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A Reference to Religion in a European Constitution

**Presentation of a project of the
German Bishops' Conference Research Group
on the Universal Tasks of the Church**

Dr. Kolja Naumann



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Tasks of the Church of the German Bishops' Conference

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Introduction

The question of whether a reference to God or to religion should be included in the preamble to the European Constitutional Treaty was one of the main points of contention during its preparation. Finally, a compromise was reached through the addition of a reference to the cultural, religious and humanist inheritance of Europe. This compromise also forms part of the preamble of the Treaty of Lisbon, as the less ambitious heir of the failed Constitutional Treaty. The result was a success for those advocating a reference to God compared to the more reserved preamble to the Charter of Fundamental Rights. Yet, they did not succeed in explicitly mentioning “the responsibility before God and Humanity” or the Christian inheritance of Europe.

The articles of the European Constitution as well as these of the Reform Treaty take into account the interests of religion and religious communities in many other respects. With the Charter of Fundamental Rights becoming a binding part of EU primary law, the freedom of religion, the prohibition of discrimination based on religious belief and the respect of religious diversity are guaranteed. In addition, declaration No. 11 to the Treaty of Amsterdam has been included in the text of the Constitutional Treaty. This declaration, to this day without binding legal force, guarantees the status and rights of churches, religious communities as well as of philosophical and non confessional organisations under national law.

What will be the legal effects of the inclusion of the reference to religion in this normative context? Will the role of religious communities or of religion in general change in the European Union? Is the preamble just idle talk, or can it give a soul to the European

Union, already urged for by Jacques Delors, and a new normative approach towards religion by the EU? These questions are scrutinized by the research project initiated by the Research Group on the Universal Tasks of the Church of the German Conference of Catholic Bishops, which will be presented on the following pages. To fully understand its reasoning, it remains of course indispensable to read the complete study published by Mohr Siebeck Tübingen.

The scope of this project is limited to the legal consequences of the inclusion of a reference to religion or a reference to God within the constitution of the European Union. The political, theological or sociological question of whether or not such a reference is desirable or reasonable will not be answered. For these discussions however, this project provides the necessary foundation, as the pundits in these discussions often referred to the legal consequences of the preamble; sometimes in transparent attempts to justify their own position.

To answer the question of the legal consequences of a reference to religion in the European Constitution, it is necessary to examine the legal effects of preambles and in particular of references to God on a comparative basis. The legal character of the European Union will not change after the coming into force of the European Constitution and thus the interpretation of the Foundation treaties will follow a self-contained approach developed by the European Court of Justice and influenced by constitutional law as well as by public international law. Thus in order to reach a sound set of conclusions on the types of assumptions that can be made concerning the legal affects of preambles, this project cannot limit itself to constitutional or public international law but has to examine legal effects of

preambles in national constitutional law, public international law and the law of the European Union.

1. Comparative Law Analysis

It was Platon who elaborated in his work “Nomoi” how preambles can serve as a means of contextualisation, when interpreting laws. Even though Platon refused to acknowledge a legally binding character of preambles, he underlined their role in convincing the citizens of the necessity of a law. Since mediaeval times, the goals and convictions of the lawmaker expressed in preambles are commonly used to interpret the laws. Moreover preambles were commonly used to name the base of competence on which the law was passed.

Under totalitarian regimes as seen in Germany under the Third Reich, preambles were frequently invoked by the Courts to avoid decisions disliked by those in power and thus were used to undermine the rule of law. Even if certain decisions were obviously intended by the text of the statute, the opposite result preferred by the authorities was implemented on grounds of the wording of the preamble. These experiences have led to a certain reluctance to include preambles in acts of the German parliament today.

1.1 National Constitutional Law

In national constitutional law in Europe and worldwide the use of preambles is common practice. Of today’s 27 member states of the European Union, 18 have a preamble in their written constitution (the number would rise to 19 if one counted the preamble to the

Magna Charta as part of the constitution of the United Kingdom) and worldwide about three quarters of national constitutions commence with preambles. The preambles worldwide in general and of the European Union member states in particular differ greatly in length and content. Some of them enounce national history and principles of the (often newly founded) state on several pages, while others just consist of one sentence, stating that the people have given their consent to this constitution. In the latter case, it is questionable if such one-line phrases constitute preambles.

References to God are included in four constitutional preambles of European Union member states. Their wording however varies between invocations of the holy trinity and explicitly neutral wordings, designed to appeal to appeal believers and non-believers.

To this day there are no common rules on the legal effects of preambles to national constitutions. This shall be demonstrated on the basis of the following three examples.

1.1.1 Germany

While deliberating over the drafting of a new Constitution for the Federal Republic of Germany in 1948, the Parliamentary Council (Parlamentarischer Rat) discussed the exact content of a preamble to this constitution at length. Most members of the Council agreed that the preamble should embody the legal and political foundation of the new Republic. This prepared the ground for a very early acceptance of legal effects of the preamble to the “Grundgesetz”, the West German Constitution after 1949. As early as in the 1950s, the Federal Constitutional Court deduced the goal of reunification from the

preamble to the constitution and defined it as a legally binding national objective. This position was consolidated in the court's judgement regarding the Basic Treaty (Grundlagenvertrag) between the Federal Republic of Germany and the German Democratic Republic. Defining national objective the preamble does not provide clear-cut solutions to the political decision-makers, but it obliges them to work towards reunification and not to renounce any prerogatives or rights relevant for reunification. This jurisprudence was warmly welcomed by most constitutional law scholars and the possibility of legal effects of the preamble was generally accepted in the following years. Later on, the Federal Constitutional Court also ascertained that the goal of a "unified Europe", enounced in the preamble, was of legally binding character and hereby justified the possibility of a further integration in the European Communities and later the European Union. Some scholars discuss whether there are any further ends of the state in the preamble. Yet, even if one accepts such legally binding objectives, they are often so vague that almost no answers to legal problems can be deduced from them, which again raises doubts about the legally binding character of preambles. This problem can be illustrated through the use of an example: The commitment to worldwide peace in the preamble is certainly morally important, but cannot oblige the government to any specific actions in its foreign policy. If anything, it means that the federal republic has to pursue an active peace promoting policy, withstanding a complete indifference about the use of violence by other foreign countries.

