>36</sup> or other religious entity, may also be a source of legal rules, when the agreement is ratified by law.<sup>37</sup> These agreements deal with a variety of subjects, such as pastoral care in prisons and the armed forces,<sup>38</sup> or education.<sup>39</sup> Federalism in some States, and devolution in others, has also led to a rise in regional laws on religion: this is the case in Belgium, Spain, and the United Kingdom;<sup>40</sup> regional law which forbids religious discrimination is found in Austria;<sup>41</sup> and there are agreements between religious organizations and regional government below federal level in Germany.<sup>42</sup> The variety of legal instruments used to regulate religion, and the range of matters regulated, indicate the pervasiveness of religion in society, the extent of the competence assumed by States over religion, and the level at which such matters are best treated.

### External sources of religion law: international law

There are three main external sources for national religion laws in Europe: the law of the European Union (which is dealt with in Chapter 10),<sup>43</sup> the European Convention on Human Rights (of the Council of Europe), and the global international law of the United Nations.<sup>44</sup> Along with other matters associated with religion,<sup>45</sup> the European Convention on Human Rights (ECHR) protects religious freedom, and the right to hold and to manifest religious belief, as well as the authority of the State to limit the exercise of the right to manifest religion.<sup>46</sup>

<sup>35</sup> Particularly on religious freedom and the autonomy of religious organizations, see Chs 2 and 5 below.

<sup>36</sup> Concordats with the Holy See (a juridical person in international law) have the status of treaties under international law; they include Luxembourg: Concordat 1801; Germany: Reichskonkordat 1933; Portugal: Concordat 7 May 1940 as amended 15 February 1975, and 18 May 2004; see below.

<sup>37</sup> Spain: LORF, Organic Law 7/1980 of 5 July, Art 7: cooperation agreements must be ratified by statute; Netherlands: an agreement of 1983 to terminate government funding of ministers of religion was ratified by statute; Poland: Law of 20 February 1997 ratifies an agreement with the Pentecostal Church.

<sup>38</sup> Czech Rep: agreement on pastoral service in prisons between the Prison Administration, Ecumenical Council of Churches and Catholic Bishops' Conference (1999).

<sup>39</sup> Lithuania: agreement with the Holy See (5 May 2000).

<sup>40</sup> Belgium: Law of 13 July 2001, Art 4; Spain: see JG Oliva and D Lambert, 'Regional ecclesiastical law: religion and devolution in Spain and Wales' in N Doe and R Sandberg (eds), *Law and Religion: New Horizons* (Leuven: Peeters, 2010) 219.

<sup>41</sup> Austria: eg the Viennese Agricultural Labour Equal Treatment Act, Viennese Provincial Law Gazette Nos 25/1980 and 38/2008: this deals with the religion of agricultural and forestry workers.

<sup>42</sup> Germany: many aspects of religion-state relations are governed by the laws of the *Bundesländer* (Federal States), and agreements between these and religious organizations; see Ch 4 below.

<sup>43</sup> Reference is also made to this in other chapters when EU law is implemented by national laws, such as in the field of religion and data protection (Ch 2), and religious discrimination (Ch 3).

<sup>44</sup> For historical antecedents to both the ECHR and UN law, see MD Evans, *Religious Liberty and International Law in Europe* (Cambridge: CUP, 1997) esp chs 1–7.

<sup>45</sup> ECHR, Art 14: discrimination; Art 2 First Protocol: education; see Chs 3 and 9 below.

<sup>46</sup> ECHR, Art 9: '1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as

The importance of the ECHR for religious liberty is recognized by most commentators,<sup>47</sup> particularly the role of the European Court of Human Rights,<sup>48</sup> though some question its value today.<sup>49</sup> All States of the EU have ratified the ECHR, though its status within national laws varies from State to State: in States with a monist approach to international law, the ECHR is applicable directly on ratification without further enactment by the state legislature,<sup>50</sup> but in those with a dualist system, ratification must be followed by legislation for incorporation in national law.<sup>51</sup> In turn, in many States the ECHR is part of the constitutional order and as such may have primacy over national law,<sup>52</sup> but in others it is not: in Ireland, the courts may make a declaration of incompatibility between any statutory provision or rule of law and the ECHR but such a declaration does not make the law unconstitutional or otherwise invalid and so susceptible to judicial challenge; the United Kingdom is similar.<sup>53</sup>

ECHR provisions and abundant jurisprudence on religion have played a greater role in the courts of some States than in others.<sup>54</sup> For example, it has been invoked in relation to religious education in public schools (in Poland),<sup>55</sup> religious freedom (in Romania),<sup>56</sup> and corporal punishment (in the United Kingdom).<sup>57</sup> Indeed, the Austrian Constitutional Court has held that national constitutional and ECHR protection of religious freedom are to be understood as an integrated whole.<sup>58</sup> However, whilst the ECHR may be commonly invoked, remarkably little use has

are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.’

<sup>47</sup> See eg J Martínez-Torrón, ‘Religious liberty in European jurisprudence’ in M Hill (ed), *Religious Liberty and Human Rights* (Cardiff: University of Wales Press, 2002) 99–100.

<sup>48</sup> M Janis, R Kay, and A Bradley, *European Human Rights Law* (Oxford: OUP, 2nd edn, 2000) vii, 30.

<sup>49</sup> PM Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge: CUP, 2005) xi: ‘The escalating religious intolerance of recent years, both through State violation and by non-State entities, is most conspicuous in events following the collapse of the former Soviet Union, in religious conflict in many parts of the world, and, of course, in the attacks of 11 September 2001. This has caused speculation whether the international instruments which were developed more than half a century ago... are sufficient to meet present and foreseeable demands.’

<sup>50</sup> Estonia: Const, Arts 3, 123; it ratified the ECHR in 1996; France, in 1974.

<sup>51</sup> Cyprus: Law, no 39/1962; Hungary: Act XXXI/1993; Italy: Const, Art 10: ‘The legal system of Italy conforms to the generally recognized principles of international law’; Art 80 (ratification).

<sup>52</sup> Austria: ratified 1958 as part of the constitutional order: BGBl 219/1958, BVG BGBl 59/1964; Luxembourg: Law of Ratification 29 August 1953; for the cases see Cass, 14 July 1954, Pas Lux 16, 150, 152; Cour d’Appel, 13 November 2001, *Ann dr lux* 12 (2002) 455; Romania: ratified by Law no 30 1994; Finland: ratified 1990 (under Const, Art 95.2); Sweden ratified 1952, incorporated 1995.

<sup>53</sup> Ireland, Const, Art 29.6: ‘no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas’; ratified 1953, incorporated by ECHR Act 2003, ss 1–4; UK: Human Rights Act 1998; see also Cyprus: T Hadjanastassiou, ‘The European Convention on Human Rights applicable in Cyprus’ (1976) 3 *Cyprus Law Tribune* 97.

<sup>54</sup> C Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford: OUP, 2001).

<sup>55</sup> Poland: CCt, Case U 12/92; since then Art 9 has been rarely invoked: CCt, Case K 44/2002 (but only in passing in a dissenting judgment).

<sup>56</sup> Romania: SC, Decision no 1934, 7.7.1999.

<sup>57</sup> UK: *R v Secretary of State for Education and Employment and ors, ex p Williamson* [2005] UKHL 15.

<sup>58</sup> Austria: VfSlg 16.054/2000; cf VfSlg 15.680/1999; VfSlg 15.394/1998; VfSlg 15.592/1999.

been made of Strasbourg jurisprudence on religion by courts in France,<sup>59</sup> Estonia,<sup>60</sup> Italy,<sup>61</sup> and Ireland, where it has been understood that provisions of the ECHR on religion ‘guarantee substantially the same rights with regard to free practice of religion’ as those contained in the Irish constitution.<sup>62</sup> This is not surprising—domestic protection of religious freedom is now deeply embedded in the legal cultures of Europe: some constitutional provisions are ancient and many pre-date the ECHR,<sup>63</sup> and they operate regardless of whether the country has a state church,<sup>64</sup> a system of separation,<sup>65</sup> or one of cooperation.<sup>66</sup> Nevertheless, the ECHR has influenced the development of constitutional texts in several States as evidenced by the similarities between these and the text of the ECHR.<sup>67</sup> Moreover, in several States Article 9 and Strasbourg jurisprudence enjoyed persuasive authority prior to formal ratification of the ECHR.<sup>68</sup>

In the wider environment of global international law, European States are also subject to the standards set by the United Nations, with its Human Rights Committee and Special Rapporteur on religion or belief (who examines incidents inconsistent with international standards). The United Nations has four instruments relevant to the field of religion.<sup>69</sup> Article 18 of the Universal Declaration of Human Rights 1948 provides for religious freedom and limitations on its exercise, and is almost identical to Article 9 ECHR,<sup>70</sup> as is Article 18 of the International

<sup>59</sup> France: CCI, Decision no 77-87 DC 23.11.1977 (religious education).

<sup>60</sup> Estonia: SC, Cases no III-4/A-4/93, 4.11.1993 (RT III 1993, 72/73, 1052); no III-4/A-1/94, 12.1.1994 (RT III 1994, 8, 129); no III-4/A-2/94, 12.1.1994 (RT III 1994, 8, 130).

<sup>61</sup> Italy: CCt, Decision no 388 of 1999: ‘human rights protected by universal or regional conventions signed by Italy are expressed—and protected with the same intensity—by the Constitution’. However, the draft law on religious freedom of the Constitutional Affairs Commission, Chamber of Deputies, July 2007, explicitly refers to the ECHR.

<sup>62</sup> Ireland: Report of the Constitution Review Group (1996) 380; see eg *Murphy v Independent Radio and Television Commission* [1999] 1 IR 12: this involved advertisements claimed to be offensive to religion and was resolved under ECHR, Art 10.

<sup>63</sup> Belgium: Const (1831), Art 19; France: Declaration of the Rights of Man etc (1789), Art 10; Const 1946, Preamble, 5: no one can be wronged in his work or employment by reason of his origins, opinions or beliefs; Const, 1958, Art 1.

<sup>64</sup> Finland: Const (2000), Art 11; Denmark: Const, Art 67; Greece: Const, Art 13.

<sup>65</sup> Ireland: Const, Art 44. 2.1.

<sup>66</sup> Germany: GG, Art 4: ‘Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable’; Italy: Const, Art 19.

<sup>67</sup> Czech Rep: Const, Arts 15 and 16 are almost identical to Art 9 ECHR; see also Hungary: Const, Art 60; Slovenia: Const, Art 41.1; Bulgaria: Const, Art 13(1)–(4).

