In Good Faith

Freedom of Religion under Article 10 of the EU Charter

Edited by
Jakob Gašperin Wischhoff & Till Stadtbäumer

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ON MATTERS CONSTITUTIONAL

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Content

Jakob Gašperin Wischhoff & Till Stadtbäumer
In Good Faith: Freedom of Religion under Article 10 of the EU Charter 9

Ronan McCrea
Justifiable Caution: The Approach of the Court of Justice to Religion in the Context of Rapid Change 23

Martijn van den Brink
When Caution is Justified: The EU Court of Justice and the Right to Be Free from Religious Discrimination 35

Andrea Pin
Playing with Fire: Religious Freedom, Civil Society, and State Neutrality in the EU Court of Justice 49

Kristin Henrard
Article 17 TFEU as a Gateway to National Sovereignty Creep: The CJEU's Broad Margin of Appreciation of Freedom of Religion 61

Erica Howard
Headscarves and the Wrong Balance: Neutrality and Business v Freedom of Religion and Non-Discrimination 77

Maria Francesca Cavalcanti
Beyond Religious Freedom: Rethinking the Protection of Religious Minorities in Europe 89

Paul Blokker
The Battle over the Sacred and the Profane: The Increased Contestation of Reproductive Rights in Europe 101

Peter Bußjäger
Compulsion to Freedom: The Austrian Headscarf Ban and the Political Elephant in the Room 115

Michael Lysander Fremuth
Lifting the Veil? Oops, They Did it Again: On the Headscarf Ban for Schoolgirls in Austria 127

Lucy Vickers
The Fragility of Proportionality Review: Egenberger Revisited 143

Matthias Mahlmann
Winning by Losing: The Egenberger Decision and the Reconfiguration of Religious Freedom in Germany 153

Hans Michael Heinig & Frank Schorkopf
Religiously Sensitive Union Law in Fundamental-Rights Pluralism: Egenberger Strengthens Both, Corporate Religious Self-determination and EU Law 171

Mattias Wendel & Sarah Geiger
Fundamental Rights Pluralism with an Element of Surprise: Solange in Egenberger 187

Jakob Gašperin Wischhoff, Till Stadtbäumer

In Good Faith

Freedom of Religion under Article 10 of the EU Charter

Debates over the role of religion in contemporary European constitutional orders have increasingly shifted from the national to the European level, placing EU law and the jurisprudence of the Court of Justice under sharper scrutiny. While concrete expressions of the freedom of religion largely remain within the ambit of the variable regulatory frameworks of the Member States, the EU Charter, the Treaties, and secondary law – predominantly concerning the prohibition of discrimination in the workplace – are substantially influencing and curtailing their scope of discretion. Accordingly, EU jurisprudence collides with and shapes questions of religion, concurrently generating resentment and contestation both among progressive liberal narratives demanding stronger equality rights and among more traditionalist movements expecting greater room for national margins and the role of religion therein.

Nonetheless, the EU is far from absent in this picture and plays an important role as an external corrective or supervisory actor. In our view, despite imperfections in the CJEU's case law, the external and differentiated role of the Court and of EU law can challenge claims of self-referential sufficiency. EU law provides a mirror and necessitates a dialogue in which these convictions are tested and, where necessary, redefined. The fact that religion's role in societies is a sensitive field, closely intertwined with tradition and historical developments in the Member States, does not shield these matters from this dialogue, but rather reinforces the need for it.

The contributions to this edited volume seek to situate the role of the CJEU and its jurisprudence within this context. They either welcome the Court's generally deferential approach to the role of religion in the Member States or warn that the CJEU

plays with fire in assuming that a single Luxembourg-approach can simultaneously deliver justice across Europe's highly diverse and non-homogeneous legal and social landscapes.

The latest developments and the right balance

Beyond several general contributions on the changing role of the CJEU in matters of freedom of religion, this edited volume analyses and elucidates some of the most recent and significant developments in this field. In particular, it examines, from highly diverse perspectives, Austria's latest prohibition on headscarves in schools for Muslim girls under the age of 14, scheduled to enter into force in September 2026.[1] This legislation has been justified on the grounds that such a prohibition ostensibly promotes social integration and gender equality and prevents "familial or societal pressure [on Muslim girls] to wear certain clothing, which could have negative developmental and psychological effects"[2].

In addition, the edited volume critically examines how the CJEU's *Egenberger* judgment (C-414/16) decisively changed the relationship and oversight of the Member States and their religious communities. Specifically, it explores how the CJEU's interpretation of the prohibition of discrimination in the workplace has prompted the German Federal Constitutional Court (FCC) to amend and progressively evolve its control and review of the constitutionally guaranteed right of churches to self-determination.[3] Following the CJEU's approach, the FCC changed its decades-long practice and determined that occupational requirements imposed by the church on the employees must plausibly be linked to tasks and activities involved, thereby differentiating the categories of employment. In other words, a

church gardener does not necessarily need to belong to a particular religious denomination. Moreover, the courts must review these requirements to ensure they are proportional and thus subject to civil judicial scrutiny.

The FCC's *Egenberger*[4] decision of November 2025 shows how timely and relevant the questions of religious freedom in the EU are, particularly in light of the shared and constitutionally multilevel framework of several fundamental rights systems interacting in a complex equation.

Freedom of religion in the EU

Freedom of religion, one of the cornerstones of liberal constitutional democracies, cuts both ways. Conceived as a right of religious self-determination, it exerts a remarkable influence on liberal constitutional frameworks, successfully carving out space for its reservations. The *Egenberger* decision underscores the significant weight attached to the collective dimension of freedom of religion vis-à-vis the prohibition of discrimination. At the same time, freedom of religion is frequently curtailed under the pretext of neutrality, masking covert prejudice or paternalistic attempts to force individuals to be free.[5] The recent Austrian example discussed above demonstrates this tension well.

Given the explicit neutrality carve-out under Article 17 TFEU, EU law finds itself between a rock and a hard place. While the Union protects against discrimination and directly legislates on equal treatment in employment, this inevitably challenges Member States' prerogatives regarding the appropriate scope of freedom of religion, a particularly sensitive area.

The edited volume *In Good Faith* revisits recent case law in an effort to reconcile the dual nature of religious freedom from

an EU law perspective. It examines the reciprocal relationship between freedom of religion and other fundamental rights, exploring how the former may impose limitations on the latter and, conversely, how these rights can constrain freedom of religion.

Dual dynamics of freedom of religion - equality and liberty

Religious freedom, constitutionally protected in all EU Member States and enshrined in Article 10 of the EU Charter, remains deeply contested. The extent of this right and the relationship between state and religion differ across the Union. On the one hand, (formerly) dominant religions continue to enjoy privileges in many states – primarily based on their autonomy as religious communities, and often in tension with other rights. On the other hand, individual freedom of religion, in particular the wearing of religious symbols by Muslims, is readily restricted, selectively justified by appeals to neutrality,[6] customer preference,[7] or abstract notions of *vivre ensemble*.[8] Conflicts around religious freedom are intensifying as right-wing and conservative movements increasingly invoke Europe's Christian heritage, framing migration and Islam as perceived threats.[9]

In its headscarf jurisprudence, the CJEU has adopted a restrained approach, granting Member States a wide margin of discretion. The CJEU interprets freedom of religion primarily in the context of equality, rather than as a liberty-right. As long as neutrality requirements apply to all employees, they are not deemed to disproportionately restrict religious freedom. This reasoning neglects the extent to which these restrictions interfere with the beliefs of the individual and disproportionately affect Muslim women.

With respect to religious employers, the CJEU has adopted stricter scrutiny, requiring national courts to assess whether occupational requirements are "genuine, legitimate and justified", and "necessary and objectively dictated".[10] This has narrowed the scope for denominational employers to discriminate, i.e. dismiss or hire persons, on grounds of belief. Nevertheless, religious communities continue to invoke their autonomy and right to self-determination to justify arguably discriminatory practices,[11] as indicated by the latest *Egenberger* decision by the German FCC regarding church membership as a prerequisite for employment.

