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GDPR and Religious Freedoms (With Insight Into Ronald Dworkin and Competing Rights)

- **ABSTRACT:** *In this article, the author explains that important privacy laws are not by any means absolute and unconditional. Like other rights in contemporary democratic society, they often clash with other rights (and duties), which are usually resolved by balancing. The GDPR and its direct application influence various situations (not originally and initially planned) in which requests on the basis of the right 'to be forgotten' cause or can cause problems for religious institutions (religious communities) when they are pressed by some citizens to implement erasure from church books and records. The author explains why this cannot be done and that religious communities cannot be treated in the same manner as business entities. Moreover, such requests can cause harm to religious freedoms and also jeopardize proper functioning of the state bodies, since in many countries, church books are not only historical but also public documents. On a theoretical level, the author examines Dworkin's teachings on conflicting rights and values and, by using his methodology, concludes that the religious rights of citizens belong to the group of rights that require specific and more persistent protection.*
- **KEYWORDS:** GDPR, privacy law, legal theory, religious freedoms, Ronald Dworkin

1. Introduction

One of the most important manifestations of privacy law in contemporary European privacy law is the General Data Protection Regulation (GDPR), which was initially intended for business entities. The regulatory bodies of the European Union intended to regulate the use of private data by big companies that have been

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expanding their networks and profits through the use of private and sensitive material.

This is an important historical aspect in the development of the document, which is today considered a major tool for halting the corporate sector from penetrating into the protected world of private area and family life. All this was created as a safeguard and a guarantee that private and sensitive features of everyday life of commons will be in the hands of those who are the principal bearers of data – physical (natural) persons, or simply said, citizens themselves. As mentioned, the GDPR¹ was connected with the protection of citizens from corporations that had the power to use the private data of their customers and distribute the same through their channels to various entities that did not have direct access to their original data. Certainly, in that respect, the GDPR was necessary, but as is the case with many big changes, it was not possible to foresee all possible consequences of such intensive legislation.

This paper will examine and explain how the GDPR potentially jeopardizes the freedom of religion enjoyed by churches and other religious communities and/or organizations for many years. This is connected with the right of the religious community to organize its practices and beliefs according to its own traditions and needs. This is the obvious setup of the European Convention on Human Rights, which in its Article 9, protects freedom of religion, and the same is true for Article 10 of the Charter of the Fundamental Rights of the European Union. This article will elucidate that extensive use of the GDPR could harm religious freedoms that have two major components: the first one is connected with the individual rights for religious freedoms; and the second one is the collective right of religious freedoms that is embedded into the institutional rights of religious entities to operate freely. In that sense, the concept of religious freedoms cannot be fully understood in the absence of either of these two components: individual freedom of religion and collective or institutional freedom of religion. It is not possible to be religiously free if the institution or organization in which someone is a member does not have prerequisites to operate freely according to the practices and creeds of that particular group. In that sense, a citizen belongs to a religious organization where they execute their religious rights and operate within the system of religious norms, which again legally exist in the state according to domestic laws on religious organizations.²

1 Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) is published in the Official Journal of the European Union under the code L 119, Volume 59, dated May 4, 2016. This Regulation has been also published in the Official Journal of the European Union in parallel in all European Union languages on the official EUR-Lex website [Online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1530652545116&uri=CELEX:32016R0679> (Accessed: 3 July 2019).

2 The principal document which covers religious freedoms of citizens' is usually the constitution, which is the key document for human rights in general. Although constitutions grant

There are multiple issues connected with the right to privacy, as it was established and, to some extent, reassured by the GDPR on one side and the freedom of religion on another. In this article, there is a reference to Donald Dworkin's theory of clash of conflicting rights—in fact, this problem, which will be elaborated upon in subsequent passages, can be observed as a confrontation of different rights. On the one hand, there is the right to privacy, which is guaranteed by many international treaties and conventions,³ and on the other hand, is the right to worship freely—a right that is also recognized internationally. In this scenario, we have to find a way of proportionality and balance those rights. Another approach in search of the protection of religious freedoms (and this might be more appropriate), would be to confront the right to privacy with public order and public security. This will ensure that documents of various religious communities, if declared a public good, have to be protected for the benefit of society (e.g., matrimonial books are public books). Documents that, for some, may fall under the scope of the GDPR, have the concrete ability to be declared as, a) historical documents, and b) public documents—documents of great importance, which are then exempt from application of the GDPR. Also, as it will be explained, specific rights, according to Dworkin's view, have a basis in human dignity and liberty, which prevail over other competing rights.

2. The GDPR

“GDPR” is an acronym for ‘General Data Protection Regulation,’ the full title of Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016, on the protection of individuals concerning the processing of personal data and the free movement of such data and repealing Directive 95/46/EC’. Title itself gives us five important information: ‘who’ passed it the European

principal and efficient protection to religious liberties, most democratic countries have this important area of law regulated by law on religious organizations or law on religious communities or similar laws. Also, various countries have treaties signed with the Holy See, which is an international subject of law (State), and such documents are part of the national system of law immediately under the constitution and above the laws.