<sup>68</sup> Cyprus: *AG v Ibrahim* [1964] CLR 195, 225; UK: *Ahmad v Inner London Education Authority* [1978] QB 36; but even post-incorporation, Strasbourg case-law enjoys only persuasive not binding authority—the courts must consult but have no duty to follow it: Human Rights Act 1998, s 2(1); Ireland: the following cases on religion were resolved under Const, Art 44 not the ECHR: *Quinn’s Supermarket v Attorney General* [1972] IR 1; *Campaign to Separate Church and State Ltd v Minister for Education* [1998] 2 ILRM 81; *Corway v Independent Newspapers (Ireland) Ltd* [1999] 4 IR 484.

<sup>69</sup> See MD Evans, *Religious Liberty and International Law in Europe* (Cambridge: CUP, 1997) chs 8 and 9. For comparison of UN law and the ECHR, see PM Taylor, *Freedom of Religion* (Cambridge: CUP, 2005).

<sup>70</sup> ‘Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance’; States may impose limits on the right to manifest religion on the basis of Art 29.2: ‘In the exercise of his rights

Covenant on Civil and Political Rights 1966.<sup>71</sup> Alongside this binding treaty law, there is the non-binding Declaration on Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief 1981, which deals in Article 1 with religious freedom and in Article 2 with religious discrimination.<sup>72</sup> The Convention on the Rights of the Child 1989 deals with religious freedom of parents and children as well as religious discrimination against children.<sup>73</sup> Most European States have ratified these,<sup>74</sup> and they are occasionally invoked by national courts.<sup>75</sup>

### Legal definitions of religion

An understanding of the nature of religion is implicit in global international law in its treatment of the elements of religious freedom—religion involves belief which may be manifested in teaching, practice, worship, and observance.<sup>76</sup> Equally implicit are the notions that religion involves choice,<sup>77</sup> individual or collective action,<sup>78</sup> and a host of activities such as the maintenance of sacred places, charitable initiatives, rituals and customs, dissemination of belief, training, appointment and functions of leaders, observance of holy days, and adherence to principles in the

and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.'

<sup>71</sup> ICCPR (1966) UN HR Cn; Art 18: '1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 3. Freedom to manifest one's religion or belief may be subject to such limitations as are prescribed by law and necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others. 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, where applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.'

<sup>72</sup> UNDRIP, Art 1: '1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice. 3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.'

<sup>73</sup> For the UNCRC, see S Langlaude, *The Right of the Child to Religious Freedom in International Law* (Leiden: Martinus Nijhoff Publishers, 2007); see Ch 9 below.

<sup>74</sup> eg ICCPR and UNCRC have been ratified and are court-enforceable in Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Hungary, Latvia, Lithuania, the Netherlands, Poland, Spain; ICCPR has been ratified but is not enforceable in Austria, France, Ireland, Italy, Luxembourg, Sweden; the same applies to UNCRC in Austria, Ireland, and Sweden.

<sup>75</sup> Romania: HC of Cassation, Decision 1088/2006 invoked ICCPR, Art 18; Netherlands: HR 19 January 1962, NJ 1962, 107 (also invoking Art 18); Poland: CCt, K 26/00 (Art 22).

<sup>76</sup> UDHR, Art 18 (see n 70 above).

<sup>77</sup> ICCPR, Art 18 (see n 71 above).

<sup>78</sup> UNDRIP, Art 1 (see n 72 above).

lives of believers.<sup>79</sup> Similarly, Article 9 ECHR associates religion with belief and the manifestation of belief in teaching, worship, practice, and observance, but Strasbourg is often criticized for its failure to define ‘religion’.<sup>80</sup> Nevertheless, to attract protection, for Strasbourg beliefs must have ‘a certain level of cogency, serious reflection and importance’,<sup>81</sup> not simply being ‘mere opinions or deeply held feelings’, but rather spiritual or philosophical convictions with an identifiable formal content.<sup>82</sup> Strasbourg takes a liberal approach to the definition of belief: its institutions have considered claims concerning, for example, scientology, druidism, pacifism, and atheism.<sup>83</sup>

### The criteria used to recognize religion

At the national level, it may be necessary to define ‘religion’ in order to determine whether legal benefits and burdens apply in particular circumstances, for example whether a claim is properly one of religious freedom, whether an exception to discrimination law is religious, or whether an activity is for the advancement of religion.<sup>84</sup> However, the States of Europe do not generally define ‘religion’ in their constitutions or other formal legislation, but, rather, leave it to the courts to determine whether something is ‘religion’.<sup>85</sup> Consequently, the nature of religion is most usually elucidated in case-law, though sometimes also in statements issued

<sup>79</sup> *ibid* Art 6: freedom of religion shall include, *inter alia*, ‘the following freedoms: (a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes; (b) To establish and maintain appropriate charitable or humanitarian institutions; (c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief; (d) To write, issue and disseminate relevant publications in these areas; (e) To teach a religion or belief in places suitable for these purposes; (f) To solicit and receive voluntary financial and other contributions from individuals and institutions; (g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief; (h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one’s religion or belief; (i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels’.

<sup>80</sup> R Ahdar and I Leigh, *Religious Freedom in the Liberal State* (Oxford: OUP, 2005) 122, 124: ‘It is a frequent criticism of the jurisprudence on Article 9 . . . that it has failed almost entirely to confront the issue of defining religion . . . The reason why . . . may be [that] courts harbour a general unwillingness to differentiate religion from other beliefs deemed worthwhile’. See also C Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford: OUP, 2001) 53.

<sup>81</sup> *Campbell and Cosans v UK* (1982) 4 EHRR 293. See also: The Office for Democratic Institutions and Human Rights, *Guidelines for Review of Legislation Pertaining to Religion or Belief* (2004) Section A, para 3: ‘The “belief” aspect typically pertains to deeply held conscientious beliefs that are fundamental about the human condition and the world. Thus, atheism and agnosticism, for example, are generally held to be entitled to the same protection as religious beliefs.’

<sup>82</sup> *McFeeley v UK* (1980) 3 EHRR 161; see also *X v UK* App no 7291/75 (1977) 11 D&R 55.

<sup>83</sup> *X and Church of Scientology v Sweden* App no 7805/77 (1978) 16 D&R 68; druidism: *Chappell v UK* App no 12587/86 (1987) 53 D&R 241; pacifism: *Arrowsmith v UK* (1978) 3 EHRR 218; atheism: *Angelini v Sweden* (1988) 10 EHRR 123; Moon sect: *X v Austria* App no 8652/79 (1981) 26 D&R 89; *X v UK* App no 7291/75 (1977) 11 D&R 55: the applicant failed ‘to establish the existence of the Wicca religion’.

<sup>84</sup> See Chs 2, 3, and 4 below.

<sup>85</sup> Romania: SC, Decisions 769, 7 March 2000 and 1124, 28 March 2000; Germany: CCt, BVerfGE 84, 341. This approach was taken in Sweden on a discrimination bill in 2003: Proposition 2002/03:65, p 82.



by executive bodies or in the course of parliamentary debate.<sup>86</sup> Yet courts may decline to define 'religion' for a variety of reasons, typified in recent British case-law: it may be unnecessary to do so, as when it is sufficient to determine that a 'belief' is asserted;<sup>87</sup> it is obvious that something is 'religion';<sup>88</sup> or it is too difficult to define 'religion', particularly 'in an age of increasingly multicultural societies' where there is a trend towards 'a newer more expansive reading of religion'.<sup>89</sup> In turn, States are generally agreed that 'religion' must be interpreted in a broad manner;<sup>90</sup> "religion" is not restricted to churches and officially recognised religious communities;<sup>91</sup> and some national courts warn against too Judeo-Christian an understanding of religion.<sup>92</sup>

States agree that to be religion the phenomenon must satisfy some 'minimum' or 'objective' criteria. There is, however, divergence as to what criteria; and some States simply look to Strasbourg.<sup>93</sup> Italian criteria include 'public recognition', 'common opinion', and 'self-perception'.<sup>94</sup> In Portugal whether it is embedded in society is important.<sup>95</sup> It used to be the case in Germany that the religious belief or practice had to be linked to well-established faiths.<sup>96</sup> However, in German jurisprudence today whether a belief or activity is religious is to be determined objectively by reference to 'spiritual content and external appearance';<sup>97</sup> but

<sup>86</sup> eg religion is defined in Austria in the explanatory notes produced by the government on the various statutes which deal with religion; in Portugal by a statement of the Attorney-General; in Sweden in parliamentary debate; in the UK, by the Charity Commission (see below).

<sup>87</sup> UK: *R v Secretary of State for Education, ex p Williamson* [2005] UKHL 15, para 24, per Lord Nicholls: '[Article 9] leaves on one side the difficult question of the criteria to be applied in deciding whether a belief is to be characterised as religious. This question will seldom, if ever, arise under the [ECHR] ... Article 9 embraces freedom of thought, conscience and religion. The atheist, the agnostic, and the sceptic are as much entitled to freedom to hold and manifest their beliefs as the theist. These beliefs are placed on an equal footing for the purpose of this guaranteed freedom.'

<sup>88</sup> *ibid* Lord Walker, paras 55–56: 'it is not in dispute that Christianity is a religion'.

<sup>89</sup> *ibid* para 54: 'it is certainly not necessary, and is probably not useful ... to try to reach a precise definition [of 'religion']'. Courts in different jurisdictions ... have almost always remarked on its difficulty. ... The trend of authority (unsurprisingly in an age of increasingly multicultural societies and increasing respect for human rights) is towards a "newer, more expansive, reading" of religion'.

<sup>90</sup> Slovenia: FRA 2007: its definition of religious freedom implies that religion involves belief and its expression at 'a mass, class, practice or religious ritual', or conscientious objection to a duty required by law that seriously contradicts religious belief.

<sup>91</sup> Austria: ETA, Explanatory Notes: 'Religion is any religious, confessional belief'.

<sup>92</sup> Spain: CCt, Judgment 46/2001 of 15 February: until this case, 'religion' was implicitly understood to come from the Judeo-Christian tradition, and to a more limited extent, from Islam.

<sup>93</sup> Romania: CCt, Decision 72 (18 July 1995); UK: *R v Secretary of State for Education, ex p Williamson* [2005] UKHL 15, paras 23–24: 'The belief must be consistent with basic standards of human dignity or integrity ... [and] relate to matters more than merely trivial. It must possess an adequate degree of seriousness and importance ... it must be a belief on a fundamental problem. With religious belief this requisite is readily satisfied. [It must] be coherent in the sense of being intelligible and capable of being understood. But, again, too much should not be demanded in this regard.'