Like all fundamental rights, religious freedom must be carefully balanced against intersecting and competing rights and principles – equality, access to justice, state neutrality. Given the diverse understandings of religion across Member States, the CJEU has largely granted Member States discretion in religious matters while establishing only minimum standards. However, this judicial restraint rendered the Court's interpretation of religious freedom somewhat one-dimensional, overlooking its broader implications for equality, societal diversity, secularism, and the role of religion in secular democratic states. Such a narrow framework risks overlooking the complex interplay between religious rights and other fundamental principles of liberal democracies.

This edited volume sheds light on the dual dynamics of religious freedom in Europe: both the restrictions imposed upon it and those justified in its name. It explores how religious freedom is invoked to undermine rights such as non-discrimination and reproductive autonomy, and how, conversely, individual religious freedom is curtailed by state or societal norms.

Between meaningful boundaries and disregard for pluralism

In cases concerning religion in the workplace, the CJEU's generally assertive stance in anti-discrimination law aligns with its general deference to questions about religion's role in society. **Ronan McCrea** analyses how the Court addresses this tension by setting wide but meaningful boundaries for Member States. Although this approach has been criticised in the past, McCrea explains why it constitutes a prudent and defensible choice in light of the existing legal framework and the evolving religious landscape in Europe.

Martijn van den Brink responds to McCrea and argues that the Court's cautious case law on religious dress requirements cannot be justified and reveals troubling attitudes toward Muslim women that have no place under anti-discrimination law. In his view, the CJEU's approach legitimises the exclusion of Europe's Muslim population from important aspects of daily life – which is rather a sign of cowardice than of caution.

Similarly, **Andrea Pin** argues that, in the name of anti-discrimination and neutrality, the CJEU risks undermining religious freedom in ways that are particularly detrimental to Muslim minorities – both by feeding into identity politics and by advancing a liberal narrative that frames restrictions as necessary to protect women's rights and non-discrimination. He is starkly critical of how the CJEU disregards the profound diversity of church-state relations and neglects the differing social positions occupied by religious communities across Member States. He explicates why the CJEU's approach is structurally ill-suited to the realities it seeks to address.

Additionally, **Kristen Henrard** also highlights the negative effects on religious freedom for Muslim women. Her piece analyses how the Court's approach differs in its scrutiny. In cases of religious slaughter and headscarves at work, the Court has been largely deferential and arguably hides behind a broad margin of appreciation. The low level of scrutiny adopted in these cases does not augur well for the protection of fundamental rights.

Headscarf jurisprudence and the contested balance

In its jurisprudence in the headscarf cases (*Achbita* (C-157/15), *Bougnaoui* (C-188/15), *Wabe and Müller* (C-804/18 and C-341/19), *LF* (C-344/20) and *OP* (C-148/22)), the CJEU has taken a largely deferential approach, emphasising neutrality as a legitimate aim, derived from the freedom to conduct a business for private entities and the principle of neutrality for public bodies. The CJEU thereby provided little protection for freedom of religion and overlooked broader implications for equality and societal diversity.

Accordingly, **Erika Howard** argues that the CJEU struck the wrong balance in the headscarf cases. The Court overemphasised neutrality while neglecting the implications of a *de facto* headscarf ban for individuals and society. Moreover, she criticises the Court's failure to engage with indirect discrimination based on grounds of sex or race (Article 21 of the EU Charter) or with the possibility of intersectional discrimination.

Prohibitions on wearing religious symbols affect minorities in particular. **Maria Francesca Cavalcanti** shows how the constitutional architecture of religious freedom and non-discrimination proves insufficient to capture the specific vulner-

abilities and identity-based claims of minority communities. In her view, protecting minorities demands more than balancing rights. It requires recognising the specific forms of vulnerability produced by their social and constitutional position.

On a more general level, **Paul Blokker** highlights the European struggle over the sacred and the profane. While not an entirely new phenomenon, the intensity seems to grow considerably. In his view, increasingly well-organised radical-conservative actors actively use liberal-democratic instruments to advance their claims in domestic and European political and legal arenas.

Forced to be free

Concerning the recently renewed prohibition of headscarves for Muslim pupils in Austria, proponents describe it as a "clear commitment to gender equality" and a step toward "empowering girls".[12] In 2020, however, the Austrian Constitutional Court had already declared a similar headscarf ban in schools unconstitutional.[13] **Peter Bußjäger** analyses how the new prohibition attempts to comply with the standards set by the Constitutional Court. Although the legislator has been largely successful in this regard, two crucial aspects seem to have been overlooked: the resulting stigmatisation and the underlying patriarchal structures. By contrast, **Michael Lysander Fremuth** supports the prohibition. Given the increasing number of reports from teachers and sociologists that girls lack autonomy and *de facto* freedom to determine their own identity, and considering the need to combat radicalisation and promote integration, he argues that these societal changes

may prompt the Court to reassess and adapt its jurisprudence accordingly.

Egenberger and the limits of self-determination of churches

The edited volume concludes with an analysis of the *Egenberger* decision by the German Federal Constitutional Court (FCC), a decision that was eagerly awaited. While the FCC avoided a looming conflict with the CJEU and affirmed a shared conception of fundamental rights, the decision offers numerous points for debate.

Lucy Vickers assesses the proportionality review employed in balancing the right to self-determination with individuals' right to equality and non-discrimination. The fact that two courts could consider the same facts and reach opposite conclusions without either seeming to have misapplied the law shows how flexible the proportionality review can be. In her view, this flexibility is a great strength, allowing decisions of nuance and fact sensitivity, but also a significant weakness, demonstrating the fragility of the protection against discrimination on grounds of religion and belief in EU law.

Furthermore, **Matthias Mahlmann** analyses the decision and explains how the FCC changed its praxis, from now on requiring that occupational requirements imposed by the churches must have a direct link with the tasks in question. He argues that the FCC not only strengthens equality and non-discrimination but also reinforces the protection of religious freedom itself. In this light, the decision constitutes a substantial, constitutionally well-justified, fundamental-rights-friendly, and welcome shift.

Additionally, **Hans Michael Heinig** and **Frank Schorkopf** also welcome the FCC's decision, although for different reasons. They analyse how the right of self-determination of churches was affirmed, while the FCC strengthened at the same time the normativity of Union law within the German legal order.

Finally, **Matthias Wendel** and **Sarah Geiger** show that the *Egenberger* decision is not only about church labour law but also touches on fundamental issues in the interplay between national and European constitutional law in a multilevel system. While the FCC prevented unnecessary conflict with the CJEU through a balanced, conciliatory, and nuanced approach, they contend that the decision introduces an unwelcome reservation. By reasserting the possibility of national constitutional review of EU law with respect to individual fundamental rights under the *Solange*-doctrine, the FCC once again claims the authority to potentially disregard the primacy of EU law.

With numerous cases currently pending before the courts across the Member States and a wide range of scholarly perspectives on the role of the CJEU in relation to freedom of religion and its associated rights, the issue of freedom of religion remains more pertinent than ever. It appears that the questions addressed in this edited volume are far from settled, and debates over the appropriate balance among these conflicting fundamental rights are likely to continue in the foreseeable future.

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Ronan McCrea

Justifiable Caution

The Approach of the Court of Justice to Religion in the Context of Rapid Change

The *Egenberger* case (C-414/16) neatly illustrates the tensions underpinning the approach of the Court of Justice to the question of religion in the workplace. Cases in this area bring together two areas of law in which the CJEU has taken markedly different approaches. This has left the Court torn between following its generally assertive approach in relation to discrimination in the workplace and its generally deferential approach in relation to questions around religion's role in society. The result has been an approach that has accorded more leeway to Member States than in other areas of workplace discrimination, while also using discrimination law to set down parameters that place some limits on the choices that Member States can make in how they regulate religion's place in their societies. While this caution has been heavily criticised, in the context of the inevitable uncertainty produced by rapid and unprecedented religious change in Europe, it is the most prudent and politically sustainable approach for the time being.