- 3 Universal Declaration on Human Rights [Online]. Available at: <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (Accessed: 10 July 2022); International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of December 16, 1966, entry into force March 23, 1976, in accordance with Article 49 [Online]. Available at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (Accessed: 10 July 2022); Punta del Este Declaration on Human Dignity for Everyone Everywhere [Online]. Available at: <https://www.dignityforeveryone.org/introduction/> (Accessed: 10 July 2022); Charter of Fundamental Rights of the European Union [Online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT> (Accessed: 10 July 2022); European Convention on Human Rights (ECHR), Article 8 [Online]. Available at: https://www.echr.coe.int/documents/convention_eng.pdf (Accessed: 10 July 2022).

Parliament and the Council; ‘when’ have they passed it—on April 27, 2016; under which ‘number’ is it marked as Regulation of the European Union—2016/679; ‘what’ it deals with, i.e. ‘what’ is its content—the protection of individuals in connection with the processing of personal data and the free movement of such data; and ‘which’ legal text does it replace or repeal—Directive 95/46/EC. The next important feature is the structure of the GDPR text. Namely, the GDPR, viewed as a whole, consists of two large parts: an extensive introductory part divided into 173 recitals and the legal text itself, which consists of 99 Articles divided into 11 chapters, of which Chapters III, IV, VI, and VII are further divided into sections. Furthermore, the introductory part and the legal text itself are interconnected in such a way that each article of the legal text supports one or more of the above recitals that explain it by giving it a breadth and describe what it aims to achieve and in what way’.⁴

As mentioned in the introduction, the GDPR was initially set up to protect citizens from big corporations that were controlling the economic life of citizens, but later, it shifted from its original intention to other disciplines and social activities that are not necessarily connected with commerce. Privacy became an important value for the European Union, not only in the GDPR, but also in other documents such as the Charter of Fundamental Rights of the European Union and its Article 8(1).⁵

What does it mean when we state that the GDPR was ‘invented’ for corporate bodies? This means that citizens have to have control over their own data, which are deliberately collected for economic (profit) purposes.

The GDPR is made up of 11 chapters and is the most comprehensive and wide privacy law instrument of the European Union. The major principles of the GDPR can be found in Article 6, which show that privacy control has limits, and this will be an important feature of this article. This is because of conflicting rights, which would otherwise be balanced if not supported by the construction of the reality of public order (public morals and necessity). Conflicting rights and interests will later be commented in the light of Dworkin’s tools of (specific) political rights. Privacy rules (norms) are shaped through the chapter ‘Lawfulness of processing’ and are confronted by other (EU) rights, with public rules

4 Same technical text up to this footnote with minor corrections in numbering has been equally written for the Savić and Škvorc, 2020.

5 Charter of Fundamental Rights of the European Union

‘Article 8 Protection of personal data 1. Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. 3. Compliance with these rules shall be subject to control by an independent authority.’ [Online]. Available at: https://www.europarl.europa.eu/charter/pdf/text_en.pdf (Accessed: 10 July 2022).

and public morals, thus balancing between privacy and other rights and values is inevitable.⁶

For all these reasons, the GDPR principles are not easy to implement. Churches and religious institutions (religious organizations) could face enormous problems with the simplified and direct implementation of the GDPR. Indeed, the GDPR can be used as a malicious tool to attack religious freedoms and religious institutions. If applied without looking into complete systems of laws and without using interpretation, the GDPR rules may become a serious obstacle for religious activities and the proper organization of religious life. The GDPR is a harsh and demanding legislation for its ability to pressurize entities that receive, collect, and store data over a long period of time. Those who have their data collected, in general, have the right to opt out throughout the entire process of processing data; to enter and to withdraw are both equal parts of the GDPR legislation.⁷

Articles 15 and 17 represent the core of the GDPR structure. The concept that the GDPR shaped fundamentally consisted of: a) individual right to access the data, b) individual right to acquire the knowledge of processing of data and c) individual right to receive the copy of the data, and to receive an d) explanation of how the data was used, and for example, for which purposes, and also to e) explain if the data was delivered or transferred, and why. Equally important is to receive information on f) how the body (data processor) acquired the data, if applicable.⁸

6 Article 6 of GDPR: 'Processing shall be lawful only if and to the extent that at least one of the following applies: 1. the data subject has given consent to the processing of his or her personal data for one or more specific purposes; 2. processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; 3. processing is necessary for compliance with a legal obligation to which the controller is subject; 4. processing is necessary in order to protect the vital interests of the data subject or of another natural person; 5. processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; 6. processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.'

GDPR [Online]. Available at: <https://gdpr-text.com/hr/read/article-6/> (Accessed: 1 April 2022).

7 'The data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal. Prior to giving consent, the data subject shall be informed thereof. It shall be as easy to withdraw as to give consent.' Article 7 of GDPR [Online]. Available at: <https://gdpr-text.com/hr/read/article-7/> (Accessed: 11 July 2022).