<sup>94</sup> Italy: CCt, Dec no 195, 27 April 1993: the Church of Scientology met the criteria of public recognition (*pubblici riconoscimenti*), common opinion (*comune considerazione*), and self-perception.

<sup>95</sup> Portugal: 'Churches are large communities that are well established in society': A-G, Proclamation no 54/95, DR II Série, no 222, 24/09/96. The Committee for Religious Freedom has not as yet defined 'religion' (*religião*) or 'belief' (*crença*).

<sup>96</sup> Germany: CCt, BVerfGE 12, 1(4).

<sup>97</sup> Germany: CCt, BVerfGE 84, 341: 'The mere claim and self-understanding that a community professes a religion ... cannot justify for it and its members [religious freedom]; rather there must actually be a religion and religious community in terms of spiritual content and external appearance.'

religious ‘self-understanding’ must also be considered,<sup>98</sup> and on occasion it may be ‘self-evident’ that something (such as Bahá’í) is a religion.<sup>99</sup> As such, States speak of sham religions, usually in the context of sects,<sup>100</sup> which they consider are not religions properly so-called;<sup>101</sup> this approach may lead to negative definitions of religion.<sup>102</sup>

### Religion as belief and practice

There is little to distinguish between European States in terms of the core elements of their understanding of religion—religion is transcendent belief in divinity and action based upon it in the world. States are in agreement that religion involves ‘belief’, ‘a set of beliefs’, ‘a statement of belief’, or ‘a specifically formulated belief’.<sup>103</sup> Some States link religion to ‘faith’, ‘a structure of convictions’, or faith based on convictions.<sup>104</sup> Beliefs are religious by virtue of their object—‘a supreme being’,<sup>105</sup> ‘transcendence, a higher being of divinity’,<sup>106</sup> or ‘the dependence of human beings on a power over the human race’.<sup>107</sup> Religion seeks both ‘to explain humankind and the world in its transcendent meaning’,<sup>108</sup> and to address ‘the ultimate questions of human society and individual life’ including the quest for salvation.<sup>109</sup> Religious belief, a common category in national laws,<sup>110</sup> therefore offers a particular ‘world view’<sup>111</sup> about the whole of life (its origin and purpose) which gives sense to

<sup>98</sup> Germany: CCt, BVerfGE 24, 236 (247f): this is required by the principle of autonomy; see Ch 4 below.

<sup>99</sup> Germany: CCt, BVerfGE 83, 341 (353); see also Hungary: CCt, Decision 4/1993 (II.12) AB.

<sup>100</sup> Belgium: Act of 2 June 1998: a sect is ‘any group with a religious or philosophical vocation, or pretending to have such a vocation, which in its organisation or practice performs illegal and damaging activities . . . to individuals or to the community or violates human dignity’.

<sup>101</sup> For sects see Ch 3 below.

<sup>102</sup> Spain: LORF, Art 3.2: ‘activities, intentions and entities relating to or engaging in the study of and experimentation on psychic or parapsychological phenomena or the dissemination of humanistic or spiritual values or other similar non-religious aims do not qualify for the protection provided in this Act; they may be excluded from the Register of Religious Associations.’

<sup>103</sup> Bulgaria: RDA, Art 1; Austria: ETA, Explanatory Notes; Denmark: Guidelines of the Standing Advisory Committee on Religious Communities (January 2002).

<sup>104</sup> UK: for religion as ‘faith and worship’, see *Re South Place Ethical Society, Barralet v AG* [1980] 1 WLR 1565; *R v Registrar General, ex p Segerdal* [1970] 3 WLR 479; France: Lyon CA, 28 July 1997: ‘common faith’; Austria: FLSCC, Explanatory Notes: religion is ‘a structure of convictions’; Sweden: for debate on ‘belief’ signified by ‘worship’ (*religion*) or ‘religious faith’ (*trosuppfattning*) and its connection to ‘conviction’ (*övertygelse*), see government Proposition 2002/03:65, pp 81–2.

<sup>105</sup> UK: *Re The Druid Network* [2010] Charity Commission Decision (21 September 2010): the Druid Network had a combination of belief in a supreme being and notions of ‘sacred nature’.

<sup>106</sup> Spain: the General Directorate for Religious Affairs (Ministry of Justice) adopted the idea that the concept of religion consists of ‘an organic whole of dogma or beliefs related to transcendence, a higher being or a divinity’, but this approach was criticized in CCt, Judgment 46/2001 of 15 February.

<sup>107</sup> Denmark: Guidelines, Standing Advisory Committee on Religious Communities (January 2002).

<sup>108</sup> Austria: FLSCC, Explanatory Notes.

<sup>109</sup> Austria: ETA, Explanatory Notes.

<sup>110</sup> Slovenia: FRA (2 February 2007): religious freedom includes conscientious objection against an obligation required by law that seriously contradicts religious belief of a person.

<sup>111</sup> Denmark: Explanatory Notes to Draft no 384 SE (11th Riigikogu).

human life and transcends the world.<sup>112</sup> However, the broad approach to religion has led to the idea that religion may embrace 'theistic, non-theistic or atheistic' beliefs.<sup>113</sup> In other words, religion is not confined to belief in (or the relation of humans to) a Creator but refers 'to theistic, non-theistic, and atheistic convictions. It includes convictions such as agnosticism, free thinking, pacifism, atheism and rationalism'.<sup>114</sup> Religious belief is often treated as a species of belief in general, but distinguished from other beliefs, such as those that are philosophical, political, or ideological.<sup>115</sup>

Another fundamental concept in national laws is that religion is capable of expression, representation, or manifestation in outward 'acts of a religious character' through 'individual or collective behaviour' which results from or is otherwise related to religious belief.<sup>116</sup> The outward acts of religious belief may take a wide variety of forms. One form of expression is teaching,<sup>117</sup> the profession of faith,<sup>118</sup> dogma,<sup>119</sup> or doctrine.<sup>120</sup> Such teaching results in visible religious practices,<sup>121</sup> which themselves may symbolize the beliefs upon which they are based.<sup>122</sup> Consequently, religion is commonly viewed as an individual or a group activity,<sup>123</sup>

<sup>112</sup> Germany: CCt, BVerfGE 90, 112 (115); see also CCt, BVerfGE 24, 236 (247f).

<sup>113</sup> Poland: 'religion shall in particular include... having theistic, non-theistic or atheistic beliefs' Law on the Protection of Aliens, 18 March 2008 (Journal of Law 2008, no 70, item 416), Art 14.2.

<sup>114</sup> Cyprus: *Pitsillides v The Republic of Cyprus* [1983] 2 CLR 374; UK: Charities Act 2006, s 2(2) (c) and (h): schemes for 'the advancement of religion' and for 'reconciliation or the promotion of religious... harmony or equality and diversity' are charitable; s 2(3): 'religion' includes 'a religion which involves belief in more than one god' and 'a religion which does not involve belief in a god'.

<sup>115</sup> Austria: ETA, Explanatory Notes: belief embraces 'all religious, ideological, political and other leading perceptions of life and of the world' as well as 'an orientation of the personal and societal position for the individual understanding of life'; belief is 'a system of interpretation consisting of personal convictions concerning the basic structure, modality and functions of the world; it is not a scientific system'; see also Germany: CCt, BVerfGE 90, 112 (115): religion transcends the world whereas philosophical belief is not a metaphysical but an immanent system of convictions; Sweden: Government Proposition 2002/03:65, pp 81–2 (on the now repealed Prohibition on Discrimination Act 2003); SOU 2000:43, p 155; Legislative Council, Official Statement 2003-03-06, Proposition 2002/03:65, p 344; SOU 2006:22, p 311.

<sup>116</sup> Poland: Law on the Protection of Aliens, Act of 18 March 2008 (Journal of Law 2008, no 70, item 416), Art 14.2; Austria: FLSCC, Explanatory Notes (representation); Bulgaria: RDA, Art 1.

<sup>117</sup> In global international law, teaching (or practice) 'includes acts integral to the conduct by religious groups of their basic affairs, such as, *inter alia*, the freedom to choose their own religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts and publications': UNHRC (1993), General Comment 22.

<sup>118</sup> Czech Rep: CCt: 27 November 2002 Pl US 6/02.

<sup>119</sup> Austria: ETA, Explanatory Notes; Spain: dogma was a criterion for the General Directorate for Religious Affairs, but this was criticized by the CCt, Judgment 46/2001 of 15 February.

<sup>120</sup> Portugal: A-G, Proclamation no 54/95, published in DR II Série, no 222, 24/09/96.

<sup>121</sup> Austria: ETA, Explanatory Notes. See also UNHRC (1993), General Comment 22: religion 'may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or headcoverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group'.

<sup>122</sup> Austria: FLSCC, Explanatory Notes: practices as 'symbols' of belief.

<sup>123</sup> Indeed, religious groups may also claim an ethnic dimension: in Cyprus, the Maronites complained that the Constitution classifies them merely as a 'religious group', whilst they consider themselves also as 'a specific ethnic group'; the Latin community, too, is dissatisfied with the term 'Latin' as it does not properly reflect their Catholic religious identity: see Opinion on Cyprus by the Advisory Committee on the Framework Convention for the Protection of National Minorities 2001.

carried out voluntarily,<sup>124</sup> in public or private.<sup>125</sup> Religious groups (or confessions) are ‘social aggregates’, unified by a common faith,<sup>126</sup> or by common membership of a religious community,<sup>127</sup> which consists of ‘a body of adherents’.<sup>128</sup> This idea often represents the ‘objective element’ of religion, whether the community is small<sup>129</sup> or large.<sup>130</sup> Such religious groups may or may not have formal structures,<sup>131</sup> internal rules, and governing bodies,<sup>132</sup> and the latter may in turn be bureaucratic or hierarchical.<sup>133</sup>

Key to national understandings of religion is worship.<sup>134</sup> Religion consists of ‘concrete and definite acts of worship’, an external expression of the relationship between the adherents to a religion and a higher being or divinity.<sup>135</sup> Some States see this as the primary medium for the expression of religious belief,<sup>136</sup> or indeed as the principal characteristic of religion itself.<sup>137</sup> Rituals and ceremonies are also commonly associated with religious practice and worship.<sup>138</sup> Performed in public or in private, individually or collectively,<sup>139</sup> religious rituals include, for example, participation in a Mass or a religious class.<sup>140</sup> Such activities may involve ‘communication’ with a

<sup>124</sup> Bulgaria: religion involves a ‘voluntary union of natural persons for purposes of manifestation of a certain religion’: RDA, Art 1.