It can be ascertained that the preamble of the basic constitutional law includes some legally important points, but that it cannot be used to

create rights of individuals or specific requirements for the actions of state authorities.

1.1.2 France

The preamble to the constitution of the French Fifth Republic bears an outstanding degree of importance to French constitutional law. As this constitution includes no charter of fundamental rights, essential to any modern constitution, the Constitutional Council (Conseil Constitutionnel) was confronted with a very difficult situation. How could fundamental freedoms be secured without usurping the powers of the legislator? The Conseil Constitutionnel considered the reference to the Declaration of Human Rights of 1789 and to the preamble of the constitution of 1946 made in the preamble of the Constitution of 1958 as legally binding, thereby giving itself the power to declare void any parliamentary act violating these rights and principles. This rather bold interpretation of the preamble was seen as dogmatically problematic by most scholars; however, given the importance of the protection of fundamental rights, it was unanimously accepted. The reference to these two historical texts, which were neither conceived as legally binding when they were drafted nor harmonized, raised numerous doubts and gave a considerable margin of interpretation to the Conseil Constitutionnel. This is especially true for the so called “Principes Fondamentaux de la République“, mentioned in the preamble, but of which it was unclear what kind of rights or principles they actually embraced. This uncertainty is the reason why the Conseil Constitutionnel has refrained in recent years from acknowledging any new such principle. Instead, the Conseil often refutes the arguments of the parties of the

trial arguing that such principles existed and instead the Conseil rather used the catalogue of fundamental rights in the declaration of 1789 to ensure an appropriate level of human rights protection.

Recently, the preamble of the constitution was amended and a reference to the environmental charter introduced. Thereby, the French Parliament once again acknowledged that the normative dimension of the preamble to the constitution is unanimously accepted. From a constitutional point of view, however, this amendment was sharply criticized as many scholars believed the environmental charter to be of poor judicial quality.

Today, it can be ascertained that the references in the preamble of the constitution of 1958 constitute a very important part of France's constitutional Law.

1.1.3 Portugal

In Portuguese constitutional Law any attempt to infer legal value from the preamble to the constitution has for the most part been denied. The preamble enounces a significant number of principles in four paragraphs. Yet, as all these principles are postulated more precisely in the articles of the constitution, there is no need to acknowledge an independent legal value of the preamble. Only in the first years of the democratic Portuguese constitution when there was no special mention of the rule of law in the articles of the constitution did the majority of Portuguese scholars agree that this principle was enounced in the preamble in a legally binding way. After the inclusion of the rule of law in the articles of the constitution, no such construction was necessary.

1.1.4 Conclusion

The normative effects of preambles in national constitutional law can be summarized as follows: Declarations in the preamble can be of full autonomous legal value if the articles of the constitution remain silent on the respective topic. Such was the case with the goal of reunification in the preamble to the German Fundamental Law and with human rights protection in France. If no such lacunae exist in the articles of the constitution, the preamble will not have direct legal effects. However it can still become very important when national courts have to adjudicate upon the importance of conflicting legal principles. In these cases, very common in constitutional law, the courts can use the preamble to justify the higher legal value of a principle mentioned in the preamble.

The legal value of preambles thus depends largely on the constitution, they precede. In most cases some legal effects of the preambles are conceivable.

1.2 References to God in European Constitutions

References to God are a traditional element in European Constitutional history. Today four Constitutions mention God respectively the responsibility in front of God. The German and the Polish Constitution open with a so called “*nominatio dei*”, only naming the responsibility in front of God and humanity and which can be perceived as being neutral, while the Irish and Greek Constitution include a “*invocation trinitatis*” making reference to the Christian perception of God. The legal significance of these references eludes a clear classification.

1.2.1 Germany

In post World War II Germany, the Parliamentary Council discussing the new constitution agreed on including a reference to God and humanity in the preamble, not because the Council wanted to found a “Christian State” but to draw a clear distinction to the Nazi regime which was perceived as “godless”. The legal relevance of this reference was little discussed in the early years of the Federal Republic. It was only since the 1980s that the question of legal relevance of the reference to God gave way to some discussions, which however did not lead to consensus

Some scholars contended that the “*nominatio dei*” expressed the intention of the Grundgesetz to found a Christian state and obliged state agents and individuals to attend Christian seminars. In contrast, many scholars argued that the “*nominatio dei*” was of no legal value, being nothing but “*décor*” to the constitution and better be abrogated. In between these two extremes, the majority of scholars deduced some legal effects from the “*nominatio dei*”; however refuting the idea of a “Christian state”. It was contended that it contained a reference to metaphysical norms, a rejection of any form of totalitarian government closely connected to human dignity, a prohibition of strict laicism or state atheism, the duty of state agencies to protect religious freedom or national resources. These possible effects are all very controversial and often come up in heated debates about the relationship between state and churches. In practice however, they are included in other norms of the constitution, so that in constitutional jurisprudence there has never been a need to recur to the “*nominatio dei*”, except for one dissenting opinion in the early years of the Constitutional Court.

In the recent discussion it has been widely emphasized that the Fundamental Law places humanity beside God. Many scholars interpret this as acknowledgement that some moral or legal values superior to written law might exist, but that the law remains silent about the question where the source of such values can be found. It is up to the individuals to answer this question according to his or her personal belief.