8 '1. The data subject shall have the right to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to the personal data and the following information: (a) the purposes of the processing; (b) the categories of personal data concerned (c) the recipients or categories

Nevertheless, it is clear that the ‘right to be forgotten’ from Article 17 leans on Article 15, Paragraph 1 Subparagraph e), which guarantees that the data subject has the right to request the erasure of his/hers personal data. This is the most comprehensive and complete right of citizens regarding their private data. This is so even if the legitimate interest for the collection data exists, because legitimate interests are subordinate to fundamental rights and freedoms of the individual (citizen) in case. This can be observed through the lens of balancing the right to privacy and the right to worship freely. As explained in this article, the right to worship, in connection with specific public goods that must be protected (which could be described as political rights), should then be a priority right. For that reason, there are solutions for arranging privacy law issues—from approval and giving consent on one side to the right to erasure on the other. There are various options, variations, and gradations that allow the data subjects to be in control of their personal data. As said, erasure is an important feature of privacy law protection, but at the same time serious limitations of privacy rights also do exist.

Paragraph 3 of Article 17:

Paragraphs 1 and 2 shall not apply to the extent that processing is necessary:

- (a) for exercising the right of freedom of expression and information;
- (b) for compliance with a legal obligation which requires processing by Union or Member State law to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;

of recipient to whom the personal data have been or will be disclosed, in particular recipients in third countries or international organizations; (d) where possible, the envisaged period for which the personal data will be stored, or, if not possible, the criteria used to determine that period; (e) the existence of the right to request from the controller rectification or erasure of personal data or restriction of processing of personal data concerning the data subject or to object to such processing; (f) the right to lodge a complaint with a supervisory authority; (g) where the personal data are not collected from the data subject, any available information as to their source; (h) the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject. 2. Where personal data are transferred to a third country or to an international organization, the data subject shall have the right to be informed of the appropriate safeguards pursuant to Article 46 relating to the transfer. 3. The controller shall provide a copy of the personal data undergoing processing. For any further copies requested by the data subject, the controller may charge a reasonable fee based on administrative costs. Where the data subject makes the request by electronic means, and unless otherwise requested by the data subject, the information shall be provided in a commonly used electronic form. 4. The right to obtain a copy referred to in paragraph 3 shall not adversely affect the rights and freedoms of others.’ Article 12 of GDPR [Online]. Available at: <https://gdpr-text.com/hr/read/article-12/> (Accessed: 11 July 2022).

- (c) for reasons of public interest in the area of public health in accordance with points (h) and (i) of Article 9(2) as well as Article 9(3).
- (d) for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing; or
- (e) for the establishment, exercise or defence of legal claims.⁹

This means that public health or public morals and interests will prevail over the interests of citizens requiring privacy law actions. It is specifically mentioned in Article 20 that the right to control portability will not be enforced in cases of public interests or against the rights that the controller has through official (public) rights and duties.

This Article explains that the GDPR, although intended for just purposes, created serious problems for non-corporate entities, such as religious organizations. This is especially problematic in countries where there is an international treaty or more of them signed with the Holy See as an entity of International Law. As understood, international treaties that are signed and ratified will find their place under the respective constitutions but are above the law of the countries. It can then jeopardize religious freedom(s), as set up in Article 9 of the European Convention of Human Rights,¹⁰ which protects both private and institutional freedom of religion.¹¹ As stated before, one cannot exist without the other. Problems with the GDPR started when the citizens began to request the removal of data from church books and registers, which the church or other religious officials did not agree to. Although this was not the original intention of the GDPR, the wording of the document seems to give enough potential for interested parties to act on using this tool, but this is only if the GDPR has not been observed in its totality. Application of the GDPR toward religious communities and organizations without understanding totality of relations and legal mechanisms that protect historical and public books that exist for the 'greater good' of public morals and are

⁹ Ibid.

¹⁰ Article 9 Freedom of thought, conscience and religion '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 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. [Online]. Available at: https://www.echr.coe.int/documents/convention_eng.pdf (Accessed: 13 April 2022).

¹¹ On the issues of Church State Relations in Croatia and Europe see more in: Savić, 2018, p. 239-240.

necessary for the mere existence of the state leads to unwanted pressure toward religious entities.¹² This is so because church registries are not only documents where the church (or other religious communities) archives the names of their believers (e.g., baptized people), but also historical and public documents that are necessary for public security, as will be explained in connection with (prevailing) political rights, which have to be put higher on the scale of rights.

Thus, it is clear that the European Union and its regulations accept the specificity of church/religious entities and the special way of collecting data that they perform and that are located. This does not mean at this point that they will not be affected by the GDPR, but in any case, the preconditions are created for a specific atmosphere in which churches and religious organizations will be treated.¹³

When we discuss the GDPR and religious communities, it is important to stress that Article 3, which clearly states that this regulation applies to processing personal data in the context of establishing a controller or processor in the Union, regardless of whether the processing takes place in the Union or not.¹⁴ This will specifically be important when discussing the special position of the Holy See as an international entity.¹⁵ There are also other regulations that put special attention to churches and religious organizations such as Article 91 of the IX Chapter,¹⁶ which prescribes that collecting the data from church organizations must be considered 'specific,' and allows options for churches and their entities (e.g. institutes,

12 See more in: Savić and Škvorc, 2020, footnote 5.

13 Ibid., p. 8.

14 '1. This Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not.

2. This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to:

(a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or

(b) the monitoring of their behaviour as far as their behaviour takes place within the Union.