<sup>125</sup> Slovenia: FRA (2 February 2007).

<sup>126</sup> Portugal: ‘A religious confession can be defined as a community based on a doctrine, manifested in a cult, and established according to rules addressed to the human group of followers’; ‘Religious confessions are social aggregates unified by the communion of faith of their members; the religious confession has a doctrine, the fundamentals of faith are the religious principles accepted by the believers’: A-G, Proclamation no 54/95, published in DR II Série, no 222, 24/09/96.

<sup>127</sup> Austria: ETA, Explanatory Notes.

<sup>128</sup> Spain: the General Directorate for Religious Affairs considered that religion involves ‘ritual practice, whether individual or collective (worship), constituting the adherents’ institutional means of communication with the higher being;’ this was criticized in CCt Judgment 46/2001 of 15 February.

<sup>129</sup> France: Lyon CA, Decision of 28 July 1997: a community is the objective element of religion.

<sup>130</sup> Portugal: A-G, Proclamation no 54/95, published in DR II Série, no 222, 24/09/96.

<sup>131</sup> Spain: this view of the General Directorate for Religious Affairs was discussed by the CCt, Judgment 46/2001 of 15 February: the Unification Church was held to be religious under LORF.

<sup>132</sup> Bulgaria: RDA, Art 1: a religious institution has ‘governing bodies and statutes’.

<sup>133</sup> Portugal: ‘Churches are large communities that are well established in society, with a formal structure that is bureaucratic and hierarchical’; ‘Sects are in principle smaller and less organised’: Office of A-G, Proclamation no 54/95, published in DR II Série, no 222, 24 September 1996.

<sup>134</sup> The idea also appears in global international law: UNHRC (1993), General Comment 22: worship ‘extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places to worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest’.

<sup>135</sup> Spain: the General Directorate for Religious Affairs proposed ‘as a consequence of the existence of acts of worship, although this is not an essential element, ownership of places to which the adherents may go to perform such acts’; this was criticized by the CCt in Judgment 46/2001 of 15 February.

<sup>136</sup> See n 104 above.

<sup>137</sup> UK: *Re The Druid Network* [2010] Charity Commission Decision (21 September 2010): the Network had elements of common worship; Luxembourg: CCt, Judgment 3/1998 of 20.11.98, Mémorial (OG) A of 18 January 1999, no 002/1999; Sweden: Government Proposition 2002/03:65, pp 81–2 (on the now repealed Prohibition on Discrimination Act 2003).

<sup>138</sup> Bulgaria: RDA, Art 1: the ‘performance of worship, religious rituals and ceremonies’.

<sup>139</sup> Poland: Law on Aliens, Act of 18 March 2008 (Journal of Law 2008, no 70, item 416), Art 14.2.

<sup>140</sup> Slovenia: FRA (2 February 2007).

higher being,<sup>141</sup> or ‘reverence’ to a dominant power in the form of ‘submission to the object worshipped, veneration of that object, praise, thanksgiving, prayer or intercession’,<sup>142</sup> or ‘communal or personal worship, supplication and meditation’.<sup>143</sup> They may include abstention from work on certain days, wearing prescribed forms of dress, rituals connected with the preparation of food, and abstinence from certain types of food or drink.<sup>144</sup> However, not all rituals may be protected by religious liberty but only those required by a religious duty.<sup>145</sup>

Importantly, religion also involves the observance of norms of conduct.<sup>146</sup> Religious belief generates ‘principles’,<sup>147</sup> ‘rules’,<sup>148</sup> ‘rules for [a] way of life’,<sup>149</sup> or ‘a body of moral rules’, and these regulate the individual and social behaviour of its adherents.<sup>150</sup> Such norms may represent an ‘identifiable positive, beneficial, moral and ethical framework’,<sup>151</sup> and they may include the laws of nature and other guidelines for human ethics and morality.<sup>152</sup> As adherents to religion may ‘pattern their whole behaviour on the teachings of their faith and act according to their inner beliefs’,<sup>153</sup> so ‘religious faiths call for more than belief’—‘To a greater or lesser extent adherents are required or encouraged to act in certain ways’ not only to ‘affect the entirety of a believer’s way of life’ but also to ‘impact on others’.<sup>154</sup> Indeed, the Constitutional Court of the Czech Republic is notable for its recognition of the wider social impact of religion; organized religion involves values which go beyond the profession of belief: ‘the task of [religious] entities cannot... be reduced to the mere profession of a particular religious faith... but their role in society is considerably wider and also consists of radiating religious values externally, not only through religious activities but also, e.g. charitable, humanitarian and general educational activities’.<sup>155</sup>

<sup>141</sup> Spain: the General Directorate for Religious Affairs considered that religion involves ‘ritual practice, whether individual or collective (worship), constituting the adherents’ institutional means of communication with the higher being:’ see CCt Judgment 46/2001 of 15 February.

<sup>142</sup> UK: *R v Registrar General, ex p Segerdal* [1970] 3 ALL ER 886, per Winn LJ.

<sup>143</sup> UK: *R v Secretary of State for Education, ex p Williamson* [2005] UKHL 15, paras 16–17.

<sup>144</sup> *ibid.*

<sup>145</sup> Estonia: Tartu DC, Case no 3-07-701 (2 May 2007): candles were an important part of Buddhist rituals, but Buddhism did not require a prisoner to burn them in his cell.

<sup>146</sup> For the notion of ‘customs’ and ‘dietary regulations’ in international law, see n 121 above.

<sup>147</sup> Bulgaria: RDA, Art 1; ‘a set of beliefs and principles’; Austria: FLSCC, Explanatory Notes: religion provides rituals, for example, ‘with basic principles and doctrine’.

<sup>148</sup> Portugal: a religious confession may have ‘rules addressed to the human group of followers (believers)’ as well as ‘religious principles accepted by the believers’: Office of the A-G, Proclamation no 54/95, published in DR II Série, no 222, 24 September 1996.

<sup>149</sup> Austria: ETA, Explanatory Notes: ‘rules for the way of life’.

<sup>150</sup> Spain: for the General Directorate for Religious Affairs, religion consists of ‘a body of moral rules regulating the individual and social behaviour of the adherents to a religious denomination, derived from that dogma’; this was criticized by the CCt in Judgment 46/2001 of 15 February.

<sup>151</sup> UK: *Re The Druid Network* [2010] Charity Commission Decision (21 September 2010).

<sup>152</sup> Denmark: Guidelines of the Standing Advisory Committee on Religious Communities (January 2002).

<sup>153</sup> Germany: CCt, BVerfGE, 98 (106).

<sup>154</sup> UK: *R v Secretary of State for Education, ex p Williamson* [2005] UKHL 15, paras 16–17, per Lord Nicholls: precepts such as the duty to love one’s neighbour impact on others in addition to abstinence from work, food, and drink, and holy days and times ‘impact on others’.

<sup>155</sup> Czech Rep: CCt, 22 November 2002, no Pl US 6/02.

Whilst the above seeks to draw together the core of religion from a wide range of national laws, it might be helpful to present some complete juridical definitions in order to illustrate the spectrum of approaches used in terms of their detail and focus. At one end is the minimalist approach of France: 'a religion can be defined by the convergence of two elements, an objective element, the existence of a community even limited, and a subjective element, a common faith'.<sup>156</sup> Other minimalist approaches focus on the transcendence of faith: in Denmark, religion is seen as 'a specifically formulated belief in the dependence of human beings on a power over the human race [which] provides guidelines for human ethics and morality'.<sup>157</sup> At the other end of the spectrum is the more detailed and expansive approach of Austria: 'for a religion there are minimum requirements concerning a statement of belief, rules for a way of life and a cult';<sup>158</sup> religion is a 'structure of convictions whose content is capable of representation [which] has been growing in history to explain humankind and the world in its transcendent meaning and to accompany [this] with specific rites and symbols [giving] them orientation in accordance with basic principles and doctrine'.<sup>159</sup> Between these two extremes is the tripartite approach of Poland:

... the concept of religion shall in particular include: (a) having theistic, non-theistic or atheistic beliefs, (b) participation, or refraining from engaging in religious rituals, performed in public or private, individually or collectively, [and] (c) other acts of a religious character, beliefs expressed [in the form] of individual or collective behaviour as a result of religious beliefs or related to them.<sup>160</sup>

Occasionally, States propose understandings of particular religions. In Spain, for example, Catholicism is understood to involve mission, worship, teaching, and the exercise of jurisdiction through institutions;<sup>161</sup> evangelical Christianity is understood to involve duties of worship, the administration of the sacraments, pastoral care, preaching the Gospel and religious teaching;<sup>162</sup> Judaism involves Jewish law and tradition, worship, rituals, teaching the Jewish religion, providing spiritual support, and the exercise of rabbinic office;<sup>163</sup> and Islam is understood to involve Islamic law and tradition as these issue from the Qu'ran and Sunna, as well as rituals

<sup>156</sup> France: Lyon CA, Decision of 28 July 1997; see also Portugal: 'A religious confession [is] a community based on a doctrine, manifested in a cult, and established according to rules addressed to the human group of followers': A-G, Proclamation no 54/95, DR II Série, no 222, 24/09/96.

<sup>157</sup> Guidelines of the Standing Advisory Committee on Religious Communities (January 2002).

<sup>158</sup> ETA, Explanatory Notes: religion is 'a system to address in its dogma, practice and social manifestations the ultimate questions of human society and individual life'; it involves ideas about salvation and the means to achieve salvation, 'personal (god, gods) and impersonal (rules, cognition, knowledge) transcendence'.

<sup>159</sup> FLSCC, Explanatory Notes.

<sup>160</sup> Law on Aliens, Act of 18 March 2008, Art 14.2.

<sup>161</sup> Agreement with the Holy See on Legal Affairs, 4 December 1979, Art 1.1.

<sup>162</sup> Agreement with FERED, Law 24/1992, 10 November, Art 6.