Employment discrimination and freedom of religion

In relation to employment discrimination the Court has a long history of dynamic and bold interpretations of EU law. As far back as the 1970s, in cases like *Defrenne* (Case 43-75), the Luxembourg judges interpreted the principle of equal pay for equal work in an adventurous fashion that revolutionised the approach to the equality of men and women at work as well as pushing forward the process of European integration. This adventurousness has persisted into later decades in cases such as *Mangold* (C-144/04) where the Court showed a notable willingness to push the boundaries of interpretation in order to promote the principle of non-discrimination.

In relation to religion, however, a notably different approach has been evident. In the early decades there were few cases of note and religion usually appeared only as an incidental factor on cases that turned on other elements.[1] But even during the past fifteen years when cases more directly focused on religion (religious symbols at work,[2] ritual slaughter,[3] time-off for religious observance,[4] ethos-based discrimination[5]) came before the Court, greater caution has been detectable, even in the context of employment discrimination where elements of the Court's case law pull it in a more interventionist direction.

The CJEU has been notably keen to give Member States considerable leeway to regulate issues relating to religion's role in society (including individual and collective religious freedom), particularly when dealing with cases that include elements that touch on issues related to the political hot button of multiculturalism. I will suggest that this caution on the part of the Court of Justice about its ability to use its interpretative powers to identify and impose ideal, Union-wide solutions to the difficult issues that arise in relation to the place of religion in contemporary Europe is the correct approach, for both textual and pragmatic reasons.

Deference to Member States choices

Just how deferential has the Court been? The desire to interpret EU law in order to give Member States leeway to pursue different approaches in contentious areas has certainly been a feature. For example, the Court has permitted bans on the wearing of religious or philosophical symbols at work (*Achbita,* C-157/15) while also making it clear that Member States are also entitled to facilitate the wearing of such symbols

if they so choose (*Wabe and Müller,* C-804/18 and C-341/19). It has also declined to interfere with prohibitions on religious slaughter (disregarding the advice of the Advocate General who urged a more interventionist approach).[6]

This caution has been subject to significant criticism. Much of this is understandable. It is undeniable that principles such as secularism or neutrality have been used by those who have exclusionary agendas. It is also the case that for many adherents to faiths, such as Judaism and Islam, that place greater emphasis on worn symbols, neutrality rules can present more of a challenge than they do for most Christians. In addition, given that religion often overlaps with racial and ethnic identities and that in many cases the relevant religious symbols are worn by women, there is the additional factor of potential discrimination on grounds of race and sex as well as religion.

In these circumstances many have expressed disappointment that the Court has not been more protective of religious freedom and freedom from discrimination on grounds of religion or belief. Both Spaventa[7] and Weiler[8] were notably critical of the failure of the Court to engage in a more searching analysis of the proportionality of laws restricting religious symbols and their impact on religious individuals.

Textual reasons for a cautious approach

In contrast, there are powerful reasons pushing against the Court from acting in a more assertive fashion in this area. Textually, Article 17 of the TFEU gives a clear steer to the Court of Justice. The Article states that "[t]he Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States". Thus,

the Treaty is clear that there is no single model of relationships between religion and state required by European Union membership. There must, of course, be limits to such Member State discretion. The manner in which the accession criteria have been applied indicates that a full-blown theocracy cannot join the Union.[9] But significant diversity is acceptable, something that is unsurprising given that the states who drafted and signed the Lisbon Treaty have arrangements that range from recognition of an official state religion to official separation of religion and state. That does not mean that religion and state relations will be entirely unaffected, as the Court of Justice (para. 58) and German Federal Constitutional Court made clear in *Egenberger*.[10] What Article 17 TFEU requires is that Member States' right to have different constitutional arrangements in relation to religion be taken into account by the CJEU in interpreting EU law, not that EU law may not in any way affect how Member States deal with religion (para. 246).

Broader reasons for a cautious approach

Beyond the text of the Treaty, there are other powerful reasons for the Court to be modest in its perception of its ability to identify ideal models or universally applicable approaches to religion in the different Member States. Not only, as already noted, have Member States always taken different approaches to these issues. It is also the case that in many Member States, the situation is highly fluid with significant societal changes prompting intense political debate and significant legal and political changes in the regulation of religion's role in society.

In relation to religion, Europe has undergone a number of major changes in the past half century any one of which would

have been sufficient to produce endless unforeseen consequences. After many centuries during which a very large majority of Europeans were believing Christians, levels of religious practice and belief suddenly collapsed in most EU Member States in recent decades. As I have written elsewhere: "[F]or centuries, most Europeans went about their day to day lives believing they were being observed and judged by the Christian God. Most no longer do. The scale of changes that that will bring about can only be imagined."[11] There has also been a revolution in terms of norms around sex, sexuality and gender which are challenging for most traditional religions.

The decline in Christian belief and practice has been accompanied by an unprecedented growth in non-Christian communities, with Islam being by far the most numerically important of these. In many countries the longstanding contest between Christian and secular influences has now become a multiparty contest with other religions, particularly Islam, playing a notable role. As Shadi Hamid has noted, Islam has its own rich intellectual and historical traditions.[12] While European Christianity has, overall, followed a pattern of declining levels of belief and practice, and eventual embrace of the notion of the secular nature of law and politics, as Hamid points out, there is no reason to suppose that Islam in Europe will follow this path. Indeed recent data from France suggests the opposite is the case.[13]

In short, we do not have a large store of precedents for how changes of the magnitude that Europe is undergoing are successfully managed. Indeed, it is notable how, in recent times, there has been significant instability in the approaches of a number of states with governments switching between more multicultural approaches that take a favourable approach to the

maintenance and expression of minority identities (including religious identities) and more integrationist approaches, closer to the French model of discouraging religious expression in certain areas.

In this context, and given that most of the religion-related cases before the Court of Justice involve legislation (Directive 2000/78) that is subject to unanimity in the Council and therefore effectively almost unamendable, it is understandable that caution and providing some leeway to Member States has marked the judges' approach. In a context of such uncertainty and rapid change it would require a remarkable degree of self-confidence for the members of the Luxembourg court to decide that they had the necessary wisdom to use their powers to interpret EU law in a way that sought to resolve longstanding and fast shifting disputes between those who see religious diversity as best managed through facilitating religious expression and those who take the opposite view and regard coexistence as best served by curtailing such expression in some contexts.

Limits to CJEU deference

Notwithstanding its overall caution, the Court has not been entirely deferential. It has been clear that any bans on religious symbols at work must be comprehensive and avoid targeting the symbols of any particular faith (*Achbita*, para. 40 and *Bougnaoui*, C-188/15, para. 32-33). It has required concrete justification for such restrictions rather than abstract reasons (*Wabe and Müller,* para. 65). It has also made it clear that compliance with customer preferences cannot be seen as a "genuine and determining occupational requirement" that could justify direct discrimination (*Bougnaoui*, para. 40). The Court of Justice has

therefore married the granting of considerable leeway to Member States with a degree of supervision that rules out openly discriminatory targeting of particular faiths.

As previously noted, the reluctance to set down meaningful restrictions on Member State autonomy is less pronounced in cases that are more remote from the politically-charged scenarios where issues of religion, integration, and multiculturalism are key features. Thus, in *Egenberger* (C-414/16), where the issue was the scope that religious employers can be given to engage in ethos-based discrimination, the Court of Justice made its position clear. It held that the previous approach, taken by German law of allowing religious employers to determine for themselves, subject only to plausibility review, whether a particular role needed to be subject to a religious affiliation test, was incompatible with EU law (para. 59). The Court justified this conclusion on the basis that Directive 2000/78, which it held to be a codification of the general principle of non-discrimination, required that religious affiliation tests (as well as requirements of loyalty to the ethos of a religious employer in *IR,* C-68/17) needed to be shown to be proportionate in the context of the nature of the post in question and its proximity to the religious mission of the religious body.