3. This Regulation applies to the processing of personal data by a controller not.' Article 3 of GDPR.

15 See more in Savić and Škvorc, 2020, footnote 14.

16 Existing data protection rules of churches and religious associations

'1. Where in a Member State, churches and religious associations or communities apply, at the time of entry into force of this Regulation, comprehensive rules relating to the protection of natural persons with regard to processing are applied. Such rules may continue to apply, provided that they are brought into line with this Regulation.

2. Churches and religious associations that apply comprehensive rules in accordance with paragraph 1 of this Article shall be subject to the supervision of an independent supervisory authority, which may be specific, provided that it fulfils the conditions laid down in Chapter VI of this Regulation.' Article 91 of GDPR.

parishes, dioceses according to Canon Law of the Catholic Church) to collect and maintain data through their own mechanisms. However, this still does not resolve issues when there are demands for erasing the data. However, Recital 165 clearly states: ‘This Regulation respects and does not prejudice the status under existing constitutional law of churches and religious associations or communities in the Member States, as recognized in Article 17 TFEU.’¹⁷

This opens the door toward a value-, moral-, and public-oriented constitutional framework that protects religious freedoms, both individual and collective. The key task of the document is to give control of the personal data to those who are holding and producing them: citizens. The core question is about balancing between individual and collective (public) rights.

In summary, the GDPR will obviously impact religious communities, regardless of the fact that it was created for business entities in the first place. The relatively recent July 10, 2018 Judgment C-25/17 (Jehovan todistajat) on Jehovah Witnesses shows that the Luxembourg court considers religious communities as subjects to the GDPR. Certainly, religious communities should also be treated as subjects of the GDPR, but what must be taken into account is the specific nature of religious communities and their work, conventional and constitutional protections of religious freedoms and Treaties between Catholic Church and state, and contracts signed with particular religious communities. The 2018 case was concerned with ‘collecting or processing personal data in the course of their door-to-door preaching.’¹⁸

3. Religious organizations and religious freedoms

We now look at religious organizations and religious freedoms in the European context. It is important to understand that religious organizations play specific and important roles in society. One does not have to be religious to understand that religiosity is an important social phenomenon.¹⁹ It is so for the reasons that it resolves questions of ultimate reality, which is so characteristic and necessary to humans as *homo sapiens*, who seek the metaphysical meaning of existence. The quest has been important to humans that many of them consider religion an integral part of their identity. Religion gives a sense of right and wrong and sets moral standards. It is intrinsically connected with the existence of the human race. Historically, there were numerous examples where attacking religion meant attacking the very core of people and what they are. Pogroms of various religious groups have

17 GDPR [Online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679&from=HR> (Accessed: 10 October 2022).

18 See [Online]. Available at: <https://www.dpcuria.eu/case?reference=C-25/17> (Accessed: 10 October 2022).

19 Savić, 2015, pp. 145–159.

filled the history of human existence. Catholics, Jews, Protestants, Latter-Day Saints (Mormons), and Muslims are just a few groups who had been persecuted in some period of time around the world. In fact, all have suffered somewhere. Most recently, Rohingya Muslims in Myanmar attacked by Military Regime (Burma), or Christians in Finland through persecution of the former politician Päivi Räsänen and Bishop Juhana Pohjola for quoting the Bible in the context of sexual behavior. Attacks on religion are attacks on the heart of the personality of every human being. For this reason, contemporary legal systems, especially in the so-called Western world (still), protect religion through constitutional frameworks. There are practically no examples of a modern constitution that does not contain norm(s) that describe some sort of protection regarding religious life.

According to the theory excellently described by Norman Doe,²⁰ professor of Law and Religion at Cardiff, today there are three groups of arrangements between the church and state in the European continent. The first arrangement is the complete separation between the church and state, which is present, for instance, in France, which developed *laïcité* principle as a principle of 'living together,' in which religion is a private affair. The second arrangement belongs to the group of countries that have state churches, such as the United Kingdom or Denmark. There is a third group of countries that have some sort of cooperative model between the church and state, such as Italy, Croatia, Spain, Lithuania, Poland, and others. The vast majority of European countries have some modality of cooperative arrangement. Doe states: 'European Constitutions generally deal with the fundamentals of relations between the State and religion, and, occasionally, the rule of law and religion.'²¹ There are numerous situations and protections covered by various European constitutions, from religious freedom and freedom of belief and freedom of worship to defining religious discrimination, equality, and religious organizations, which include churches, funding, education, and the recently much publicized issues of conscientious objection.²²

The major problem with the GDPR and religious communities (organizations) is that the attitude toward religiosity changes, and being religious started (again) to be, but in some other form, somehow unwanted behavior or characteristic that should be hidden from the public sphere. Aggressive secularists demand erasure of religious life from public spaces and want to push religious people, when they are religious, into their private spaces – apartments, houses, organizations, churches, and so on. When they start to 'behave like normal and ordinary' people, they can come to the street again. By being a little bit sarcastic, I want to stress that there is no such thing as being ordinary or normal; all is equally human and/or political. Liberalism and requests to respect diversity should also

20 Doe, 2011.

21 Ibid., p. 15.

22 Ibid.

include the ability to accept others, who think differently than liberals, and also conservatives. Only people who really realize that deep pluralism means that one should accept that in the public sphere there are others who think differently and as such have the right to think so are truly democratic. However, as I have written and discussed several times,²³ there are serious tendencies to remove religion from public spaces, labeling religion as non-neutral and harmful.