<sup>163</sup> Agreement with Israelite Communities, Law 25/1992, 10 November, Art 6: 'functions set out under Jewish law and tradition shall be considered to be the functions characteristic of the Jewish religion, including the religious functions deriving from the rabbinic office, worship, administration of ritual services, rabbi training, teaching the Jewish religion and tendering spiritual support'.

and pastoral assistance.<sup>164</sup> Indeed, Strasbourg portrays Islam as concerned with the divine, law, stability, and the whole of life (public and private), but Strasbourg also has concerns about how Islam may or may not be reconciled with pluralism and democracy.<sup>165</sup> This was echoed recently by the Parliamentary Assembly of the Council of Europe: 'Islam is not only a religion but also a social, legal and political code of conduct'; it can be 'violent or mainstream and peaceful, but in both cases it does not accept the separation between religion and State which is a fundamental principle of the democratic and pluralistic societies'; the assembly also underlines the profound contribution of Islam to European culture and values of human dignity.<sup>166</sup>

Given the need to know when a belief or activity is religious for the purpose of applying legal rights or duties to concrete claims, it is perhaps surprising that most national laws do not define 'religion'. However, given what seems to be a consensus that religion is to be understood broadly, it is perhaps not surprising that States employ somewhat rough and ready but generally objective criteria to define religion—though the subjective understanding of claimants also has a part to play. In those States whose laws address the nature of religion, definitions range from the brief to the detailed—yet, at their core is the idea of religion both as belief in a transcendental worldview and as practice in teaching, worship, and norms of conduct. Such an approach seems to be consistent with that of international law. This flexible strategy—do not define 'religion' at all or else define it minimally—could be justified on the basis of the need to make the law inclusive. This may be especially desirable in societies which today are increasingly characterized by religious pluralism.

### The systems of religion law: state postures

Academic lawyers frequently distinguish between three models of religion-state relations in Europe: state church systems, separation systems, and hybrid systems.<sup>167</sup>

<sup>164</sup> Agreement with the Islamic Commission of Spain, Law 26/1992 of 10 November, Art 6: 'practices conducted in accordance with Islamic law and tradition, issuing from the Qu'ran or the Sunna and protected under the General Act on Religious Liberty shall be considered to be Islamic religious services or training or religious assistance'.

<sup>165</sup> *Refah Partisi (The Welfare Party) and ors v Turkey* (2003) 37 EHRR 1, para 123: '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... the introduction of sharia [is] difficult to reconcile with the fundamental principles of democracy... 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'.

<sup>166</sup> Res 1743 (2010) paras 2 and 3; moreover: 'Islam, Judaism and Christianity—the three monotheist religions—share the same historic and cultural roots and recognise the same fundamental values, in particular the paramount value of human life and dignity, the ability and freedom to express thoughts, the respect for others and their property, the importance of social welfare' (values which are themselves reflected in the ECHR: *ibid* para 3); see also Res 1162 (1991).

<sup>167</sup> G Robbers (ed), *State and Church in the European Union* (Baden-Baden: Nomos, 2nd edn, 2005) 577.

State church systems are characterized by the existence of close constitutional links between the State and a particular religious community, its ‘national’, ‘established’, or ‘folk’ church, or ‘prevailing religion’ or ‘traditional religion’; examples include England, Denmark, Greece, Finland, Malta, and (historically) Sweden. Systems which separate State and religion, with constitutional statements of the secular character of the State and prohibitions against state financial support for religion, include France, Ireland, Slovenia, and the Netherlands. The so-called hybrid systems are also known as cooperation systems—constitutional separation of State and religion is coupled with the recognition of a multitude of common tasks which link State and religious activity, and cooperation between the State and individual religious groups is often organized on the basis of agreements, including concordats with the Holy See (which have status in international law); examples include Spain, Italy, Germany, Belgium, Austria, Portugal, and Baltic and central and eastern States. While global international law tends to view state-church systems as permissible (provided they facilitate religious freedom),<sup>168</sup> the Council of Europe prefers States to have a secular posture,<sup>169</sup> with neutrality and separation between State and religion,<sup>170</sup> but at the same time promoting dialogue with religion.<sup>171</sup> However, the European Union formally respects the national church-state postures of its Member States.<sup>172</sup>

<sup>168</sup> UNHRC (1993), General Comment 22, para 9: ‘The fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the [ICCPR] . . . nor in any discrimination against adherents to other religions or non-believers.’

<sup>169</sup> *Refah Partisi (The Welfare Party) and ors v Turkey* (2003) 37 EHRR 1, para 93: ‘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 . . . Article 9 of the Convention’; see also *Lautsi v Italy*, App no 30814/06 (ECtHR, 3 November 2009).

<sup>170</sup> *Darby v Sweden* (1991) 13 EHRR 774; *Refah Partisi v Turkey* (2003) 37 EHRR 1: ‘the State’s role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs’ and its ‘duty of neutrality and impartiality’; see also *Yanasik v Turkey* App no 14524/89 (1993) 74 D&R 14.

<sup>171</sup> The Parliamentary Assembly of the Council of Europe encourages dialogue with religion: see eg Doc 6732 (1993), Rec 1202 (1993); Doc 8270 (1998), Rec 1396 (1999); Doc 10970 (2006), Rec 1510 (2006); Doc 11298 (2007), Rec 1804 (2007); Doc 12266 (2010), Rec 1743 (2010): ‘Recalling its [Rec] 1804 (2007) on state, religion, secularity and human rights, the Assembly emphasises that democratic standards require a separation of the state and its organs from religions and religious organisations. Governments, parliaments and public administrations that democratically reflect and serve their society as a whole must be neutral towards all religious, agnostic or atheist beliefs. Nevertheless, religion and democracy are not incompatible, in particular as religions may play a beneficial social role. Member states should therefore encourage religious organisations to support actively peace, tolerance, solidarity and intercultural dialogue’; see also the white paper on intercultural dialogue, *Living Together as Equals in Dignity* (May 2008) launched by the Ministers of Foreign Affairs of the Council of Europe: the Council of Europe ‘has frequently recognised inter-religious dialogue . . . as part of intercultural dialogue and encouraged religious communities to engage actively in promoting human rights, democracy and the rule of law in a multicultural Europe. Inter-religious dialogue can also contribute to a stronger consensus regarding the solutions to social problems’; for discussion, see F Cranmer, ‘Religion, human rights and the Council of Europe: a note’ (2009) 162 Law and Justice 36. For dialogue between religions and the EU, see Ch 10 below.

<sup>172</sup> Treaty of Amsterdam 1997, Appendix, Declaration on the Status of Churches and Non-confessional Organisations: ‘The European Union respects and does not prejudice the status under



### The state church model

States within this model are distinctive by virtue of the special constitutional position of a particular Christian church and special benefits and burdens resulting from that position. Such churches may be subject to varying degrees of state control. In Denmark, there is a high degree of control. The constitution provides that: 'The Evangelical Lutheran Church shall be the Folk Church of Denmark, and as such shall be supported by the State'; moreover, the monarch shall be a member of that church.<sup>173</sup> However, the Danish folk church has no synod, no legal personality as a corporate body, and its constitution is to be laid down by statute (but this has not yet occurred).<sup>174</sup> The church is subject to direct state control. The Ministry of Ecclesiastical Affairs determines rules on church membership, the creation of new parishes, and the appointment and dismissal of its clergy (who have the status of civil servants).<sup>175</sup> Local church units (the parishes) operate as state agencies performing various administrative functions for the State, and all taxpayers who are members of the national church pay a church tax.<sup>176</sup> Nevertheless, Danish law also provides for religious freedom, prohibitions against religious discrimination, and the operation of other religious organizations which may function freely in society.<sup>177</sup>

Other state church systems in Europe differ substantially from the Danish model. In Greece, state control is minimal. The constitution provides that the prevailing religion is that of the Orthodox Church of Greece; united with the Ecumenical Patriarchate of Constantinople, the church is autocephalous and administered by its Holy Synods.<sup>178</sup> The church has personality in public law

national laws of churches and religious associations or communities in the Member States.' See Ch 10 below.

<sup>173</sup> Const, Art 4; Art 6: 'The King shall be a member of the Evangelical Lutheran Church'.

<sup>174</sup> Const, Art 66: 'The constitution of the established Church shall be laid down by statute', no such statute has actually been enacted despite several commissions.

<sup>175</sup> 'The Ministry of Ecclesiastical Affairs is the governing body of the Danish National Evangelical Lutheran Church and [administers] grants and appropriations to that part of the Danish national Church funded out of the National Budget. The most important task of the Ministry of Ecclesiastical Affairs is to [administer] the [church] in conformity with current legislation': Statement, Ministry of Ecclesiastical Affairs, 2009. The Standing Advisory Committee on Religious Communities is independent of the Ministry of Ecclesiastical Affairs and has guidelines for approval of groups as religious communities for the purposes of marriage law; see Ch 9 below.

<sup>176</sup> Since 1903, all members of the Danish National Church over the age of 18 have been eligible to vote and stand for election to Parochial Church Councils the functions of which include the upkeep of registers and buildings; for its property and finances, see Ch 7 below.

<sup>177</sup> Const, Art 69: 'Rules for religious bodies dissenting from the established church shall be laid down by statute'; they function as private associations.

<sup>178</sup> Const, Art 3.1: 'The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ. The Orthodox Church of Greece, acknowledging our Lord Jesus Christ as its head, is inseparably united in doctrine with the Great Church of Christ in Constantinople and with every other Church of Christ of the same doctrine, observing unwaveringly, as they do, the holy apostolic and synodal canons and sacred traditions. It is autocephalous and is administered by the Holy Synod of serving Bishops and the Permanent Holy Synod originating thereof and assembled as specified by the Statutory Charter of the Church in compliance with the provisions of the Patriarchal Tome of June 29, 1850 and the Synodal Act of September 4, 1928'—the Patriarchal Tome 1850 provides that the Holy

and a statutory charter approved by parliament; its holy canons are invulnerable from challenge in state courts as to doctrine and liturgy.<sup>179</sup> The church is funded by the State.<sup>180</sup> Moreover, the President of Greece and members of parliament must take Christian oaths.<sup>181</sup> Nevertheless, religious freedom is protected for other 'known religions' (those which do not have secret doctrines and worship).<sup>182</sup> There are several agreements with various minority religions and laws on specific groups ratify or otherwise implement these.<sup>183</sup> Indeed, in Thrace there is protection for the Islamic minority and limited scope is given to Muslim law.<sup>184</sup> However, Strasbourg has criticized Greek law which deals with proselytizing,<sup>185</sup> as well as the treatment of the Catholic Church.<sup>186</sup>

The juxtaposition of church-state relations in Denmark and Greece indicates the breadth of the state-church category. These States may be contrasted with Finland, where two churches have special treatment. The Evangelical Lutheran Church enjoys constitutional status,<sup>187</sup> and the Orthodox Church, the second largest religious community, is subject to special law,<sup>188</sup> but some decisions taken in both churches must be approved by the State.<sup>189</sup> The Evangelical Lutheran Church is governed by church law enacted on the exclusive initiative of its General Synod—the government cannot interfere in the content of ecclesiastical bills introduced by the synod; parliament enacts the law but may only approve or reject the bill; the church and its parishes are autonomous; bishops are no longer appointed by the

Synod administers 'Church matters according to the divine and holy canons freely and unrestrainedly from all temporal interventions'; Art 3.2: 'The ecclesiastical regime existing in certain districts of the State shall not be deemed contrary to the provisions of the preceding paragraph'; Art 3.3: 'The text of the Holy Scriptures shall be maintained unaltered. Official translation of the text into any other form of language, without prior sanction by the Autocephalous Church of Greece and the Great Church of Christ in Constantinople, is prohibited'.