As this ruling significantly affected the constitutional protection of the self-determination of religious bodies under the German Constitution (the Basic Law), it was notably controversial. Indeed, the controversy extended to calls for the German Constitutional Court to declare the CJEU's ruling *ultra vires*. However, the eventual ruling of the Constitutional Court has continued the delicate dance between the maintenance of meaningful protections from discrimination by the Court of Justice with the according of significant leeway to Member

States to follow their own path in religious matters. The Karlsruhe judges agreed to meaningfully alter pre-existing approaches to religious autonomy to ensure that there is an objective link between a religious affiliation requirement and the tasks involved in any particular role and that an overall assessment of the proportionality in which religious autonomy rights and employee rights to equal treatment are balanced. At the same time, the Constitutional Court maintained much of the previous approach of German law by upholding the central importance of the religious body's own perception of the requirements of its ethos. This, as Matthias Mahlmann has noted, involves a degree of "pluralism of fundamental rights" which amounts, in effect, to a kind of "margin of appreciation" in the application of EU legal norms in this area.[14]

This is an approach that will disappoint many. Those keen on upholding broad notions of religious autonomy and the ability of religions to constitute communities of the faithful, will be disappointed by the use of EU legal norms to curtail that autonomy. Those who see facilitation of religious expression (or as others see it, adherence to religious norms) as clearly the best path to follow in multicultural societies are also no doubt disappointed that the Court of Justice has not required Member States to adopt this approach. But, in the context of the high levels of change and uncertainty that characterise matters of religion in contemporary Europe, the approach of the Court of Justice of setting wide but meaningful boundaries on Member State autonomy in this area may represent the most politically sustainable and wisest approach for the time being.

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Martijn van den Brink

When Caution is Justified

The EU Court of Justice and the Right to Be Free from Religious Discrimination

Little EU Court of Justice (CJEU) case law has been as fiercely criticised as that relating to the right to be free from religious discrimination.[1] However, the CJEU recently found a sympathiser in Ronan McCrea.[2] He argues that, given "the inevitable uncertainty produced by rapid and unprecedented religious change in Europe, it is the most prudent and politically sustainable approach for the time being". In his view, the approach is one of "justifiable caution".

Despite my disagreements with him, I believe that we must take McCrea's position seriously. If we do so, we may be able to develop a more fine-grained view of when caution is warranted. McCrea rightly brings together two strands of case law that are all too often discussed disjointly. In *Egenberger* (C-414/16) and *IR v JQ* (C-68/17), on the autonomy of churches and other religious employers, the CJEU construed the right of religious employers to discriminate fairly strictly. In contrast, in *Achbita* (C-157/15), *Bougnaoui* (C-188/15), *Wabe and Müller* (C-804/18, C-341/19), *L.F.* (C-344/20), and *Commune d'Ans* (C-148/22), concerning the right to wear religious dress in the workplace, the CJEU construed the right of public and private employers to discriminate broadly. Provided that a prohibition to wear the Islamic headscarf is part of a "neutrality policy" that bans any manifestations of religious, philosophical, and political beliefs at work, it is likely justified. Indeed, as McCrea notes, the cases on religious discrimination "bring together two areas of law in which the CJEU has taken markedly different approaches".

While I have taken the view that the less cautious case law on the autonomy of religious employers can be justified and that the more cautious case law on religious dress requirements cannot be,[3] I believe that McCrea's position is not without

merit. At the same time, I still firmly believe that the case law on religious clothing reveals deeply troubling attitudes toward Muslim women that have no place under anti-discrimination law. In this contribution, I will attempt to reconcile these apparent opposites by offering a more nuanced understanding of when caution is justified.

Where should caution end, and where should it begin?

Any plea for judicial deference invariably raises the question of how much of it is justified. In other words, where should caution begin, and where should it end. In this respect, McCrea's position raises difficult questions about EU fundamental rights and anti-discrimination law. He is right that, as regards religion's role in society, "Member States have always taken different approaches [...] [and that] in many Member States, the situation is highly fluid with significant societal changes prompting intense political debate and significant legal and political changes". However, it also seems right that religion is not unique. Europe has witnessed equally significant legal and political changes in relation to the position of sexual minorities.

As a result, his analysis raises the question if judicial caution must end with religion or be extended to sexual minorities and perhaps also the rest of EU anti-discrimination law. For example, what about the obligation to recognise same-sex marriages validly entered into in other Member States? Should the Court reverse its decisions in *Coman* (C-673/16) and *Trojan* (C-713/23), and show greater respect for the national identities and traditions in Member States that have not legalised same-sex marriage? And what about discrimination on grounds of sexual orientation, which is covered by the same

Directive as religious discrimination. Was the Court wrong to decide that anti-discrimination law is violated when a company refuses to hire or renew a contract with someone who is gay?[4] The CJEU does allow companies to engage in such practices vis-à-vis Muslim women, provided that they cloak their practices in "neutral" terms.

Having just published *The End of the Gay Rights Revolution*, McCrea likely has thoughtful answers to the questions I just posed.[5] However, this does not alter the fact that the case law on the position of sexual minorities raises very similar questions to the case law on the permissibility of religious clothing bans at work. Moreover, given that the latter cases constitute an exception to the CJEU's generally strict application of anti-discrimination norms in relation to other protected grounds (including sexual orientation and race and ethnicity), accepting McCrea's arguments invariably poses questions about the structure of EU anti-discrimination law as such.

In my view, such questions do not have to be asked. While I will argue later that McCrea is right that caution may sometimes be justified, I will first show why it goes against the rationale of EU anti-discrimination law to grant it to the extent that it has been granted in the headscarf case law.

Back to the root of the problem

Once a year, I thank the CJEU for its verdicts. I do so on the day when I teach key concepts of EU anti-discrimination law, using the headscarf case law as example. Even the most dispassionate students become engaged, especially when we discuss Advocate General Kokott's Opinion in the *Achbita* case.[6] Her analysis typically provokes a great deal of headshaking, anger and frustra-

tion, and above all the question of how it is possible for one of Europe's leading lawyers to take such an openly hostile stance towards Muslims.

I find it impossible to disagree with my students. The Opinion is by quite some distance the worst Advocate General Opinion I have ever read. If I were asked to summarise it in one sentence, I would say that, willingly or not, it proposes to carve out a derogation for Muslim women from the protections offered by EU non-discrimination law. Since the Opinion lies at the root of the *Achbita* judgment, and thus of subsequent rulings on the right to wear the headscarf at work, re-examining its most problematic aspects may help illustrate why it amounts not to caution, but rather a capitulation to Islamophobia.

The problems begin when AG Kokott proposes to draw the scope of direct discrimination narrowly with regard to religion because this is a "mutable" personal characteristic (paras. 44-46). Contrary to what she argues, this goes against established case law, which never regarded mutable characteristics as being less protection worthy (consider, for example, case law on discrimination against pregnant women), but it presents an important first step in her weakening of anti-discrimination norms for Muslim women.

The AG's reasoning gets truly problematic when she considers whether a ban on religious clothing at work is a genuine and determining occupational requirement that justifies an interference with the right to non-discrimination under Article 4(1) of the Equal Treatment Directive (2000/78/EC). She reasons that businesses must be allowed to "take into careful account the preferences and wishes of its business partners" (para. 90), but may not cater to demands from customers to "be served only by employees of a particular religion, ethnic origin, colour, sex, age

or sexual orientation" (para. 91). However, customers may demand "to be served without discrimination, courteously and to a basic standard of politeness" (para. 92). So far, so good, but which of these does a company policy prohibiting religious clothing at work due to customer preferences amount to? Does it cater to discriminatory customer preferences or demand a basic level of courteousness and politeness from its (Muslim) employees? Astoundingly, she implies that demanding Muslim employees to remove their veil falls in the second category.