Secular constitutions are therefore very practical and do not diminish or do not want to diminish or jeopardise the position or role of religion; they do not presume religiousness of the state. However, secularised constitutions, which lean toward keeping society secularised, tend to have negative attitudes toward religion in order to justify equality; on the contrary, though, they produce circumstances which provide less convincing techniques for the exercise of human rights and freedom of religion.²⁴

All this means that it will be much harder to defend churches and other religious organizations as having specific positions within society; that they are not sports clubs, but rather important social institutions that have historical and public roles, which then have to be protected by the constitution and through political rights with moral and societal value. Religious freedom is not only about the individual right to worship but also living in and through an organized form, which has a special social role. States count on religious activities for social cohesion, humanitarian work, and organization of free time for their members. For example, if children sing in the choir, they will not be on the street and potentially exposed to different forms of violence and harmful behaviors. Therefore, religious communities as organizations have both a historical role and, in many cases and states, a public dimension.

In many European countries, there are various arrangements between states and religious organizations, which vary from having a state church that has a privileged position within society to various agreements that have been stipulated between the religious community and state. The most obvious example is when states enter into a contract with the Holy See, which represents the interests of Catholics in that particular country. The Judeo-Christian tradition and Catholicism are intertwined with the history of Europe through concordats and international treaties. The Catholic Church had a specific role in many countries of the Mediterranean, Central, and Southeastern Europe, which continues to exist today at different levels. In that respect, the position of the Catholic Church is different from that of any other religious organization since it has an international

²³ Savić, 2019.

²⁴ Savić, 2020, p. 267.

entity—the sovereign state of Vatican City,²⁵ which represents Catholics in that jurisdiction. In reality, Catholic churches in EU member states have agreements that are above laws and under the Constitution, since those treaties are treaties between two sovereign states.

The Catholic Church, through its own lenses, is a moral entity, but in real life, it is a legal entity with its own structure organized through Canon Law. All this creates a complicated mixture of norms and rules that have to be followed both in religious and secular (civil) legal systems.²⁶ The Catholic Church is not only an organization *sui generis*, but also *sui iuris*.^{27,28}

For countries that signed agreements with the Catholic Church, if these agreements existed before the country's entry into the European Union, they usually form integral pieces of the respective state's constitutional system, especially if the constitutions themselves contain regulations about the specific position of their state church.²⁹ Taking all this into account, a careful examiner will conclude that privacy issues—when we discuss religious organizations—are sensitive: first, for the special place that religion (still) has among the vast majority of citizens of Europe; second, for the sake of protection of rights that are guaranteed to religious life (people who practice religion); and third, for the fact that church records are of public or archival value. One should understand that there is no personal religious freedom if collective or organizational religious freedom does not exist.

25 There are differences between Holy See and Vatican City State (Città del Vaticano). Regarding territorial issues and memberships in international organization that has more connections with temporal goods and organizational issues, Vatican City State is the entity in charge. However, regarding the position of the Catholic Church in the World, political international relations and diplomacy that is directly connected with sovereign position of the Pope who is supreme ruler of the State, proper usage is The Holy See. For more information, check out: Bajs and Savić, 1998.

26 See; Savić and Škvorc, 2020, pp. 11–12.

27 Ibid.

28 In a general sense, every religion is a legal system. Not all societal norms are norms of (state) legal system or legal norms in the narrow sense of meaning. There are some norms, for e.g., norms of good behavior, non-spitting, etc. that are not punishable by law (somewhere they are) or religious norms (there should be many overlapping), which from secular or private point of view, are rather norms of the specific groups or requests of customary law. However, religious beliefs, commands, and requests are in their essence legal norms of religious groups. Therefore, religion produces norms and people make them an integral part of their existence. There are some views in classical European Kelsenian jurisprudence that express that sanction is necessary part of the legal norm. Even if we consider that religious norm has to have a sanction in order to be a legal norm, we can still find it within the religious framework. The command of love in Christian religions is a norm, sanction exists and at least can be established, but it is not necessary that that happens in this world. For many religious people, life is eternal and sanctions are equally possible after the moment of death as we understand it.

29 E.g. Denmark, Greece, or in specific way Malta. See: Savić, 2018.

4. Hypothetical Case

This short case would, in my view, be the perfect explanation of what could have and has happened in several jurisdictions of Europe, and includes elements of what has been explained in the previous paragraphs of the text.

Ivan, a 21-year old young man born in Zagreb, Croatia, was baptized, as was the usual practice, as a six-month-old infant in the local church of St. Joseph. His parents were devout Catholics and regular attendees of the Holy Mass on Sundays and Holidays. When he was 16, he started to fight with his parents about the reasons why he had to go to church, and about, in his view, the inappropriate behavior of some clergy regarding political activism and activities. Concurrently, the Church was facing serious problems regarding pedophilic scandals, and he decided to stop attending Church services. In subsequent years, he separated himself from the Church and its teachings. When he moved from his parents' house, he decided to visit his local parish priest, a wonderful man who followed him during many days of his youth and he requested his erasure from the Church books as he decided that 'he does not want to be baptized anymore.' His friend Marko, who is a law student graduate told him that that there is the GDPR and that he has the right 'to be forgotten.' His priest, father Mathew told him that he cannot be erased from the church books because Canon Law of the Catholic Church does not accept erasure of sacraments (there are some exceptions in Matrimonial Law), and that the only action he may take is to put annotation on the specific place in the Church registry (book) that baptized person has 'left the Church.' He explained to him that for the Catholic Church '*unum baptisatum, semper baptisatum*'³⁰ cannot be changed. His anger was so strong that he decided to press on various fronts, to have his name erased.