<sup>179</sup> For the statutory charter, see Law 590/1977, Art 1(4) (under Const, Art 3 in conjunction with Art 72); see the Charter, Arts 4, 6, and 9, for the competences of the Permanent Holy Synod and Holy Synod of the Hierarchy. The statutory charter of the Church of Crete is also state law: Law 4149/1961.

<sup>180</sup> Funding takes various forms (eg grants, clergy salaries, tax exemptions); see Ch 7 below.

<sup>181</sup> Const, Art 33: the President on taking office must take a Christian oath 'in the name of the Holy and Consubstantial and Indivisible Trinity'; Art 59: 'Members of Parliament who are of a different religion or creed shall take the same oath according to the form of their own religion or creed.'

<sup>182</sup> Const, Art 13: religious freedom for known religions.

<sup>183</sup> London Protocol 22.1/3.2.1830 between Great Britain, France and Russia (on Catholics)—see now Law 2731/15-7-1991; Treaty of Athens (9/14-11-1913), Art 11 (ratified by Law 4213 4 November 1913): this requires Greece to respect religious minorities; Treaty of Sèvres, 28.7/10.8.1920 (on the protection of minorities). There are laws for the Jewish community (L 2456/1920 and 367/1947, and royal decree 29/29 March 1949); Muslim community (L 2345/1920 and 1920/1991).

<sup>184</sup> Treaty of Lausanne 1923 ratified by DL 25/25, August 1923.

<sup>185</sup> *Kokkinakis v Greece* (1994) 17 EHRR 397; see also *Larissis and ors v Greece* (1998) Series A no 65: the convictions of three Pentecostal Air Force officers for proselytizing servicemen were held not to violate ECHR, Art 9 but the measures taken by them to proselytize civilians were unjustified and in breach of ECHR, Art 9.

<sup>186</sup> *Canea Catholic Church v Greece* (1999) 27 EHRR 521.

<sup>187</sup> Const, Art 76 (The Church Act)—which came into force on 1 March 2000.

<sup>188</sup> Law 521/1969 (a skeleton law) and the (supplementary) Law 179/1970.

<sup>189</sup> The Orthodox Church is subject ecclesiastically to the Ecumenical Patriarch, and decisions of the Lutheran Synod and Orthodox General Assembly have legal effect only if approved by the State.

State; and its ministers are no longer state-funded.<sup>190</sup> The Orthodox Church is regulated by specific parliamentary law; the synod presents bills to parliament and the government may alter the bill prior to its approval by parliament without the consent of the church.<sup>191</sup> Both churches enjoy a church tax.<sup>192</sup> Nevertheless, Finnish law provides for religious freedom, prohibits religious discrimination, and enables religious groups to associate freely.<sup>193</sup> Iceland,<sup>194</sup> Norway,<sup>195</sup> and Lichtenstein<sup>196</sup> have similar arrangements.

Whilst in the United Kingdom several government bodies engage in dialogue with religion,<sup>197</sup> in England, the Church of England was established by a series of ancient parliamentary statutes.<sup>198</sup> Its position is not dissimilar to that of the Lutheran Church in Finland. Though it is not a department of State,<sup>199</sup> but a

<sup>190</sup> Const, Art 76 (The Church Act): 'Provisions on the organisation and administration of the Evangelical Lutheran Church are laid down in the Church Act. The legislative procedure for enactment of the Church Act and the right to submit legislative proposals relating to the Church Act are governed by the specific provisions in that Code.' The church has created for itself a Church Ordinance 1993.

<sup>191</sup> Law 521/1969; new legislation was due in 2007 to effect greater autonomy, allowing the synod to create its own constitution and ending state-payment of church expenses.

<sup>192</sup> See Ch 7 below.

<sup>193</sup> Const, Art 11: religious freedom; Art 6: religious discrimination; FRA, Act 453 of 2003.

<sup>194</sup> Const, Art 62: 'The Evangelical Lutheran Church shall be the State Church in Iceland and, as such, it shall be supported and protected by the State' (the State pays the salaries of its clergy and whilst the church elects its bishops, it is the President of Iceland who signs the candidate into office)—the church has an Assembly, and its highest authority is its Council (with two clergy and two lay persons presided over by the bishop); Art 63: 'All persons have the right to form religious associations and to practise their religion in conformity with their individual convictions. Nothing may however be preached or practised which is prejudicial to good morals or public order'; Art 64 guarantees religious freedom; a church tax is payable but non-members may pay an equivalent sum to the University of Iceland.

<sup>195</sup> Const, Art 2: the Evangelical Lutheran Church is the 'official religion of the State' (*statens offentlige religion*); the king is its titular head and it is administered by the Ministry of Culture and Church Affairs; it is regulated by law enacted by parliament (*Storting*), above all by the Act Concerning the Administration of the Church of Norway 1953.

<sup>196</sup> Const, Art 37: 'The Roman Catholic Church is the State Church and as such enjoys the full protection of the State; other confessions shall be entitled to practise their creeds and to hold religious services to the extent consistent with morality and public order'; Art 37.1: religious freedom; Art 38: this guarantees religious autonomy.

<sup>197</sup> The Department for Communities and Local Government has a Race, Cohesion and Faiths Directorate; within this there is a Cohesion and Faiths Unit which has advised on several legal reforms in the field of religion; the Equality and Human Rights Commission (set up under the Equality Act 2006) is to promote equality which includes religion or belief; the Charity Commission for England and Wales also has a Faith and Social Cohesion Unit and a Faith Advisory Group. The Churches' Legislation Advisory Service (composed of representatives from churches as well as the United Synagogue) liaises between these and government.

<sup>198</sup> The Church of England 'established according to the laws of this realm under the Queen's Majesty, belongs to the true and apostolic Church of Christ' (Canon A1); the church is 'an aggregate of individuals... including all persons who adhere and conform to the liturgy and ordinances of the Church of England as by law established, or it may be considered as an organised operative institution' (*Re Barnes, Simpson v Barnes* [1930] 2 Ch 80); the Reformation legislation of the 1530s resulted in the foundation (through a series of Acts of Parliament) of the Church of England.

<sup>199</sup> 'A Church which is established is not thereby made a department of State. The process of establishment means that the State has accepted the Church as a religious body in its opinion truly teaching the Christian faith, and given to it a certain legal position, and its decrees, if rendered under certain legal conditions, certain legal sanctions': *Marshall v Graham* [1907] 2 KB 112.

religious organization,<sup>200</sup> the church is subject to the royal supremacy;<sup>201</sup> the monarch is supreme governor<sup>202</sup> and appoints its bishops, some of whom sit in the House of Lords.<sup>203</sup> People who are resident in parishes of the Church of England have rights to baptism, marriage, and burial.<sup>204</sup> Legislation of its General Synod (its central legislature of bishops, clergy, and laity) in the form of a Measure must receive parliamentary and royal approval before it acquires the same authority and invulnerability from judicial challenge as an Act of Parliament.<sup>205</sup> A Canon must receive royal assent and not be inconsistent with common law, statute, and prerogative.<sup>206</sup> There is a constitutional convention that Parliament will not legislate for the church without its consent—but this is not judicially enforceable.<sup>207</sup> However, in Wales the Church of England was disestablished in 1920 and replaced with the autonomous Church in Wales,<sup>208</sup> and in Scotland the national (Presbyterian) Church of Scotland enjoys greater spiritual autonomy,<sup>209</sup> as is also the position with the Roman Catholic Church in Malta.<sup>210</sup> In Sweden the national (Lutheran) Church of Sweden has recently been disestablished but some links with the State remain, though religious freedom is provided for.<sup>211</sup>

### The separation model

On the surface, separation systems are characterized by the secular constitutional posture of the State, its religious indifference or neutrality, the absence of state funding for religion, non-intervention in religious affairs, and the promotion of

<sup>200</sup> *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, especially para 13, *per* Lord Nicholls: 'As the established church it still has special links with central government. But the Church of England remains an essentially religious organisation'; para 156, *per* Lord Roger: 'The mission of the Church is a religious mission, distinct from the secular mission of government'—'the Church seeks to serve the purposes of God, not those of the government'; links with the State 'do not include any funding of the Church by the government'.

<sup>201</sup> Canons of the Church of England, Canon A7: 'We acknowledge that the Queen's excellent Majesty, acting according to the laws of the realm, is the highest power under God in this kingdom, and has supreme authority over all persons in all causes, as well ecclesiastical as civil.'

<sup>202</sup> The heir apparent must be 'protestant' and the monarch 'shall join in communion with the Church of England as by law established': Act of Settlement 1700; a declaration must be made that they will uphold and maintain the church: Accession Declaration Act 1910; Coronation Oath Act 1689.

<sup>203</sup> Appointment of Bishops Act 1533; M Hill, *Ecclesiastical Law* (Oxford: OUP, 3rd edn, 2007) para 1.21.

<sup>204</sup> See generally Doe (n 1 above) 357–68, and 385 *et seq.*

<sup>205</sup> Church of England Assembly (Powers) Act 1919.

<sup>206</sup> Synodical Government Measure 1969.

<sup>207</sup> Lord Sainsbury, 19 July 2005 GC 192–3.

<sup>208</sup> Welsh Church Act 1914, Welsh Church (Temporalities) Act 1919; see N Doe, *The Law of the Church in Wales* (Cardiff: University of Wales Press, 2002) ch 1: but duties to marry and bury continue as vestiges.

<sup>209</sup> Church of Scotland Act 1921; see JL Weatherhead (ed), *The Constitution and Laws of the Church of Scotland* (Edinburgh: Board of Practice and Procedure, 1997).

<sup>210</sup> Malta: Const, Art 2: 'The Religion of Malta is the Roman Catholic Apostolic Religion'.