1.2.2 Poland

The Polish preamble to their constitution includes a very colourful and long reference to God. It reads “We, the Polish Nation - all citizens of the Republic, both those who believe in God as the source of truth, justice, good and beauty, as well as those not sharing such faith but respecting those universal values as arising from other sources.” Similarly to the European Constitutional debate, this formula was the result of long and very heated discussions. Besides some other issues, especially the question of abortion, it led to the rejection of the constitution by the Catholic Church in Poland, which advocated a clear reference to the Catholic religion and the Christian God.

After the approval of the constitution, the compromise was step by step accepted by most parts of Polish society but very little discussed by constitutional law scholars. As the Portuguese constitution the Polish constitution is exhaustive in detail and consequently the importance of the preamble as a source of legal guidance has little influence. Those scholars who examined the preamble usually agree that the “*nominatio*” includes a commitment to neutrality of the state and to the importance of religious freedom. The wording of the

preamble also evokes the existence of higher values to be respected by humanity.

1.2.3 Invocatio trinitatis

The Greek and Irish constitutions open with the invocation of the holy trinity. Thereby they disclose the Roman Catholic respectively Orthodox Catholic foundation of the state. In some decisions, the Supreme Courts resorted to the preamble to justify the validity of metaphysical norms in constitutional law. The Irish Supreme Court, for example, justified the prohibition of homosexual acts between men with the existence of such norms. Yet, such judgements have remained the exception, as in the neutral secular European states of today the legal value of these invocations disappears more and more. Presently as the freedom of religion is guaranteed by the European Convention of Human Rights and accepted by all European states, the invocatio trinitatis loses most possible fields of application and thus was never seriously discussed in negotiations about a reference to religion in a European constitution.

1.2.4 Constitutional Amendments in Austria

At the beginning of the new millennium the European constitutional debates triggered similar discussions in Austria about constitutional amendments. The question of whether to include a “nominatio dei” in a new preamble gave rise to much controversy. In contrast to the Polish and European churches in general, the Austrian Catholic Church was rather reluctant vis-à-vis demands from the Austrian Conservative Party (ÖVP) to include such reference. If in early

debates most proponents favoured a nominatio similar to the German one, later on the reference to the responsibility before “humanity and the Creation” was much discussed. The legal value of such a reference was examined in obvious analogy to German discussions.

1.2.5 Conclusion

References made to God in the preambles to constitutions contain some legally important declarations, without constituting anything like a “Christian State”. In secular societies they have to be interpreted in a neutral way emphasizing the existence of prelegal values and the importance of religious freedom. Typically for preambles, they do not contain any specific obligations of state agencies.

1.3 International Law

In international law, preambles are admitted as means of interpretation by Article 31 paragraph 2 of the Vienna Convention on the Law of Treaties as is the case in international customary law. The jurisprudence of the International Court of Justice stresses that preambles can be especially relevant in teleological interpretation as in application of the implied powers doctrine; a fortiori when an independent body is competent to interpret the treaty. In such cases, international treaties in general are interpreted in a rather dynamic way and for such interpretation the preamble can contain important guidelines. Preambles to international treaties however usually do not contain any rights or obligations of the parties to the treaty. Actually, it is the fact that some concerns are expressed in the

preamble that makes clear that the parties did not intend to give a legally binding character to this content.

These findings can be well demonstrated in the example of the European Convention on Human Rights. The European Court of Human Rights has often referred to the preamble to conclude on the binding force of legal principles not expressly enounced in the Convention. In particular, the rule of law was deduced from the preamble allowing the Court to interpret the limited judicial guarantees of the Convention in a way to allow full-fledged protection of individuals. Similarly, the Court has stressed the importance of the principle of democracy to all members of the Convention and used this principle to further strengthen some fundamental rights in its jurisprudence.

In contrast, the preamble to the Charter of the United Nations has been marginalized in the practice of the U.N. The Security Council has never referred to it and the General Assembly only in two, although important resolutions. There have been some attempts by scholars to develop the significance of the preamble according to national constitutional law, in particular to establish the validity of human rights in United Nations law. But these attempts have not yet been reflected by the practice of Security Council and General Assembly and cannot be considered international law.

Thus to this day, preambles in international law serve as means of interpretation. They can be especially relevant since they express the will of the parties and reflect this will in the text of the treaty. Thereby, they can be considered to balance objective and subjective theories of interpretation.

1.4 European Union Law

Since the foundation of the European Coal and Steel Community, all European Community Foundation treaties contained a preamble enouncing the goals of the member states. These goals reflect the change of the European Union from an economic pact designed to secure peace in Western Europe, to a more profound and liberal economic alliance and now to a union based on common goals and values.

These contents of the preamble and especially the preamble of the EC Treaty have had considerable impacts on the jurisprudence of the European Court of Justice. In the court's first landmark decision "van Gend en Loos" the court already referred to the preamble to ascertain the direct effect of European Community Law. In the opinion of the court, the preamble sequence addressing the peoples of Europe clarified that the European citizens had to be the direct beneficiary of EC Law and thus the "direct effect" of EC Law had to be recognized. This is to say that citizens can invoke norms of European Law in legal proceedings against their own state, what at the time was highly uncommon in International Law. In other decisions, the preamble was used to determine the "telos" of articles of the Foundation treaties or to emphasize the special importance of certain aspects of European integration. In particular, many of the competition rules of the treaties were interpreted in a very strict way as to secure fair competition between the member states. Later the preamble was used to stress the social concern of the European Communities.

Some scholars have suggested that the preamble of the EC also contains objectives of the Community, what would allow the

Community to ascertain new competences based on the preamble in conjunction with article 308 EC Treaty. Other scholars refuted this thesis and argued that such an interpretation would lead to an unforeseeable growth of EU competences, not intended by the member states. The question has lost most of its importance as today the European treaties include very detailed catalogues on competences and objectives of the Union and thus there are no clear gaps which could be filled with reference to the preamble.