What Ivan and Fr. Mathew did not know that the Church books and Church registries are not only books that belong to the normative order of the Canon Law of the Catholic Church but also that they are public documents containing data for marriage. Therefore, baptism records are important part of that process, same is with confirmations. Church books are not only public books but also part of the mechanism of how the Church works and operates. They are necessary for citizens who are believers, to access verified documents that can then be used to perform religious ceremonies. Religion is not only about spirituality and theology; its work and scope of activities include much paperwork and documentation as a preparation for actual spiritual acts. Therefore, those documents are important for religious life and pressure on them is a pressure on religious freedom. In this case, Croatia has agreements signed with the Holy See. These agreements are a part of the Croatian legal system, which was in place even before Croatia decided

30 Once baptized, always baptized, lat.

to join the European Union³¹. In addition, church documents have historical value, and church history, in all European countries, is part of the history of the nation, regardless of the numbers or percentages of believers.

5. Few words on Dworkin and conflicting rights and values

Just recently, during the IVR Congress in Bucharest³² I realized that the discussion around privacy law, especially the GDPR in regard to religious freedoms, falls perfectly into the discussion of competing rights and values and Ronald Dworkin's Legal Theory. In the age of proportionality, as Kai Möller, Associate Professor of Law, Department of Law, London School of Economics and Political Science clearly points out, it is the notion that competing rights have to be balanced against each other and that Dworkin uses the conceptualization of rights as they are 'trumps' against competing interests.³³ The great value of the research elaborated in Möller's paper is a desire to reconcile balancing as a norm in today's comparative contemporary jurisprudence and having 'trumps' or better 'higher values,' which then, in particular cases, outweigh particular rights.

As will be shown, the strength of Dworkin's theory lies in the substantive moral foundation that it offers – in particular its conceptions of human dignity, freedom, and equality –, but its weakness is the structural account of rights as 'trumps', as evidenced by the fact that despite its fame this idea has never really resonated in legal practice. With regard to proportionality, the opposite picture presents itself: the doctrine does not give any indication as to its moral foundation – which is illustrated by the fact that its most famous theoretical account, namely Robert Alexy's theory of rights as principles and

31 Ugovor o pravnim pitanjima (Treaty on Legal Issues) od 18. 12. 1996. This Agreement was the basis for registration of the legal entities of the Catholic Church into Register which had its place in the Ministry of Administration [Online]. Available at: <https://hbk.hr/ugovor-o-pravnim-pitanjima/> (Accessed: 15 July 2022); Ugovor između Svete Stolice i Republike Hrvatske o suradnji na području odgoja i kulture (Education and Culture Treaty) od 18.12.1996 [Online]. Available at: <https://hbk.hr/ugovor-o-suradnji-na-podrucju-odgoja-i-kulture/> (Accessed: 15 July 2022); Ugovor o dušobrižništvu katoličkih vjernika pripadnika oružanih snaga i redarstvenih službi Republike Hrvatske (Military and Police Treaty) od 18.12.1998 [Online]. Available at: <https://hbk.hr/ugovor-o-dusobriznistvu-katolickih-vjernika-pripadnika-oruzanih-snaga-i-redarstvenih-sluzbi-republike-hrvatske/> (Accessed: 15 July 2022); Ugovor o gospodarskim pitanjima (Treaty on Economic Issues) od 9.10.1998 [Online]. Available at: <https://hbk.hr/ugovor-o-gospodarskim-pitanjima/> (Accessed: 15 July 2022).

32 The World Congress of the Philosophy of Law and Social Philosophy, Bucharest, Romania July 3–8, 2022 [Online] for more see: <https://www.ivr2022.org/> (Accessed: 16 July 2022).

33 Möller, 2017.

optimisation requirements, is a formal theory – while offering a structure that has proven to be so useful that it has become the globally dominant tool of rights adjudication.³⁴

Without going deep into the explanation of Dworkin's theory of rights, it is useful to understand the basic concept of proportionality, which is enriched by his theories, as Möller suggests.³⁵ To the general reader of law, who is not familiar with legal theory or philosophy, this chapter offers a synergic solution that would explain the balancing between rights on the one hand and values (political rights) on the other. Dworkin makes a distinction between constitutional and political rights, and political rights are those connected with morals—we may call them moral rights. Political rights have also been protected by the constitution and that might cause confusion—it seems now that we might have two 'constitutional' rights. In addition, many legal theorists call political rights constitutional rights, which may cause even more confusion.³⁶ To avoid all this, I suggest that we stick to political rights as those rights that belong to the morals and have to be a part of the constitution as they deserve the highest form of protection. Certainly, the existence of states and their functions would also be a prerequisite, which is defined through constitutions themselves—states have the right to exist according to the principles set up in the Constitution.³⁷ Since privacy and religious freedoms may both belong to a group of political rights,³⁸ it means that they both contain more 'power' as 'trumps:' this situation may cause even more confusion. In this case, obviously, the proportionality concept in the 'age of proportionality'³⁹ cannot be solely used, and we need something higher in the hierarchy of norms.