<sup>211</sup> Religious Communities Act 1998; Church of Sweden Act 1998; see L Friedner, 'State and church in Sweden 2000' (2001) 8 EJCSR, 255.

religious freedom for all.<sup>212</sup> France is seen as a separation system par excellence: constitutionally, ‘France is a Republic which is indivisible, secular (*laïque*), democratic and social. It guarantees equality before the law to all its citizens, without distinction of origin, race or religion. It respects all forms of belief’.<sup>213</sup> This *laïcité* of the State is spelt out in the 1905 *Loi de la Séparation*: ‘The Republic assures freedom of conscience. It guarantees the free exercise of religion subject only to the restrictions mentioned hereafter in the interest of public order’, and ‘The Republic does not recognize, remunerate, or subsidize any religious denomination’.<sup>214</sup> The regime is supervised by the *Bureau des Cultes* of the Ministry of the Interior.<sup>215</sup> *Laïcité* is perhaps most vividly expressed in the ban on the wearing of religious symbols in schools.<sup>216</sup> However, the doctrine of *laïcité positive* enables the exercise of religious liberty—and, perhaps paradoxically, the doctrine generates cooperation between State and religion: religious groups may function as private law associations; assistance is given to the maintenance of historic places of worship; and funding is available for spiritual assistance in schools, hospitals, prisons, and the armed forces;<sup>217</sup> moreover, the president is consulted about the appointment of Catholic bishops.<sup>218</sup> Above all, the separation law does not apply to the three eastern French *départements* where there are cooperation agreements with various religious organizations.<sup>219</sup>

Although the apparent paradoxes of the French system of *laïcité positive* raise questions about the usefulness of the separation category, Ireland illustrates its limitations.<sup>220</sup> The Irish constitution spells out the basics of separation and neutrality: ‘The State guarantees not to endow any religion’; it ‘shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status’; and every religious denomination has ‘the right to manage its own affairs’.<sup>221</sup> The anti-endowment provision has been held to prohibit concurrent endowment (the conferral of financial benefits on all religions) as well as the establishment of religion.<sup>222</sup> However, the Irish constitution also expressly recognizes the value of religion: ‘The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion’.<sup>223</sup> This provision has been interpreted as underpin-

<sup>212</sup> R Ahdar and I Leigh, *Religious Freedom in the Liberal State* (Oxford: OUP, 2005) 72 *et seq.*

<sup>213</sup> Const, 1958, Art 2.

<sup>214</sup> Law of 9 December 1905, Arts 1 and 2.

<sup>215</sup> The bureau was created in 1918; there is also a *conseiller pour les affaires religieuses* for the Minister of Foreign Affairs.

<sup>216</sup> Law of 15 March 2004; see Ch 8 below.

<sup>217</sup> See Chs 4, 7, and 8 below.

<sup>218</sup> This position remains under the Napoleonic Concordat with the Holy See (15 July 1801).

<sup>219</sup> Namely Haut-Rhin, Bas-Rhin, and Moselle, which were under German rule until 1918.

<sup>220</sup> Robbers (n 167 above) 578: Ireland is a ‘separation system’ because separation exists ‘to a great extent’.

<sup>221</sup> Const, Art 44.2.2 (endowment), Art 44.2.3 (disabilities), Art 44.2.5 (denominations).

<sup>222</sup> *Campaign to Separate Church and State v Minister for Education* [1998] 3 IR 321.

<sup>223</sup> Const, Art 44.1; the Constitutional Review Group in 1996 called for Art 44.1 to be replaced by the phrase ‘The State guarantees to respect religion’, but this has not occurred.

ning Christianity,<sup>224</sup> but its benefits are not confined to Christians,<sup>225</sup> and ‘the State is not placed in the position of an arbiter of religious truth’.<sup>226</sup> Indirect financial aid is provided to religious groups.<sup>227</sup> This has led some commentators to see Irish religion-state relations as being characterized by ‘inextricable interdependence’, typified in the field of education, most of which is provided by church schools.<sup>228</sup> Slovenia and the Netherlands are also States which exist at the separatist end of the spectrum.<sup>229</sup>

### The cooperation model

The most prevalent model in Europe is the so-called hybrid or cooperation model, characterized by a basic separation of State and religion and the secular posture of the State, but where relations with a religious organization and matters of common concern are addressed usually in the form of agreements.<sup>230</sup> Portugal, Spain, and Italy are seen as the classic examples. Portuguese law provides that: ‘churches and other religious communities are separate from the State’; moreover: ‘The State neither adopts any religion whatsoever nor pronounces on religious issues’;<sup>231</sup> however, whilst, for example, ministers of religion are excluded from membership of public bodies and education must be non-confessional,<sup>232</sup> there are agreements with religious organizations.<sup>233</sup> Similarly, the Spanish constitution provides that: ‘No religion shall have a state character. Public authorities shall take the religious beliefs of Spanish society into account and shall in consequence maintain appropriate cooperation with the Catholic Church and the other religious communities.’<sup>234</sup> As such, under the auspices of the Directorate for Religious Affairs at the Ministry of Justice, there are agreements with the Catholic Church

<sup>224</sup> *Norris v Attorney General* [1984] IR 36.

<sup>225</sup> *Corway v Independent Newspapers (Ireland) Ltd* [1999] 4 IR 484: ‘[The] State acknowledges that the homage of public worship is due to Almighty God... At the same time it guarantees freedom of conscience, the free profession and practice of religion and equality before the law to all citizens, be they Roman Catholics, Protestants, Jews, Muslims, agnostics or atheists.’

<sup>226</sup> *ibid*: ‘Its only function is to protect public order and morality’; see also *Flynn v Power and Sisters of the Holy Faith* [1985] IR 648: a religious body may require higher standards than those applying to average employees.

<sup>227</sup> eg ministers of religion are liable to income tax (*Dolan v K* [1944] IR 470), but income to a religious organization by way of a gift or bequest which qualifies as charitable is tax exempt.

<sup>228</sup> Colton: PECCSR (2006) 111. See Ch 8 below.

<sup>229</sup> eg both forbid solemnization of religious marriages before a civil marriage; see Ch 9 below.

<sup>230</sup> *Robbers* (n 167 above) 579: a formal agreement is merely a reflection of the cooperationist nature of the system rather than proof of its existence.

<sup>231</sup> LORF 2002 (Law no 16/2001), implemented by DL 134/2003, Art 3: the ‘Principle of separation’; Art 4: the ‘Principle of the non-denominational State’; see also Art 4.2: ‘The non-denominational principle shall be respected in official ceremonies and State protocol’. There is a government Committee for Religious Freedom.

<sup>232</sup> DL 701-B/76 of 29 September, Art 4, which renders ministers of religion ineligible for election to parliament and other state and municipal bodies, and Law 14/79 of 16 May, Art 6, on regional parliaments; LORF, Art 4.4: ‘State education shall be non-confessional’; see Ch 8 below.

<sup>233</sup> eg Concordat with the Holy See, 7 May 1940, amended 15 February 1975, and Concordat 18 May 2004.

<sup>234</sup> Const, Art 16.1.

(a concordat which has status in international law), and covenants with Evangelical (Protestant), Jewish, and Muslim communities which have been ratified by law.<sup>235</sup> Equally, however, religious freedom is afforded to all Spaniards.<sup>236</sup> Italy safeguards the liberty and equality of individuals in religious matters whilst simultaneously guaranteeing cooperation between the State and religious bodies.<sup>237</sup> The constitution provides that both the State and the Roman Catholic Church are ‘according to its own order, independent and sovereign’ and that their ‘relations are ruled by the Lateran Treaties’; all other religious denominations ‘are equally free before the law’ and their relations with the State are to be defined ‘on the basis of agreements with their respective representatives’; some have agreements, others do not, and the latter are governed by particular law.<sup>238</sup> The Cypriot constitution also operates a cooperation system.<sup>239</sup>

Cooperation, by way of agreements with and/or laws directed to specific religious organizations, is also the key characteristic of state-religion relations in Austria (with its recognized religions, public and private),<sup>240</sup> Belgium (also with recognized religions),<sup>241</sup> Luxembourg (where ministers of religion are state-paid),<sup>242</sup> and Germany (with its judicially-recognized neutrality, and public and private religious bodies, as well as numerous agreements at the level of the *länder*).<sup>243</sup>

<sup>235</sup> Agreement with the Holy See on Legal Affairs, 4 December 1979; Agreement with the Evangelical Religious Entities, Law 24/1992, 10 November; Agreement with Israelite Communities, Law 25/1992, 10 November; Agreement with the Islamic Commission of Spain, Law 26/1992, 10 November.

<sup>236</sup> Const, Art 16.1; LORF, Law 7/1980 of 5 July; Art 7 deals with cooperation agreements with registered religious organizations; see Ch 4 below.

<sup>237</sup> Const, Art 3: all citizens are ‘equal before the law, regardless of . . . religion’; Art 19: everyone has the right to ‘profess faith freely’ and to ‘exercise worship in public or private, provided that the rites involved do not offend common decency’.

<sup>238</sup> Const, Art 7 (Catholic Church); Art 8 (other denominations); Agreement with the Holy See 1984 replaced the Lateran Concordat 1929 and subsequent agreements have been entered (eg on church holidays (1985) and cultural and religious heritage (1996)); also agreements with eg Seventh-Day Adventists (1986); other denominations are governed by Law no 1159 of 24 June 1929 (no action has been taken on a proposal for its reform approved by the Council of Ministers in 1990).

<sup>239</sup> Const, Art 2; Art 110 recognizes the Orthodox Church and Turkish Cypriot religious trust (Muslim); the law also recognizes the Armenian, Maronite and Latin Catholic churches; see Ch 4 below; Const, Art 18: religious freedom.

<sup>240</sup> Const, Art 7.1: religious equality; RCA 1874 (with public corporation status—eg Catholic, Lutheran, Reformed churches, Islamic and Jewish communities); FLSCC 1998 (eg Baha’i, Baptists, Seventh-Day Adventists, Hindus); agreements with the Holy See are subject to incorporation in domestic law: B-VG, Art 50.

<sup>241</sup> Const, Art 21: the State cannot intervene in the nomination of ministers of religion; Art 19: freedom of worship; there are particular laws on each of the recognized religions (eg Roman Catholics, Law of 8 April 1802; Protestants, Law of 8 April 1802; Jews, Law of 4 March 1870; Muslims, Law of 19 July 1974; Orthodox, Law of 17 April 1985); see Ch 4 below.

<sup>242</sup> Const, Art 19: religious liberty; Art 106: funding ministers of religion on the basis of agreements signed with the State; in 1801 Luxembourg was a department of France, and as a result the Concordat of that year between France and the Holy See is still in some sense in force.