The preamble to the European Community treaty played an important role in the development of European Community Law. The court frequently used it to justify bold and much criticized jurisprudence paving the way to an “ever closer Union”.

In contrast to the preamble of the ECT, the preambles to the Treaty of the European Union and to the Single European Act are not within the immediate jurisprudence of the court. Thus, the court never had the option to use these preambles to affirm new competences of European Union or new obligations of the member states. Yet, these preambles have had some impact on the court’s decisions. As they form part of the treaties and following a widely accepted rule, treaties have to be interpreted as a whole, the court used these preambles as means of interpretation of the treaties. Especially in the conclusions of the General Advocates, the preambles are used to outline the exact contents of the treaty and not only of their own treaty but to all the Foundation treaties of the European Union and Communities, showing the interdependencies between the different treaties. Beside some other legal arguments, the court took the preamble to the Single European Act, mentioning the Union’s respect for Human Rights, as a confirmation of its own jurisprudence

recognizing Human Rights as part of European Community law since considerable time. Equally, the General Advocates often quoted the preamble to establish the overwhelming importance of democracy for the Union and the Member States.

In contrast to the preambles to the Foundation treaties, preambles to secondary legislation – regulations or directives –in general have no such legal effects. There have been some judgments in which the court used preambles to justify bold interpretations, but in general it has accorded them almost no legal effects emphasizing that they cannot be used to derogate from the explicit text of the regulations or directives.

In conclusion, it can be ascertained that the court has used the preambles to the Foundation treaties to establish very far reaching changes in European Community Law. While no independent legal norms have been deduced from them, they have played an important role in the development of European Law.

2. Reference to Religion in a Constitutional Treaty

On the basis of these comparative observations, legal effects of a reference to God or to religion in the preamble to the Treaty establishing a constitution for Europe can be examined in the following.

2.1 General Observations

As it has been demonstrated above, it cannot be argued that there will be no legal effects of a reference to religion because of its presence in the preamble to the Constitutional Treaty. Preambles can have legal effects; not necessarily the same as articles of a constitution, but still they can have important and long lasting influences on the state of law.

The legal relevance of the reference to religions can neither be denied because of the European Union's strong secularism or laicism nor because of the religious freedom of European Union citizens. The affirmation that European Union Law is secular to such extent that a reference to religious heritage can have no legal effects turns things up side down. There is no written provision in the European Constitution stipulating such a strong laicism and it rather has to be analyzed if the preamble does not refute the assumption that European law is so strongly secular. Furthermore, there is no contradiction between a reference to the religious heritage of Europe and the religious freedom of EU citizens. It rather has to be contended that religious freedom forms part of Europe's heritage and thus there is no contradiction but rather interdependency between the two.

2.2 Legal Definition of Europe's Religious Heritage

To conclude on legal effects of the reference in the preamble, one has to give a definition of Europe's religious heritage. Given the text of the preamble which mentions the cultural, religious and humanist inheritance, it can be contended that this inheritance in the sense of

the preamble shall include the findings, ideas and ideologies of European humanities in the last millenniums. There is no need for a clear-cut separation between the different disciplines, i.e. philosophy, theology, sociology etc., as often such lines of separation are often difficult to draw. “Religious” inheritance certainly includes Christian and Jewish influences and given the sometimes observed symbiosis between Europe’s and Christianity’s history, the Christian influences are certainly predominant. It is very controversial whether the religious inheritance also includes Islam or not and of course this question can only be answered by historians. From a legal perspective however, it is important that the final wording of the preamble is very open, obviously trying to avoid a meaning which could be interpreted as excluding any religion. Hence, it is convincing to say that at least the Moorish influences in Spain and the strong Muslim influence because of immigration to Europe in the second half of the 20th century certainly form part of Europe’s religious inheritance.

The European Union is not only conscious of this inheritance, as it was stipulated in the preamble to the Charter of Fundamental Rights, but it is willing to draw inspiration from it. This implies that Europe’s cultural and historical background shall be of importance for the future development of the European Union and it can be used as source of inspiration in European decision-making.

Those advocating a clear reference to Christianity usually argued that as historic truth this influence should be explicitly mentioned in the preamble. Yet, it was very controversial whether there was a point in including this historic truth in a legal text. If Christianity had been explicitly mentioned, this would have highlighted the role of

Christianity. It is dubious if such mentioning causes any special legal effects, it might however give wider margins of appreciation to the competent authority.

2.3 Definition of a Reference to God

As the reference to the religious inheritance, the reference of God, which finally of course was not included in the Constitutional Treaty, would have had to be defined to have legal effect. A mentioning of responsibility before God and humanity does not have to be understood in a confessional way. To understand the God mentioned in the preamble, as the God of one of the monotheistic world religions, in Europe most probably of Christianity, is neither consistent with the neutral constitutional law concerning religions of the European Union nor with the linguistic usage of the word “God” in the multi-confessional Europe of the 21st century. Of course, individuals are free to conceive the God of the preamble as the deity they personally believe in. But this does not mean an identification of the European Union with the God of any of its citizens. Instead, the reference to responsibility before God and humanity would point out that there exist higher values or instances any written law shall respect. Arguably this does not mean legally binding metaphysical norms, but rather an ethical responsibility. Further implications in a sense that metaphysical norms are recognized by this reference would certainly go far beyond the intentions of the member states.