Someone who claims a political right makes a very strong claim: that government cannot properly do what might be in the community's overall best interests. He must show why the individual interests he cites are so important that they justify that strong claim. If we accept the two principles of human dignity that I described in the last chapter, we can look to those principles for that justification. We can insist that people have political rights to whatever protection is necessary to respect the equal importance of their lives and their sovereign responsibility to identify and create value in their own lives.⁴⁰

34 *Ibid.*, p. 2.

35 *Ibid.*, p. 3.

36 *Ibid.*, p. 4.

37 See Guastini, 2016, pp. 149 et seq.

38 For Dworkin, otherwise constitutional rights defended by constitutions.

39 This is Möller's reference to the title of Alexander Aleinikoff's influential article 'Constitutional Law in the Age of Balancing', *Yale Law Journal*, 96(5) pp. 943.

40 Dworkin, 2013, p. 32; Möller, 2017, p. 5.

Dworkin says that there are some rights that overrule or outweigh other rights and rules; some individual rights, he states, are extremely important and intrinsically connected with human existence and dignity that cannot be put aside. Based on this notion is the concept of dignity that ‘justifies the extraordinary force of rights⁴¹ to ‘block policies that might further the community’s overall best interests.’⁴² This means that some rights have to exist even if they are contrary to countries’ (or societies’) best interests (at the particular moment). In this respect, only those rights are constitutional, not as part of the constitution, but as those that have to be protected by the constitutions. All constitutions.

Now that all the terms are clear, we must find a common wording that will address the major characteristics of political (moral) rights, which must exist. The key word is human dignity, which under Dworkin’s perception has two major components: a) the principle of intrinsic value (equality principle) and b) the principle of personal responsibility (liberty principle)⁴³. The principle of intrinsic value ‘declares the intrinsic and equal importance of every human life’ and the principle of personal responsibility ‘holds that each person has a special responsibility for realizing the success of his own life, a responsibility that includes exercising his judgment about what kind of life would be successful for him.’⁴⁴ As stated, discrimination and genocide are clear examples of the first principle,⁴⁵ and forcing someone into religious practice is an example of the second.⁴⁶ Regardless of the fact that Dworkin went too far into underlying individual rights over collective rights (and duties), there is inevitable value in his theory with regards to placing human dignity into the center of political (moral) rights and constitutional rights that ‘must be.’

When we encounter privacy rights and the right to worship freely, which includes the right to belong to an organized religion and access religious services and ceremonies, and the rights of religious communities to organize their life freely, then religious rights, in my view, according to Dworkin, must be treated as political rights. As stated before, religion forms an essential part of a human being, so important that people have been ready to face persecution and even death in order to protect their religious beliefs and the existence of their religious life. We have to be aware that history is full of religious persecutions, and this is the reason why religion is protected by constitutions throughout the world. Jeopardizing religious life is always a dangerous affair. Historically, privacy laws came into our codes much later, and perception of privacy, especially of questions concerning the GDPR, also came much later in legal history.⁴⁷

41 Möller, 2017, footnote 34; Ibid.

42 Ibid.

43 Ibid.

44 Ibid. and Dworkin, pp. 37, 10.

45 Ibid. and Dworkin, p. 37.

46 Möller, 2017, footnote 34, p. 5.

47 Diggelmann and Cleis, 2014, pp. 441–458.

At the same time, balancing between privacy law and religious rights would be possible in specific circumstances that do not include the political rights of citizens and communities. For instance, a clash between privacy of religious life and security exists if religious services are used for criminal offenses, but then again surveillance would not be possible in case of confessional secrets, and so on. It is important to determine whether one right has a higher moral value than another right. In this case, we must use a political rights doctrine. If that is not the case, and if the rights are the same, then we must use balancing and proportionality. That is the case if we consider public safety (which is connected with existence of the state itself) as a core constitutional norm which then has to be balanced with religious freedoms.

My major concern with Dworkin's theories is that he does not give enough attention to the collective and political rights of a community. Without community, there could not be a democracy. If the community is endangered, the rights of individuals will also be in a state of distress. In that respect, I will extend the use of political rights to the state as a political body that needs to have its roots and pillars of existence. In that case, not only is public order (also as a proper operation of all three functions) of the state important, but public morals are also necessary to achieve social cohesion, which is necessary for the state to exist.

Therefore, Dworkin's claims that 'while it is acceptable for the state to force people to live with collective decisions of moral principle (for example to refrain murdering), its laws must remain neutral between competing ethical ideas.'⁴⁸ In my view, this is incorrect since moral principles arose from ethical ideas and formed the foundational framework of a particular society, and which, even in the most rigid conventional solution, have the rights on the Margin of Appreciation basis. Dworkin rejects 'moralism' and 'deep paternalism' as impermissible⁴⁹, but then again sets his own standards and does not allow stratifications in which some moral ethical stands of the state could stay and be beneficial for society. Dworkin also imposes his own set of values when discussing which paternalistic rules are acceptable and which are not. The example of 'impermissible legal paternalism [where the state imposes its own preferred set of ethical values on a person in order to improve that person's life] has to be distinguished from (permissible) superficial paternalism (which aims to help people achieve what they actually want) which is found, for example, in seat-belt laws.'⁵⁰ The problem is that he is not able to understand (who is?) what people really want, and this is his other self-creation.