AG Kokott saves the worst for last. It is worth citing paragraph 132 of her Opinion in full:

> *"The wearing by male or female employees of visible signs of their religious beliefs, such as, for example, the Islamic headscarf, in the workplace may be prejudicial to the rights and freedoms of others in two principal respects: on the one hand, it may have an impact on the freedoms not only of their colleagues but also of the undertaking's customers (particularly from the point of view of the negative freedom of religion); on the other hand, the employer's freedom to conduct a business may be adversely affected."*

It is when reading this paragraph that my students are rightly dismayed. According to the AG, employees wearing the Islamic headscarf may prejudice the rights and freedoms of their colleagues and customers. But who, other than persons who are blatantly Islamophobic, will consider their rights and freedoms to be prejudiced by having to interact with a Muslim woman wearing the headscarf? The answer is none. A Muslim woman wearing a headscarf is observing her religious beliefs; she is not

proselytising for them. In no way does the Islamic headscarf interfere with someone else's rights and freedoms.

Unfortunately, not appreciating that observing one's beliefs is different from proselytising for them, AG Kokott proposed that, within the framework of anti-discrimination law, those with discriminatory attitudes should receive more protection than the victims of such attitudes. This does not amount to justified caution, but a troubling misunderstanding of the very point of anti-discrimination law.

The CJEU's case law

The CJEU has avoided some of the most troubling aspects of AG Kokott's Opinion. Most importantly, in *Bougnaoui*, it ruled that an employer's desire to accommodate the wishes of a customer to not be served by a person wearing an Islamic headscarf is not a genuine and determining occupational requirement (para. 41). Moreover, perhaps listening to the vicious criticism of *Achbita*, it ruled in *Wabe and Müller* that a company rule banning the manifestation of any political, philosophical, and religious belief is proportionate only when it is "*strictly necessary* in view of the adverse consequences that the employer is seeking to avoid by adopting that prohibition" (para. 69).

Yet despite the stricter language, companies may still cater to the prejudiced views of customers who do not want to be served by Muslim employees if they can demonstrate that they would otherwise face adverse consequences. This is at odds with the objectives of anti-discrimination law. Essentially, the Court made one of two mistakes: either it wrongly decided that neutrality policies, adopted to accommodate customers, are not directly discriminatory; or, if such policies are indeed not

directly discriminatory, it wrongly ruled that they serve a legitimate aim and are not indirectly discriminatory.

Regarding direct discrimination, the Court has tried to distinguish neutrality policies from the *Feryn* case (C-54/07). This case "concerned direct discrimination based on race or ethnic origin that allegedly arose from discriminatory requirements on the part of customers" (*Wabe and Müller*, para. 66). However, the clothing requirements were cloaked in neutral language, but, as their justification shows, they were put in place to cater to discriminatory customer requirements. Following *Feryn*, they should therefore have been found to discriminate directly on religious grounds.

Moreover, if the CJEU was correct that a neutrality policy adopted to accommodate the wishes of customers does not amount to direct discrimination but possibly only indirect discrimination, it should still have ruled against them. Indirectly discriminatory policies are justified only if they serve a legitimate aim and if they are appropriate and necessary in view of this aim. Any neutrality policy adopted to meet the requirements of customers should never pass the first stage of the justification analysis. Allowing companies to cater to the prejudices of customers would be contrary to the very ideal of anti-discrimination law. Therefore, the problem is not primarily that the CJEU did not assess the necessity of the company's neutrality policies sufficiently strictly, as it is sometimes argued,[7] but rather that such policies should never be considered to serve a legitimate aim.

When caution would be justified

While the headscarf rulings represent a problematic departure from anti-discrimination law, in respect to one ruling, I can agree with McCrea that the CJEU's approach may be one of justifiable caution. Four of the five cases involved private employers, but one, *Commune d'Ans*, involved a public employer: the municipality of Ans in Belgium. The CJEU's analysis of the municipality's neutrality policy was lenient, and I can understand why (although it could have spelt out its reasons much more clearly).

The first reason is Article 4(2) TEU (national constitutional identity) combined with Article 17(1) TFEU, according to which the EU "respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States". According to McCrea, Article 17(1) TFEU offers sound legal reasons for caution in all cases pertaining to religion, but in my view, it does so only when the CJEU is asked to rule on a rule or practice that emanates from a national conception on the relationship between religion and the state. In other words, Article 17(1) TFEU may justify caution in relation to public employers, but not in cases where private employment practices are involved.

In this respect, it is worth reminding ourselves of the fact that even France and Belgium considered that the neutrality policy of the company in the *Achbita* case could not pass a proportionality assessment (AG Kokott Opinion, para. 63). Applying the principles of *laïcité* and *neutralité*, both countries prohibit *public servants* to wear religious clothing at work, but these principles do not extend to the *private sector* (AG Sharp-

ston Opinion in *Bougnaoui,*[8] para. 42). In other words, the CJEU decided to tolerate more "neutrality" than even France found acceptable. In the context of anti-discrimination law, this seems like a very poor choice.

Moreover, the fact that public sector neutrality policies stem from domestic conceptions on the appropriate relationship between religion and the state may also be relevant to their classification under anti-discrimination law. Private employers typically adopt such policies to accommodate the wishes of customers or colleagues. As I argued above, such policies should be considered to be directly discriminatory because they directly pander to discriminatory attitudes. Public employers applying constitutional principles of *laïcité* and *neutralité* do not necessarily do so (although these principles are often weaponized against Muslims nowadays). Therefore, it may be incorrect to classify neutrality policies of public employers as direct discrimination. While they may still discriminate indirectly, the more open-ended justification available for indirect discrimination, along with Article 17(1) TFEU, might indeed justify caution as regards public employers.

For similar reasons, McCrea may be right that the CJEU should have been more cautious in *Egenberger* and *IR v JQ*. Although I believe that both verdicts were legally defensible, it is certainly true that a different, more cautious, conclusion could have been justified under Article 17(1) TFEU and Article 4(2) of the Equal Treatment Directive. Space is too limited to delve into these cases,[9] but since EU law allowed, and maybe even push for, a large degree of caution, this might have been the politically wiser approach.

Political context supports this conclusion. The degree of autonomy enjoyed by religious organisations under German law

meant that the German churches, with the backing of the German Constitutional Court, were able to discriminate on a large scale. Religious organisations are vital to the German welfare state, running hospitals, kindergartens, nursery homes, and the like. As a result, the two main churches are Germany's second-largest employer after the state. They could demand that all their employees, including those not performing religious functions (such as doctors), join the church. However, in recent years, the churches have abolished the requirement of church membership as an absolute prerequisite for employment. Nowadays, membership is only required for roles involving proclamation, pastoral care, or education, or positions requiring the promotion of the church's religious profile (Part I of the decision of the German Constitutional Court in *Egenberger*[10]). As this greatly reduces the discriminatory practices of both churches, a degree of caution by the CJEU can indeed be justified.

By contrast, Muslims are facing an increasingly hostile environment in Europe, including in the workplace. In my view, for the EU's highest court to stand by and, through its judgments and language, legitimise the exclusion of Europe's Muslim population from important aspects of daily life is not a sign of caution, but of cowardice.

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Andrea Pin

Playing with Fire

Religious Freedom, Civil Society, and State Neutrality in the EU Court of Justice

Because of its narrow understanding of religious freedom under EU law and of the social and cultural role of religions, the Court of Justice of the EU is playing with fire.[1] In the name of anti-discrimination and neutrality, the Court risks undermining religious freedom in ways that are particularly detrimental to Muslim minorities – both by feeding into nationalist, Christian-heritage identity politics and by advancing a liberal narrative that frames restrictions as necessary to protect women's rights and fight discrimination. At the same time, it proceeds as if European constitutional systems were roughly homogeneous, disregarding the profound diversity of church–state relations and the very different legal and social positions religious communities occupy across Member States. This double-blind spot – towards Muslim minorities and towards Europe's plural constitutional traditions – makes the CJEU's approach not only normatively troubling, but structurally ill-suited to the realities it seeks to address.