<sup>243</sup> Federal CCt, BVerfGE 24, 236 (247f): ‘Admittedly, the state is neutral in religious matters and has to interpret constitutional terms on neutral, general grounds, and not on those found in the particular belief or philosophy’; for public religious corporations, see Ch 4 below; a Reichskonkordat was signed with the Catholic Church in 1933. Agreements have been entered between the Protestant church and the *länder*: eg Saxony (1994), Thuringia (1994), and Brandenburg (1996); and with the Catholic Church: eg Saxony (1996), Thuringia (1997), and Brandenburg (2003); and with smaller

The constitutions of the central and eastern States of Europe present the terms of both separation and cooperation formally. Some also illustrate the ambiguities of separation. The Czech Republic ‘must not be bound either by any exclusive ideology or by a particular religion’—religious affairs are the responsibility of the Department of Churches at the Ministry of Culture, religious freedom is guaranteed, religious discrimination forbidden, religious associations may be registered (with consequential rights), and there are agreements with some religious organizations.<sup>244</sup> The same applies in Hungary (separation),<sup>245</sup> Romania (autonomy of religion),<sup>246</sup> Slovakia (the State is not bound by any religion),<sup>247</sup> and Slovenia (separation).<sup>248</sup> Similar arrangements—separation-with-cooperation—are also found in Poland,<sup>249</sup> Estonia,<sup>250</sup> Latvia,<sup>251</sup> and Lithuania.<sup>252</sup> However, the Bulgarian

religious communities (eg the Association of Jewish Congregations of Lower Saxony (1983); there is also an agreement between the Federal Republic of Germany and the Central Council of Jews (2003).

<sup>244</sup> CFRF 1992, Art 2.1; Arts 15, 16: religious freedom; CRSL 2002: registration; there is an agreement on cooperation between Czech Radio, the Ecumenical Council of Churches, and the Catholic Bishops’ Conference (1999).

<sup>245</sup> Const, Art 60.3: ‘The church and the State shall operate in separation in the Republic of Hungary’; Art 60.1–2: religious freedom; LFCRC 1990 regulates registered religious associations; there are agreements on specific issues (but not a general one) with the Holy See (on military chaplaincies, 10 January 1994; on finance, 20 June 1997).

<sup>246</sup> Const, Art 29.1: religious freedom; Art 29.2: it must be manifested in a spirit of tolerance and mutual respect; Art 29.5: religious organisations ‘shall be autonomous from the State and shall enjoy support from it, including the facilitation of religious assistance in the armed forces, hospitals, prisons, homes and orphanages’; Art 29.4: religious enmity is forbidden; Art 29.3: ‘All religions shall be free and organised in accordance with their own statutes, under the terms laid down by law’.

<sup>247</sup> Const, Art 1: the Republic is not bound by any ideology or religious belief; Art 24: religious freedom; a Law of 2007 regulates registration (and the register is kept by the Church Department of the Ministry of Culture); there are agreements with the Holy See, no 326/2001, no 648/2002 Zz; for agreements with registered churches, etc, see Act no 394/2000.

<sup>248</sup> Const, Art 7: ‘The State and religious communities are separate. Religious communities enjoy equal rights and freedom of activity’; Art 41: religious freedom; Law of 2007 (registration); there are agreements with the Holy See 2001 and the Protestant Church 2000.

<sup>249</sup> Const, Art 25.3: ‘The relationship between the State and churches and other religious organisations shall be based on the principle of respect for their autonomy and the mutual independence of each in its own sphere, as well as the principle of cooperation for the individual and the common good’; Art 25.4: ‘The relations between [Poland] and the Roman Catholic Church shall be determined by international treaty concluded with the Holy See, and by statute’; Art 25.5: ‘The relations between [Poland] and other churches and religious organisations shall be determined by statutes adopted pursuant to agreements concluded between their appropriate representatives and the Council of Ministers’; Art 53: religious freedom; see also the Statute on the Relationship between the Catholic Church and the State 1989, and the Statute on Freedom of Conscience and Religion 1989; there is a concordat with the Holy See 1993; Law of 20 February 1997 ratifies an agreement with the Pentecostal Church.

<sup>250</sup> Const, Art 40: ‘There is no state church’; this article also deals with religious freedom; CCA 2002, RT I 2002, 24, 135; RT I 2002, 61, 375 deals with registered religious associations; there is an informal agreement with the Catholic Church (12 March 1999). There is also a Religious Affairs Department in the Ministry of Internal Affairs.

<sup>251</sup> Const, Art 99: ‘The church shall be separate from the State’ (but religious freedom is guaranteed); LORO 1995 (as amended) governs the registration, etc of religious organizations; there are agreements with the Holy See (ratified 25 October 2002) and with seven traditional religions (2004).

<sup>252</sup> Const, Art 43: ‘There shall not be a state religion in Lithuania’; the article provides for the autonomy of religious organizations under statutes established by agreement or by law; Art 26: religious freedom; LORCA 1995 (registration of religious organizations and agreements) and Art 5



constitution provides that 'Religious institutions shall be separate from the State', but 'Eastern Orthodox Christianity shall be considered the traditional religion';<sup>253</sup> nevertheless, the Bulgarian Constitutional Court has classified the republic as 'secular',<sup>254</sup> and sub-constitutional law provides for the autonomy of registered religious organizations.<sup>255</sup>

Needless to say, the three models offer only general categorizations of the postures of States towards religion.<sup>256</sup> National and established churches take many forms, through the foundation, recognition, protection, control, or financial support of a church by the State to a national ministry for all.<sup>257</sup> The same applies to separation: in 'structural separation' the State is independent of the control of institutional religion (which itself is independent of state control); and in 'transvaluing separation', state neutrality excludes religious influences from public life—religion is privatized. In turn, cooperation between State and religion may involve 'principled pluralism', when the State recognizes the public value of religion, or 'pragmatic pluralism', when the State collaborates with religion to achieve common goals.<sup>258</sup> Moreover, whilst the models surface at the constitutional level, they are less conspicuous in sub-constitutional laws. Here each State has at least some elements of all three models. State churches vary so greatly (in their strategic and operational autonomy) that it is difficult to find the defining element of the system; and within each state-church system, the State is separate from but cooperates with other religious organizations. Separation States are cooperative in so far as they facilitate the practice of religion. Hybrid systems have a basic separation but are like state-church systems in so far as the State favours particular religious organizations with formal agreements.<sup>259</sup> Indeed, as we shall see throughout this book, more

of this recognizes nine 'traditional religions' which are not required to register their statutes with the Ministry of Justice (Roman Catholic, Greek Catholic, Lutheran, Reformed, Orthodox, Jewish, Old Believers, Sunni Muslims, and Karaites); there are agreements with the Holy See (eg 16 September 2000).

<sup>253</sup> Const, Art 13.2–3; Art 13.1: religious freedom; Art 13.4: 'Religious institutions and communities and religious beliefs shall not be used to political ends.'

<sup>254</sup> CCt, Decision no 2/1998 (State Gazette (SG) 15/1998).

<sup>255</sup> RDA 2002 (SG 120/2002), Ch 3; Art 10 complements Const, Art 13.3 on the Orthodox Church.

<sup>256</sup> For other models proposed outside the field of law, see eg: A Hastings, *The Faces of God* (London: Geoffrey Chapman Publishers, 1976) ch 5 (a typology of church-state relations); for a geo-political approach, see JTS Madeley, 'A framework for the contemporary analysis of church-state relations in Europe' in JTS Madeley and Z Enyedi (eds), *Church and State in Contemporary Europe* (London: Frank Cass, 2003) 23.

<sup>257</sup> See eg N Doe, 'The notion of a national church: a juridical framework' (2002) *Law and Justice* 77; and M Ogilvie, 'What is a church by law established' (1990) 28 *Osgoode Hall LJ* 179.

<sup>258</sup> For these models and their proponents see R Ahdar and I Leigh, *Religious Freedom in the Liberal State* (Oxford: OUP, 2005) ch 3; this also examines the neutrality model (in which the State does not intervene in religion and neither encourages nor discourages it), and the related competitive market model, in which the State considers religion to be a matter of private or individual choice.

<sup>259</sup> For critiques of classical doctrine, see R Sandberg, 'Church-state relations in Europe: from legal models to an interdisciplinary approach' (2008) *Journal of Religion in Europe* 329; S Ferrari, 'The new wine and the old cask: tolerance, religion and the law in contemporary Europe' (1997) 10(1) *Ratio Juris* 75.

often than not cooperation is the dominant feature in all States of Europe through the provision of a host of facilities.<sup>260</sup>

### Conclusion

The States of Europe regulate religion by means of constitutional law, sub-constitutional laws which implement or otherwise complement constitutional provisions, case-law, formal agreements which may be ratified by law, and in some instances through regional laws. International laws of the European Union, Council of Europe, and United Nations are also sources of national religion laws. The array of legal instruments used by States to regulate religion, and the diversity of subjects regulated, indicate well the pervasiveness of religion in society, the extent of the competence which States assume over religion, and the level at which such matters are best addressed. Whilst not all States define 'religion', those which do offer a spectrum of definitional forms, from the minimalist to the expansive—and all share an understanding of religion as belief in a transcendental worldview practised in teaching, worship, and norms of conduct for the lives of believers. The classical outlook is that there are three models of religion-state relations in Europe: the state-church system (in the Protestant north and Orthodox south-east); the separation system (in France, Ireland, and the Netherlands); and, the most prevalent, the hybrid or cooperation system (in the Catholic Mediterranean, Baltic and central-eastern Europe). However, whilst the models appear in constitutional texts, they are often blurred at sub-constitutional level; as we shall see, all States cooperate with religion on a host of matters. Nevertheless, several common principles emerge from the similarities between national laws in terms of sources, subject-matter, and systems: when the State regulates religion it should do so in accessible legal instruments; the State determines which religious matters it regulates (subject to religious freedom); national religion laws should satisfy international standards; religion involves belief in a transcendental worldview and its practice in teaching, worship, and observance; a State may adopt a particular national religion provided it guarantees religious freedom for others; a State is free from the control of institutional religion and vice versa; and a State may cooperate with religion to further common goals and tasks.

<sup>260</sup> Namely, in the provision of religious freedom, prohibitions against religious discrimination (Chs 2 and 3); the legal position, personality and autonomy of religious organizations (Chs 4 and 5); the protection of religious belief from defamation and of worship from disturbance (Ch 6); the protection of religious sites and the funding of religion (Ch 7); the provision of education, including religious education, and spiritual care in hospitals, prisons, and the armed forces (Ch 8); and permitting solemnization of religious marriages (Ch 9).