2.3.1 Metaphysical Legal Norms

If, contrary to the opinion contended here, the existence of metaphysical norms in European Union law was deduced from the reference to God, this could have a strong impact on the future legal development of the European Union. In this case, the European Court of Justice could establish a hierarchy of norms within the norms of the European Foundation treaty, claiming that some of these norms are of metaphysical origin and thus bind the member states when adjudicating upon amendments to the Foundation treaties. Thus, some core provisions of the treaty – especially those naming the common values of the European Union – could be interpreted as resistant to any changes by the member states. This would not imply, however, a control of secondary legislation of the EU based on metaphysical norms not included in the treaties as the treaties include an exhaustive enumeration of norms necessary for control. But it would put an end to the discussion about the member states being the masters of the treaty, as the court could then control primary law set by the member states.

2.3.2 The EU: A Sovereign State?

A reference to God in the preamble would not be a further step in the development of the European Union from an international, though supranational organisation towards a sovereign state. Even though it is true that in the last century only national constitutions, not treaties establishing international organisations, have included a reference to God, this empirical finding cannot be used to conclude on a change of the legal nature of the EU. Even under the Constitutional Treaty, the European Union cannot claim the so called “competence-

competence”, instead the member states will still be competent to decide which matters shall be addressed by the EU and which will remain within the national competences.

2.3.3 Deletion of a Reference to God

If a reference to God had been included in the preamble, it still could have been deleted in subsequent amendments to the Constitutional Treaty. A reference to God is, from a juridical point of view, neither an essential element of a treaty, nor is it beyond the competences of the member states to delete it, if once introduced. From a political perspective, however, it seems evident that a deletion of such reference is highly unlikely.

2.4 Independent Obligations

Given their very vague wording, references to religion or to God do not contain autonomous obligations for the member state or the European Union. Anyway, given the exhaustive codification in the Constitutional Treaty, there is no necessity of such interpretation. Many observers voiced concerns that a reference to religion could be read as normative reference to religious teachings thus determining the European Union’s stance towards questions like abortion or stem cell research. Yet, such an intrusion of religious teachings into European Union Law seems highly unlikely, given the broadly accepted neutrality of European Union Law and the widely recognized separation between state or Union and institutions of faith. Furthermore, the reference to religion through its neutral wording does not imply what kind of religious teachings should be included.

This does not exclude a consideration of religious world-views in decision-making, but no special and higher weight can be accorded to such arguments than to perspectives of philosophical, sociological or economic nature.

Yet, a reference to God has one independent and at least symbolically important meaning. It shows that there is no absolute truth on earth that human beings are not faultless. This makes clear that the European Union rejects any form of totalitarianism and thus denies absolute power in the hand of the state or the Union. This includes some, necessarily not specified, forms of separation of powers and subsidiarity as well as a certain level of human rights protection. The values of the European Union laid down in article I-2 of the Constitutional Treaty concretize this aspect and it is clear that the rejection of totalitarianism as we can find it today in Europe is deeply ingrained in recent but also pre-modern European history.

2.5 Principles of Interpretation

Thus religious references have no autonomous legal value, meaning legal effects on European law independently of the articles of the Treaty. As it has been contended above that most legal effects of preambles can be seen in the area of interpreting treaties and constitutions and in balancing legally protected interests, it is on such questions that references to religion can be expected to have the strongest legal effects.

2.5.1 Constitutional Law Concerning Religion

All discussed religious references can be interpreted as giving guidance to the future development of European Constitutional Law Concerning Religion. The member states of the European Union cooperate and interact in very different ways with religious communities and with religious practice of individuals. Some states, as a consequence of history, still maintain very close organisational links between the state and the majoritarian church, while granting religious freedom to other churches and religious communities. In contrast, some states follow an approach of strict separation of state and churches, sometimes even try to prevent individuals from practicing their religion in public. A third and majoritarian group of member states have a rather strict organisational separation between state and churches, whilst cooperating with them when it comes to questions pertaining to education or civil society. None of these systems can be transferred to the European Union without any changes. Yet, it seems clear that when the European Union's powers are extended, the EU will become more interrelated and confronted with religious practice, eventually pushing it to determine its own stance towards religion.

In this process, the reference to religion in the preamble can be of high relevance. This reference clarifies that the European Union considers the religious inheritance of Europe to be one of its important assets. This religious inheritance is still part of the European reality because of religious practice by EU citizens within various religious communities. Consequently, it must be contended that the European Union will strive for an open, positive and friendly relationship with these actors. Under this premise, religious practice

in public life principally has to be accepted. Thus religious freedom does not only guarantee religious practice in private, but also in public spaces as long as it does not collide with other important interests and rights. This insinuates that the European Union can neither favour atheism over other beliefs nor can the European Union pursue a path towards strict laicism, ignoring religious life. However, mentioning the cultural, religious and humanist inheritance also points out that the European Union favours a pluralistic approach accepting and including cultural, religious and humanist influences in Europe. Thus the European Union is going to cooperate with the various interest groups of civil society as well as with churches, religious and non-confessional organisations in an open and friendly way, and at the same time will not implement all of their wishes. This principle finds numerous specifications in the articles of the Constitutional Treaty and has to be duly considered when interpreting these.

The interaction between preamble and articles of the Constitutional Treaty actually applies in two different situations, caused by the particularities of European Union law: First the friendliness towards religions has to be considered when adjudicating on the direct protection of religious practice and the admissibility of actions of religious communities in European Union Law. Thus, when the European Union will be confronted at a progressing rate with religious practice of EU citizens, the European Council, Commission and Court will have to respect religious freedom. The preamble makes it clear that religious freedom is of central importance for the future development of the European Union and thus, even when the type or form of religious practice is controversial, has to be accepted as long as it does not harm other very important principles enshrined

in the treaty. When adjudicating upon such issues, the European Court of Justice can take the jurisprudence of the European Court of Human Rights as a starting point and then carefully develop its own jurisprudence on this important right.