Balancing various aspects of religious freedom under EU law

The legal provisions that have most frequently served as a compass for the Court of Justice to adjudicate cases revolving around religious freedom have been Article 10 of the EU Charter; a safety valve that has protected the national status of religious groups (Article 17 TFEU); some provisions about animal welfare (Article 4 of Regulation 1099/2009); and antidiscrimination rules in the employment field (Directive 2000/78/EC). On their face, all these rules seem to protect religious practices such as ritual slaughtering, prevent religious discrimination, and carve out a sphere of immunity for religious institutions that enjoy a special status at the state

level. However, the Court of Justice does not seem to have balanced this multilayered legal framework taking into account religious freedom needs and the variety of church and state models within the EU.

The challenge of religious pluralism

The EU Court of Justice has repeatedly intervened in the extremely sensitive field of religious symbolism, virtually authorising the eradication of religious symbols from both public institutions and private companies.[2] Although it has formally operated cheek-in-tongue, avoiding spelling out the notion of state neutrality as its preferred public policy, practically speaking it has almost invariably upheld that approach, at the expense of individual religious practice.[3]

The same dynamic has taken place in the context of religious dietary prescriptions. A stream of Court of Justice's rulings has progressively legitimised limitations on the production of food that is compliant with religious prescriptions: First allowing the ban on temporary abattoirs,[4] then ruling out the possibility that religiously slaughtered food be considered organic,[5] and finally declaring that states or sub-national entities can outright ban religious slaughtering, as long as edible meat is still available to the communities hit by the ban – i.e. Muslims and Jews.[6] In doing so, the Court has alternatively narrowed the interpretation of religion-friendly rules or overstretched the interpretation on facially neutral rules that actually impact on religious practices.

Overlooking religious freedom for Muslims

The impact of the EU Court of Justice's case law in this field has not generated much controversy outside of academic discourse. Its political and symbolic ramifications have been fairly modest. European society seems to accept that the Court is embracing a strong neutrality-based approach and that its case law is taking a shape that is hardly inclusive and respectful of the variety of religious affiliations and identities. This is probably due to the fact that the main target of state and company policies affecting religious freedom with this neutrality-based logic are Muslim minorities. The 9/11 terrorist attacks on American soil and especially the atrocious and long stream of killings that have taken place in Europe in the 21st century seem to have worsened the already complex relationship between Muslims and the rest of Europeans. Limits to the enjoyment of religious freedom among Muslims do not seem to concern EU citizens.

This dismissive approach to Muslim needs has deeply infiltrated European political culture. Some of the most vocal opponents of Islamic integration in Europe are the parts of civil society that usually fall under the umbrella of populism, illiberalism, or supporters of state sovereignty. A strong sense of identity and the development of new narratives that harken back to the inception of Christianity in Europe have reinvigorated the political and even legal role of religious identity and affiliation.[7] Christianity has thus become a booster of state sovereignty, independence, and pride. This phenomenon has been quite successful in Eastern Europe. Especially after the collapse of the Soviet Empire, religion has made a powerful comeback as a political and ideological identifier for countries

that liberated themselves from the Communist yoke and rediscovered their faith and religious lineage after decades of forced atheism.[8] For sizable parts of European society, the Islamic presence is not welcome because it challenges this narrative and vision.

But European social and political movements that lie on the other hand of the ideological spectrum and support supranationalism and liberal constitutionalism are often not fond of Islamic traditions either.[9] They usually push back against the public visibility of religious affiliation and belonging, see centuries-old Islamic practices as challenging the progressive narrative of rights and civilisation they espouse, and read gender biases into religious symbols, such as the Muslim veil for women.[10] In this respect, liberals and so-called illiberals largely share a common hostility towards Islam in Europe.

Additionally, Muslims seem to find it hard to make their voice and needs heard both at the state and supranational level also because the appearance of Islam in Europe does not follow the old Christian pattern.[11] Although now a sizable group especially in some regions of the Continent, the Muslim presence in Europe stretches throughout its territories instead of being located in specific areas. It does not replicate the centuries-old tradition of states with a predominant religious tradition, with which secular institutions have alternatively partnered, clashed, or identified, giving shape to a unique national model of church and state relationship. Because of their territorial distributions in Europe, Muslims do not have the agency that is available to other religious groups at the state level and are more exposed to hostile state policies. Instead of recognising that new minorities in Europe do not map onto the longstanding tradition of special ties between a state and a religion and therefore cannot lever-

age the political support that other religious groups may enjoy, the EU Court of Justice has easily accepted and even embraced state policies that willingly or inadvertently target them.

The place of pluralism and diversity in the reasoning of the Court of Justice

The EU Court of Justice has repeatedly dealt with cases between religious entities, such as cultural hubs or hospitals, and employees or candidates who argued that they had been discriminated against because of their personal beliefs or behaviours.[12] In this field, the Court has been prone to investigate the affairs of religious institutions closely, without giving state policies the same leeway it has accorded to them in the context of religious pluralism seen above, when they enforced strict neutrality.

To adjudicate these controversies, the EU Court of Justice has largely built on the case law of the European Court of Human Rights, which has been dealing with the same issues for some time. While the Strasbourg Court has largely recognised that states have wide discretion in how they handle these matters,[13] the EU Court has been much more intrusive. It has urged domestic courts to decide these cases balancing the interests involved and especially weighing the religious affiliation or the relevant behaviour of the complainant employee against her employment duties and the ethos of the institution. All in all, the EU Court has given a fairly detailed checklist to domestic courts, thus encouraging them to adopt a specific type of scrutiny.

Although its leading cases originated in Germany, the case law of the Court of Justice is able to radiate to the whole spectrum of EU states and territories. But EU Member States have very different models of church and state relations. Some of them integrate religious entities within the span of public institutions (such as Germany), while others keep them more distant, or display a special affiliation with a specific denomination. It is difficult to reconcile the rather strong enforcement of antidiscrimination provisions with this variety of legal systems, the different state and church models and the commitment of EU law to respect the domestic status of religious groups. Although the articulation of civil society across EU territories varies significantly, the Court of Justice's approach hardly reflects this reality – for example, think of the Advocate General's warning that Spain may have to terminate its agreement with the Catholic Church to comply with EU law.[14]

Conclusions

The case law of the EU Court of Justice may have powerful ramifications for religious freedom and for the public role of religions in the EU, although its impact has not received the cultural, social, and political attention it deserves. Two main reasons explain this lack of interest.

First, one of the primary victims of the Court of Justice has been religious freedom for Muslim minorities. Heightened scepticism toward Islam has characterised a large part of the political and ideological spectrum of Europe lately, making Muslim claims difficult to heed and welcome. Factions that hold very different views of the EU display similar degrees of resistance to Islam.[15]

The second reason for the lack of interest in how the Court of Justice handles the life of religious institutions lies in the modest knowledge of the different statuses that religions enjoy in every EU Member State. The approach of the EU Court, which is oblivious to the variety of church and state relations and the articulation of civil society in Europe, probably reflects a wider ignorance. Few, including the EU Court, seem to appreciate that religious groups and institutions rarely enjoy the same legal status and keep the same distance from state institutions. The relationships between religions and states may be more or less open, friendly, or hostile, depending on the jurisdiction. Thinking that religious institutions share the same needs, enjoy a similar status, and should behave roughly the same does not consider the nuances that characterise EU territories. As seen above, the jurisprudence of the Court of Justice focuses on Germany, where the ties between religious and state institutions are fairly strong. But EU territories cover a wide array of constitutional systems, and, if the Court of Justice applies elsewhere the same logic it developed for German cases, it may upset longstanding church and state relationships.