In addition, Möller's claim that, for instance, even laws that are not coercive may violate the second principle (liberty) by hanging the Ten Commandments on the classroom's wall,⁵¹ are false, since his and Dworkin's view does not take into account the collective nature of law, by taking a historical and developmental

48 Möller, 2017, footnote 34.

49 Ibid.

50 Ibid. and Dworkin, 2013, pp. 37–38, 73–74.

51 Ibid.

approach that makes law a synthesis of historical developments and the current needs of society. By using this narrative, Dworkin and his followers⁵² do not see that even his views are worldviews and as such are not neutral.⁵³ I think Dworkin did not pay much attention to the notion that some collective rights are essential for individual rights, on which he has majorly focused.

Despite all those differences, I believe that there is value in Dworkin's work and pointing at specific political rights that have to be within the constitution—religious freedom is one of those political rights (although I am not sure Dworkin would like it to be); contrarily, the state as a political entity has to protect those rights that make the very essence of its structure and form, through public order and public morals. Therefore, rules for the GDPR have to be observed through these lenses in order to protect specific individual freedoms as well as the structure and functioning of the state. In summary, combining the teaching of conflicting rights together with the value-based approach of political rights, we are thriving within the specific field of balancing through which we might find the way to protect both – individual and collective rights, rights which are both essential for the functioning of the modern democratic state.

6. Conclusion

Balancing is the key mechanism of contemporary Western law, through which it is possible to shape a just society in which specific values have their deserved position. Individual liberty today is guaranteed by various legal instruments and mechanisms that prevent penetration into private life more than is absolutely necessary for the reasons of securing public order, morals, and security. This is safeguarded by laws, by-laws, and international instruments such as the GDPR. However, as is the case with all rights, individual rights that arise from privacy also have to be observed through the scope of the legal system as a whole. In that system, which must be coherent with other rights that exist, the application of one right sometimes clashes with the substances of other rights. This is the exact situation with religious rights that are protected on both national (constitutional) and supra-national/international levels. Religious freedoms contain both an individual element that guarantees private worship and belief, and its equally important companion, organizational liberty, which guarantees that religious communities (organizations) have the capacity to organize themselves and operate freely. Religious freedoms are essential rights; therefore, this article

52 Ibid. Although Möller finds this unfortunate for Dworkin for his '...commitments to create an opposition between rights and the community's well-being.' p. 8.

53 See Puppinc, 2011; J. H. H. Weiler's final argument, delivered in front of the European Court of Human Rights in *Lautsi v. Italy* [Online]. Available at: <https://www.youtube.com/watch?v=ioylyxM-gnM> (Accessed: 16 July 2022).

uses Dworkin's legal theory to underline that religious freedom rights fall in the group of the most important constitutional and political rights from which nobody can be deprived. Although when formulating this theory, Dworkin himself probably meant other rights as the most important to protect, by using his narrative, one can explain that religious rights for historical and moral reasons constitute the most important body of law that has to be protected. In addition, in clashes with privacy rights, priority must be given to religious freedoms. However, the public order and security of all citizens must be taken into account, and used as corrective tool.

As stated, the collective nature of law, which has historical and developmental elements, requires looking at it as a synthesis of historical developments and the current needs of society, in which common values cannot be overpowered by the will of individuals. Certainly, as Dworkin correctly said, there are rights that have different or 'higher' values and must be protected by all means. The difference might only be with regard to which rights society places more value on.

The article aimed to elucidate that religious rights of individuals and freedom of religion, which also guarantees and include freedom to religious communities and organizations, must be protected in harmony with the GDPR that assures privacy, which is important for the democratic life of contemporary European citizens. Privacy laws and religious freedom can indeed go hand-in-hand and coexist in the same legal system. Using the GDPR to harm religious organizations that someone does not like anymore or dislikes for some reason should not be permitted. Certainly, the GDPR has to be applied whenever religious community organizations enter into private contracts with citizens: then specific provisions of the GDPR work well.

In summary, churches and religious organizations have specific and special positions within European societies for numerous reasons. Religious life is protected by national laws, and freedom to worship freely has been articulated in many constitutional texts. Various international conventions protect religious life, notably Article 9 of the European Convention of Human Rights and Article 10 of the Charter of Fundamental Rights of the European Union. A special position of the Catholic Church exists in many countries where the right of the Catholic Church and its relations with the state are regulated by specific agreements stipulated with the Holy See, an entity of International Law. At the same time, numerous agreements have been made with other religious communities, and in some countries, there are state churches that share specific and sometimes privileged positions within society. This has made religious life a very delicate area of social existence and legal protection. Concurrently, on a more theoretical level (as a result of reflections on Dworkin), this article shows that there are some rights that deserve to be additionally and unconditionally protected, and it has been shown that those rights are the rights of religious communities.

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