Second, the European Union law will in many cases not directly affect religious communities in the European Union, but the EU law will challenge national laws and regulations of member states giving special rights to these communities. In Germany, for example, the churches receive a church tax which is being collected by the state or in other states, religious communities are given special rights and aid in schooling. Such advantages often are at stake when European Union directives aim at harmonizing certain fields of law. In these cases, the European Union has to carefully consider these privileges and accept them as much as possible.

A sense of friendliness towards religion as expressed in the preamble includes two aspects: First, an emphasis of protection of religious freedom in European law. Second, a special consideration for national law concerning religions which shall not be unnecessarily challenged by European Law.

Even the often claimed explicit reference to Christianity in the preamble would not yield any other legal effects. It would only be the historically true, politically controversial statement that Christianity played a preponderant role in European history. It would not indicate a preferential treatment or privileges for Christian communities in the civil society. In exceptional cases however, it seems possible that the size of a church can be important when deciding which communities shall be invited to certain dialogues.

Thus, a reference to God or religion provides a means of interpretation to EU Law, but it does not contain any independent norms. Such “direct” effect of a preamble would anyway be highly unusual and it is just not necessary given the numerous other provisions of the Constitutional Treaty concerning religious freedom. The preamble shall only be used to interpret the articles of the constitution in a way that accepts the important and positive role religious communities are generally able to perform.

2.5.2 Interpretation in the Light of History of the Christian West

A second principle of interpretation can be discerned from the preamble. When the document reads that the European Union shall draw inspiration from its inheritance, this insinuates that the inheritance has to be borne in mind when interpreting norms of the Constitutional Treaty which are directly linked to and strongly influenced by European history. Yet, as the preamble mentions cultural, religious and humanist inheritance side by side none of these influences can be privileged. Thus no explicit religious interpretation of norms of the Constitutional Treaty can be justified.

2.6 Effects on Other Norms of the Constitutional Treaty

The references to religion in the preamble will have effects when interpreting other norms of European Union law or when balancing colliding norms or values. The preamble to the Constitutional Treaty can be used to interpret all parts of this treaty, even though the

charter of Fundamental Rights is also preceded by a preamble. This preamble however cannot be understood as being the exclusive means of interpretation of the Charter. To guarantee a cohesive interpretation of the Constitutional Treaty including the Charter of Fundamental Rights, all articles have to be understood in light of the same considerations in the preamble. This is even more convincing as some guarantees – like for example human dignity – are stipulated in various parts of the Constitutional Treaty and logically shall be interpreted in all parts of the Treaty in the same sense.

2.6.1 General Provisions

The references to the religious inheritance can be relevant when interpreting general provisions of the Treaty and those provisions guaranteeing religious freedom.

2.6.1.1 Human Dignity

One of the central values of the Constitutional Treaty and thus of the EU is without any doubt human dignity. When adjudicating upon this norm, the interpretation in the light of the history of the Christian West will be especially relevant as human dignity is a value created by and closely interwoven with European History. In this development, Christianity and especially the “*imago dei*” idea has played a very important role. Yet, it cannot be contended that the influences were exclusively Christian, as for example the philosophy of Kant also was very important for the development of this idea. In many periods, human dignity had to be defended against the church and by humanist currents but also vice versa. Notwithstanding,

Christian and Kantian interpretation are unanimous on one point which may become important in future jurisprudence on human dignity. Both agree that human dignity has to be considered as something essential, intangible and unrestrictable by other humans and especially by public authorities. No reason, as important as it may be, can serve to justify a treatment of human beings which violates their human dignity.

Yet, the reference to the cultural, religious and humanist inheritance gives no clear guidance on the question as to what kind of state acts are actually prohibited by human dignity. If one agrees that torture and slavery constitute violations of human dignity, religious or humanist arguments will hardly be appropriate to find new areas of application. To take but one very controversial example: The question of whether the embryo is endowed with human dignity and thus embryo-destructing research constitutes a violation cannot be positively answered with the sole reference to a Christian interpretation of human dignity. Christian interpretation is one of various possibilities and other sources of human dignity might indicate different results. Besides, if human dignity is to remain intangible and unrestrictable, it will be crucial to withstand any attempts to use human dignity as argument in everyday problems and controversies. As tempting as this possibility might be, one should resist any form of banalisation of human dignity.

2.6.1.2 Values of the EU

As for human dignity, the interpretation in the light of the history of the Christian West will be relevant for the other values of the European Union enounced in article I-2 of the Constitutional Treaty.

Among these values are freedom, democracy, equality, rule of law and respect for human rights. These values, of course, are also strongly influenced by European history. Yet, as many of these values have been subject to very intense jurisprudence and legal debate their content is today much less ambiguous than the open and enigmatic value of human dignity. Thus the influences of the European inheritance on these values will be less important than the influences on human dignity, but this fact of course does not withstand influences in particular questions.

2.6.1.3 Accession of Turkey to the European Union

The discussions about a reference to religion or to God in the preamble have often been linked to the issue of an accession of Turkey to the European Union. Yet, from a legal point of view, a reference to religion in general or to God would not exclude Turkey's entry into the European Union. Neither of these references would exclude any religion from the European Union, since they are to be interpreted neutrally.

Even a reference to Christianity would not lead to any different results. The preamble does not contain any independent preconditions which states intending to accede to the EU have to fulfil. Such preconditions are exclusively stipulated in article I-58 and I-2 of the Constitutional Treaty. According to these articles, states intending to accede have to be "European" and respect the values of the European Union enounced in article I-2. The mention of Europe's Christian heritage in the preamble would not signify that only states with a Christian heritage can be European states in the sense of article I-58. Even though the term "Europe" has to be

interpreted in a geographic and cultural sense, Christianity cannot be interpreted as being the sole factor which defines “Europe”. Furthermore, Christian inheritance is not a prerequisite for respecting the European values. The interpretation of these values may change if an explicit reference to Christianity is included in the preamble, but they do not demand a Christian inheritance. The question whether the values of the European Union are respected in Turkey or not, has to be answered after a thorough examination of the human rights situation at the moment of accession. If one wanted to exclude an accession of Turkey legally, the preconditions in article I-2 and I-58 would have to be changed.