In the long run, the EU Court of Justice may trigger two pernicious developments. It is more likely to face increasing resistance from strongly rooted religious communities and from large swaths of European public opinion if it replicates its antidiscrimination approach regarding religious employers outside Germany, where religious bodies have a different status and the connections between a religious group and state institutions are different. But the Court is also alienating Muslim believers; more broadly, its approach may give the impression that the EU does not accept Islam as a component of European society. This would widen the gap between Islam and Europe,

playing into the hands of extremist and terrorist groups, who have been leveraging Islamic disheartened individuals who realised they would be never able to integrate, to fill their ranks with anti-Western acolytes. In a nutshell, the EU is on the verge of letting down religious majorities and minorities across Europe.

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Kristin Henrard

Article 17 TFEU as a Gateway to National Sovereignty Creep

The CJEU's Broad Margin of Appreciation of Freedom of Religion

The jurisprudence of the CJEU on Article 17 TFEU and the EU's duty to respect the status of churches and religions under national law has changed significantly over time. Early case law reflected a narrow interpretation of Article 17 TFEU, emphasising strong protection of religious freedom. More recent decisions, however, demonstrate a broader reading of the provision which goes hand in hand with a wide margin of appreciation afforded to Member States, not only regarding the freedom of religion but also the prohibition of discrimination on grounds of religion. With the latter, the CJEU effectively adopts a low level of scrutiny, thereby stepping back and giving way to the vindications of national sovereignty. These developments may seem topic specific, in the sense that the first judgments concerned the protection of employees against religious employers, and the latter controversial expressions of Islam (ritual slaughter and headscarves). Nevertheless, when the CJEU chooses to adopt a broad interpretation of Article 17 TFEU – even at the expense of the fundamental freedoms of the internal market – it seems warranted to flag a case of potential national sovereignty creep, that does not augur well for the effective protection of the freedom of religion and related human rights.

Article 17 TFEU: a gate towards a broad margin of appreciation

When the Treaty of Lisbon enshrined with Article 17 TFEU in the foundational treaties that "(t)he Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States", this raised concerns about a possible transposition of the broad

margin of appreciation for religious matters generally that is visible in the case law of the ECtHR into CJEU jurisprudence. The margin of appreciation doctrine of the ECtHR has triggered a rich literature,[1] several of which are critical about the way in which that Court uses this doctrine in its jurisprudence in general, and for the freedom of religion in particular, because of its threat to the effective protection of human rights. The ECtHR started from the premise that because of the lack of European consensus concerning the relation between church and state, States have a broad margin of appreciation in these matters.[2] Granting States a broad margin of appreciation to decide which limitations to the manifestation of religion amount to violations, implies that the Court adopts a low level of scrutiny. This in turn potentially undermines the effective protection of the freedom of religion. What is more, granting States a broad margin of appreciation is problematic since the ECtHR thus "steps back", does not take up its supervisory role and gives way to national sovereignty. Notwithstanding these fundamental criticisms, the Court has over time steadily extended the reach of "church-state relations", to about any religious matter or as it postulates in *S.A.S v France* "as regards Article 9 ECHR in general" (para. 129).[3]

It is well known that the CJEU was heavily inspired by the ECHR and the jurisprudence of the ECtHR in its development of human rights as general principle of EU law. While since the adoption of the EU Charter, the CJEU increasingly develops its human rights jurisprudence in reference to the EU Charter, the ECtHR jurisprudence still exerts considerable influence on the human rights jurisprudence of the CJEU.[4] Even the EU Charter confirms (in Article 52(3)) that in case of corresponding rights "the meaning and scope of those rights shall be the same as

those laid down by the said Convention". Nevertheless, the same provision does add that "[t]his provision shall not prevent Union law providing more extensive protection". In other words, Article 52(3) of the EU Charter justifies both that the ECtHR jurisprudence still has a strong influence on the jurisprudence of the CJEU, and that the CJEU could choose to provide a higher level of protection of fundamental rights, by for example not following lines of jurisprudence granting a broad margin of appreciation to States and pitching the level of scrutiny higher.

Article 17 TFEU: a range of possible interpretations

Article 17(1) TFEU is meant to reflect the division of competences in the EU, in the sense that the relationship between churches and the state is a matter of national competence that is not conferred on the EU (Article 5(2) TEU),[5] which can be related to Article 4(2) TEU as the EU duty to protect the Member States' national identities. However, there are different interpretations of where and how the competence line is drawn. As was visible in the above description of the jurisprudence of the ECtHR, the expression "the status under national law of churches and religious associations or communities in the Member States" can be interpreted narrowly or broadly. Some argue that Article 17 TFEU only requires the EU to refrain from regulating matters that are concretely characterised by a high rate of denominational specificity.[6] Others interpret Article 17 TFEU as a safeguard clause in favour of national sovereignty more generally for religious matters, also going beyond questions of denominational autonomy.[7] This broader reading of Article 17 TFEU goes hand in hand with the adoption of a broad margin of appreciation in relation to Article 10 of the EU

Charter and a similar low level of scrutiny for the prohibition of discrimination on grounds of religion (as regulated in Directive 2000/78/EC). Inversely, when the CJEU is seen to grant States a broad margin of appreciation regarding the freedom of religion and the prohibition of discrimination on grounds of religion, this signals a broad(er) reading of Article 17 TFEU. Instead of EU competence creep, this development would rather point to "national sovereignty creep".[8]

The first judgments on Article 17 TFEU

In the first judgments on Article 17 TFEU the CJEU clearly indicated its intent to adopt the narrow reading of Article 17 and thus scrutinise religious matters suitably strictly, not granting States a broad margin of appreciation. In *IR* (C-68/17) and *Egenberger* (C-414/16) the CJEU underscored that Member States cannot exempt the employment related decisions of religious organisations as employers from the operation of EU non-discrimination law (para. 48 and 56-58 respectively). The CJEU furthermore interpreted the exception for "genuine occupational requirement" suitably narrowly by requiring these to be proportionate to the specific functions of the position concerned.[9] In these contestations of decisions of religious employers towards their employees because the latter would not respect the religious ethos of the employer, the CJEU has been most vigilant to protect the freedom of religion of the employees.

A broad margin of appreciation, Article 17 TFEU and national sovereignty creep

Subsequent judgments have revealed that the CJEU has adopted a broader reading of Article 17 TFEU though. In a range of judgments concerning ritual slaughter and the wearing of headscarves at work, the CJEU has indeed chosen to explicitly adopt the ECtHR's grant of a broad margin of appreciation for the freedom of religion (Article 10 of the EU Charter) and has even further extended this to the prohibition of discrimination on grounds of religion (Directive 2000/78/EC), thus stepping back and giving way to national sovereignty vindications.

Freedom of religion and ritual slaughter

Since the adoption of the EU Charter, there have been several cases that concern the regulation of ritual slaughter. When evaluating these cases, it is important to keep in mind that ritual slaughter may have a very long history in Europe (predating Christianity), but already since the 1840s the movements to ban this practice demonstrated how animal welfare considerations and prejudice against religious minorities often go hand in hand.[10] It is equally important to know that the EU legal framework regarding the killing of animals – Regulation 1099/2009, animal welfare under Article 13 TFEU and the freedom of religion under Article 10 of the EU Charter, does not indicate that the freedom of religion, including its manifestation through ritual slaughter, would be less protection worthy than animal welfare. Yet, in the two cases addressing the regulation of ritual

slaughter, the level of scrutiny applied by the CJEU has been inadequate: The Court has failed to detect instances of hidden direct discrimination. Once again, the CJEU can be seen to "step back" and allow national sovereignty creep.