A demand for accession by Turkey could thus not be refuted on the ground of the Christian heritage of Europe. Yet, it is apparent that such an explicit reference would render it much more difficult in a political sense to reach a consensus with Turkey about its accession.

2.6.2 European Constitutional Law Concerning Religion

The most important effects of references to the European inheritance are to be expected in the area of constitutional law concerning religion. The respective norms in the Constitutional Treaty have to be interpreted in the light of the friendliness towards religion expressed in the preamble.

2.6.2.1 Status of Churches – Article I-52

As a cornerstone of the new European constitutional law concerning religions, article I-52 prescribes that the European Union has to respect and does not prejudice the status of churches, religious

communities and non-confessional organisations under national law. The reference to religion gives some guidance when determining the scope of protection of this norm. The predecessor of article I-52, the Amsterdam declaration on state-church relations, had, as a mere declaration to the treaty, no independent legal value. It protected the rights of churches only when they could be considered part of the national identity. Beyond that, Article I-52 protects all the rights which are conferred to churches under national law. This implies a much more extensive protection and requires the European Union to carefully consider any secondary legislation and the effects it might have on rights of churches under national law. To give some examples: in the German law governing the relations between state and church, not only the public status of churches is protected but also the churches' right to self-determination. For instance, the question of whether or not women can become priests would reveal of this self-determination and thus could not be prejudiced by European Union Law.

Given the religious references in the preamble, it is convincing to assert that not only national identity but also the rights of churches in a broader sense shall be protected by article I-52. Yet, such protection cannot be absolute in the sense that European legislation cannot intrude into any rights of churches under national law. In many cases, European Law has some side effects on national law and such side effects, often unavoidable, can also affect rights of churches under national law. The rights of churches then have to be carefully balanced with the interests of the European Union pursued by the legislation in question. There is no abstract hierarchy of these interests; it rather has to be decided in the concrete situation which aspect is more important. The preamble does not propose a definite

answer to such issues, it just highlights that the rights of churches and non-confessional communities have to be considered as something important and cannot be pushed aside because of economic interest. What kind of rights of churches will be protected exactly by article 52 cannot be answered in an abstract way by sole reference to the preamble. Yet, it is clear that this protection includes all rights which are characteristic for national law concerning religions and those rights especially important for the activities of religious communities.

Beside the respect for the rights of churches under national law in article 52 paragraph 1 and 2 of the constitutional treaty, paragraph 3 of this article stipulates that the European Union shall maintain an open, transparent and regular dialogue with churches and religious communities, recognizing their identity and their specific contribution. The obligation to interact with churches, religious and non-confessional communities is the expression of the importance of these groups for the development of European culture in the past and in the future. The dialogue has to reveal an open and friendly approach towards these communities, not being seen as a mere obligation but as a real chance to find and develop new thought-provoking impulses. It is not the preamble which will give an answer to the controversial question if the European Union is obliged to engage in dialogue with all churches or religious or non-confessional communities recognized in any of the twenty-seven member states, or if the institutions of the Union rather have a choice to engage in such dialogue only with communities which respect the fundamental values of the European Union. To leave this choice to the Union would enable it to ignore communities such as Scientology or fundamental Islamic groups, which actually combat the goals of the

European Union. Yet, to enable the EU to choose its dialogue partners autonomously might be a first step in allowing the EU to deviate from the recognition of religious communities by the member states, which could cause less respect for the rights of such communities under national law. It should be contended instead that if the EU is principally obliged to dialogue with all religious communities in the member states, it can differentiate between these communities due to their very different contributions to European culture.

2.6.2.2 Freedom of Religion

The charter of Fundamental Rights as second part of the Constitutional Treaty postulates in article II-70 the respect of the European Union for the freedom of religion. This freedom forms part of the common constitutional traditions of all member states. In the first place, the interpretation of this freedom will follow the jurisprudence of the European Court of Human Rights as article II-112 paragraph 3 of the Constitutional Treaty refers to the European Convention. But as article II-112 paragraph 3 mentions the possibility of broader protection under the Charter than under the Convention, the religious reference can arguably be used to strengthen the protection of religious freedom in European Union Law.

The Freedom of religion certainly comprises individual and collective freedom but also the cooperative freedom of religion meaning the protection of religious communities as such and not just the mediation of the rights of individuals by the community.

The reference to the religious inheritance of Europe does not imply a restriction of the scope of protection of this freedom to religious communities which form part of this inheritance. It is generally acknowledged that new and foreign faith traditions both enjoy the same freedom of religion as those who have existed in Europe for centuries. Under some national constitutions the freedom of religion protects all acts by individuals inspired by religious beliefs in any way, for instance the collection of clothes for the poor. This very broad interpretation cannot be transferred to the European Union just because of the religious reference in the preamble. Most member states and the European Convention do not follow this very broad interpretation as it does inevitably lead to a general freedom of religious action, which is again so broad that it is easily restrictable. Thus, only acts which are clearly linked to religious practice or belief are protected by the freedom to religion.

The freedom of religion also guarantees the so called “negative freedom”. A religious reference however as it openly addresses the religious inheritance clarifies that not any confrontation of citizens with religious practice of others can be considered as an intrusion in this negative freedom. Thus, non-believers generally have to accept to be confronted with religious practice of others in public spaces.

The freedom of religion can be limited as prescribed by law and in the interest of important interests of a democratic society. Notwithstanding the religious reference, such limitations remain possible but they have to take into account the high importance of religious and non-confessional life pointed out in the preamble.

2.6.2.3 Prohibition of Discrimination Based on Religious Belief

The Charter of Fundamental Rights prohibits discrimination based on religious beliefs as well as based on several other reasons such as race, sex etc. The religious references will not influence this prohibition in a dogmatic way, but it will assure that this prohibition has to be considered as an important right by the institutions of the European Union.

2.6.2.4 Respect of Religious Diversity

The respect of religious diversity, stipulated in article II-82 CT, expresses the importance of religious pluralism for the European Union. The fact that non-confessional and philosophical diversity are not mentioned in this article does not signify that this diversity is less important. The preamble points out that cultural, religious and humanist inheritance go side by side and thereby insinuates that article II-82 protects diversity in a broader sense, including non-confessional and philosophical diversity.

2.6.2.5 Duty to Protect Fundamental Rights

Fundamental Rights do not only prohibit the state from intruding into the citizens' private life, but also oblige the state and the European Union to protect these rights. Such a duty to protect is principally acknowledged in European Union Law as in most member states.

Since the reference to religion in the preamble ascertains that the European Union has a high interest in the religious practice of individuals, it points out that the European Union also has to make

such religious practice possible and thus to defend it against intrusions by other citizens. In this sense, it arguably has a duty to protect not only such fundamental rights as the right to live and human dignity, but also the freedom of religion.

Yet, in the context of European Union law an important restriction on this duty applies. The duty to protect does not create competences, but it only applies where the European Union already disposes of them. Thus, any time a citizen invokes a duty to protect of the European Union two separate aspects have to be carefully analyzed. First, is the European Union competent for the demanded action, with due regard to the principle of subsidiarity, or remains the competence within the member states? Only in a second step, it shall be examined if the danger for the fundamental right is sufficiently severe to create a duty to protect of the European Union. Given that state of law, in most cases in which private actions endanger the freedom of religion of EU citizens, the appropriate countermeasures will have to be taken by the member states. When it comes to the protection of religious life and religious freedom in general, only in exceptional cases might there exist an obligation of EU organs to protect this right.

Something else might be true in cases of discrimination based on religious belief in private law. In these cases the European Union generally disposes of competences based on article 13 EC Treaty and thus could be obliged to take action against discrimination based on religious belief. Yet, even in these cases the Union would be limited by the principle of subsidiarity and consequently could only take action if it can take more efficient action than the member states.

2.6.2.6 Balancing of Legally Protected Interests

High importance can be awarded to religious references in decisions in which legally protected interests have to be weighed against each other. Such decisions are very common in European Law. The very vague norms of constitutions or European Foundation treaties often conflict and in such situations one norm has to be privileged at the expense of another. Consequently, in numerous decisions by the European Court the main issue to be decided is to which norm the court shall give preference. Between norms of the Foundation treaties there exists nothing like an abstract hierarchy but in every single case conflicting norms have to be weighed against each other. This balancing of different legally protected interest is commonly very controversial as both sides can claim with good reason that their interest is superior and justices when privileging one side can be certain to draw severe critiques from the other side. To overrule these objections the European Court of Justice could emphasize the reference to certain interest in the preamble, as it has done in the past. In doing so, the court proves in a legally convincing way that it's not the judge but the treaty itself which postulates the high importance of some legal interests and thus that the court did nothing else but to follow the intention of the member states when drafting the treaty. In this way, the religious references in the preamble could be used to ascertain the importance of freedom of religion in the EU and thus could help it to be privileged over interests or rights in some decisions. Of course, this does not mean an abstract superiority but rather a higher chance in concrete cases that religious freedom can be considered more important than, for instance, economic rights. As a consequence, the reference to religion obliges the institutions of the

European Union to accept and respect religious practice and belief at a substantial level.

2.6.3 Market Freedoms

A reference to religion in the preamble would have no direct effect on the interpretation of market freedoms, very important in EU Law. Yet, in some cases the parties in lawsuits evoked religious arguments to deny the scope of protection of a market freedom for certain activities, for instance, the trade with pornographic materials. It is foreseeable that under the Constitutional Treaty parties would invoke the reference to the religious inheritance of Europe to support such claims. Yet, it is very unlikely that the legal situation would change because of this reference. To limit the scope of protection of the market freedoms to activities that conform to the moral or religious convictions and traditions is neither compatible with European pluralism, deeply enshrined in European culture, nor is it feasible given huge deviations between convictions in different religious or moral traditions.

Some implications of the references to religion are conceivable when balancing the market freedoms against freedom to religion or other rights and interests. In these situations the high importance of religious freedom as stipulated by the preamble has to be respected. Consequently, when adjudicating about conflicts between market freedoms and religious freedoms, the latter have a potentially higher chance to be privileged because of the preamble.

2.6.4 Secondary Legislation

References to religion and especially the friendliness and openness towards religion demanded by them finally have to be taken into account when interpreting EU secondary legislation. As the references to religion do not contain autonomous norms they cannot be used to consider any secondary legislation void because of a violation of primary law. This result can only be reached by the articles of the constitutional treaty in the interpretation insinuated by the preamble. The preamble itself can only be used to give secondary legislation a certain rather religion-friendly interpretation, but only if there are doubts about the correct interpretation and if other means of interpretation do not point in the other direction.

3. Conclusion

To conclude, it can be ascertained that references to religion can have some important legal effects especially in conjunction with articles of the Constitutional Treaty. Yet, these legal effects are not as powerful as the heated political debate might have suggested. But they still have to be taken into account when analyzing the emerging EU law concerning religions and might help the Union to develop an open and friendly stance towards religious and philosophic communities.