In *Liga van Moskeeën* (C-426/16) the CJEU had to determine whether the strict norms of a Regulation violated the freedom of religion because it would impede the permission of additional slaughter houses for ritual slaughter to address the peak demand of the Feast of Sacrifice. The judgment has triggered considerable criticism in at least two respects.[11] First, the CJEU did not acknowledge that this seemingly neutral rule of demanding requirements for slaughter houses has a dispropoportionate impact for religious groups that need ritually slaughtered meat in significantly higher concentrations only for particular religious festivals. Not providing an exception for these temporary peak demands potentially amounts to a case of indirect discrimination on grounds of religion. Unfortunately, the CJEU did not even acknowledge this potential, unlike the Advocate General in that case.[12] Second, the CJEU also did not take into account the Islamophobic or racialised context in which initiatives to ban ritual slaughter emerge and get stronger.[13]

In *Centraal Israëlitisch Consistorie van België and Others* (C-336/19) the CJEU had to evaluate whether an absolute obligation of reversible stunning (which cannot result in the animal's death) could be imposed without violating the freedom of religion, because this type of stunning would respect the requirements of ritual slaughter. Notwithstanding the arguments of orthodox groups that do not accept reversible stunning, the CJEU opined that the freedom of religion would not be violated. The CJEU arrived at this conclusion while fully embrac-

ing the ECtHR line of jurisprudence on the broad margin of appreciation of States in religious matters (para. 67). The very low level of scrutiny the Court thus adopts implies that the CJEU actually "steps back", and returns the matter to the national sovereignty sphere.

Discrimination on grounds of religion, neutrality policies of employers and headscarves

In one of the early judgments on Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, the CJEU adopted suitably strict scrutiny with regard to discrimination on religious grounds. In its preliminary ruling in *Achatzi* (C-193/17), the CJEU allowed a Member State to recognise religious minorities' holy days as public holidays, as long as it respects the prohibition of discrimination on grounds of religion by not privileging one religious minority over others (paras. 79-82). Put differently, the CJEU strongly affirmed that decisions that affect actual working days through the selection of religious days as public holidays are fully subject to EU law and its prohibition of discrimination on grounds of religion.

However, in the long line of cases concerning neutrality measures of employers that translate in prohibitions on wearing headscarves at work, the CJEU's level of scrutiny is in several respects sub-optimal, also because the CJEU chose to extend the broad margin of appreciation to the prohibition of discrimination on grounds of religion. From the first judgments, the Court has chosen not to adopt a critical baseline about neutrality policies that prohibit the wearing of visible signs of political,

philosophical, or religious beliefs. The CJEU opined that such neutrality measures would not amount to direct discrimination on grounds of religion as long as they would be applied generally and consistently, even when these policies are put in place following an employee's request to wear a headscarf (*Achbita,* C-157/15*,* paras. 29-32). The Court did acknowledge that such a neutrality policy puts persons adhering to certain religions at a particular disadvantage and could thus amount to indirect discrimination on grounds of religion (*Achbita*, paras. 37-38).

Critical observations are in order regarding both the CJEU's limited attention for hidden direct discrimination and the (degree of) guidance it provides to national courts about the justification for indirect discrimination. As regards the former, the Court has been suitably strict when the neutrality policies obviously targeted headscarves, whether because a client requested no headscarves (*Bougnaoui,* C-188/15*)* or because the policy was limited to conspicuous large signs (*Wabe and Müller,* C-804/18 and C-341/19, para. 73*)*. Notwithstanding the fact that several national courts have asked questions inviting the Court to consider more subtle cases of possible hidden direct discrimination, the CJEU has so far chosen to ignore these questions, inviting suitable criticism.[14]

Regarding the latter, the CJEU's initial guidance to the national courts about parameters to evaluate the proportionality of neutrality policies, given the disparate impact on persons who want to wear religious signs/clothes at work (e.g. in *Achbita*), was minimal. In subsequent cases, the CJEU does become more demanding and increases its level of scrutiny.[15] In both *Wabe and Müller,* also followed in *SCRL* (C-344/20)*,* the CJEU indeed imposes a more rigorous justification test by

requiring employers to prove economic harm (a sufficiently specific risk to its business activities) if they would not have neutrality policies (*Wabe* para. 64; *Müller* paras. 76 and 85).

However, this trend to restrict at least the extent to which private employers can impose neutrality rules on their employees has not been extended to the sphere of public employment. In *Commune d'Ans* (C-148/22), the CJEU continues its narrow reading of what neutrality measures would amount to direct discrimination. In its evaluation of possible indirect discrimination, the CJEU's level of scrutiny is too light, as it chooses to extend the broad margin of appreciation concerning the freedom of religion to the prohibition of discrimination on grounds of religion. In *Commune d'Ans* the CJEU considers that municipalities can choose which vision of neutrality they opt for: exclusive neutrality, inclusive neutrality or something in between (paras. 33-35). The Court could have deduced from the fact that neutrality can be conceived "inclusively" namely by allowing the wearing of all visible signs of political, philosophical or religious beliefs, that exclusive neutrality (not allowing any) would be disproportionate. Instead, the CJEU steps back and leaves the matter in the sovereign sphere of the Member States, which is in line with a broad reading of Article 17 TFEU.

The CJEU does add that a policy of strict neutrality can only be adopted by a municipality, provided that the policy is applied consistently and indiscriminately and that it is ultimately necessary and proportionate (para. 37). Arguably, the latter is interesting, as it seems to open the possibility for the national court, conscious of the context of Islamophobia throughout Western Europe, to opine that a strict neutrality policy would not be proportionate, exactly because neutrality can also be conceived in an inclusive manner.

Either way, it should be underscored that the CJEU's extension of the broad margin of appreciation (from the freedom of religion) to the prohibition of discrimination on grounds of religion does not have a precedent in ECtHR case law. Indeed, although the ECtHR has so far refused to acknowledge explicitly that religion is a suspect ground of differentiation[16] – which would trigger heightened scrutiny (leaving a very narrow margin of appreciation) – it nevertheless tends to scrutinise disadvantageous treatment on grounds of religion rather closely and has not granted States a broad margin of appreciation in the matter.[17]

Article 17 TFEU, status of religions under national law, and the internal market fundamental freedoms

In a more recent preliminary ruling on state funding for denominational schools (*Freikirche,* C-372/21), the CJEU accepted that this funding could be limited to schools of religions that are recognised under national law, notwithstanding its exclusion of schools of religions that are recognised in other Member States, and the related restriction on the freedom of establishment (para. 30-31). The Court here relies explicitly on Article 17 TFEU when discussing the justification of the restriction of the freedom of establishment (running a school on a stable basis concerns the freedom of establishment). The case suggests a broad interpretation of "the status under national law of churches and religious associations or communities" that carves out a broad range of religious matters from the freedom of establishment (paras. 41-43). It is remarkable, to say the least, that the CJEU seems willing to even reduce the protection

of one of the four freedoms central to the internal market to safeguard States' broad margin of appreciation in religious matters.[18] Such an extensive reading of Article 17 TFEU, "and the related national sovereignty creep", obviously does not augur well for the effective protection of the freedom of religion and related human rights, as was already visible in the *Commune d'Ans* judgment which followed a few months later.

Conclusion

The various jurisprudential lines of the CJEU discussed here unfortunately show that Article 17 TFEU has over time indeed induced, or at least enabled, the CJEU's adoption of the ECtHR's jurisprudence on the broad margin of appreciation for the freedom of religion at large. What is more, the CJEU has even chosen to extend the broad margin of appreciation to the prohibition of discrimination on grounds of religion. When an international court grants states a broad margin of appreciation, it adopts a low level of scrutiny, which in turn threatens the effective protection of the fundamental rights concerned. A low level of scrutiny also implies that the court is stepping back and ultimately gives way to national sovereignty (vindications). It may have seemed that the adoption of the broad margin of appreciation was specific to controversial manifestations of Islam. However, when the CJEU chooses to adopt a broad interpretation of Article 17 TFEU, even when this means an encroachment on the fundamental freedoms of the internal market, it seems warranted to flag a case of potential national sovereignty creep, that does not augur well for the effective protection of the freedom of religion and related human rights.

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Headscarves and the Wrong Balance

Neutrality and Business v Freedom of Religion and Non-Discrimination

To date, the CJEU has decided six cases concerning women who wanted to wear a headscarf at work for religious reasons but who were prohibited from doing so by their employer, losing their jobs as a consequence. *Achbita* (C-157/15), *Bougnaoui* (C-188/15), *Wabe and Müller* (C-804/18, C-341/19), *LF* (C-344/20) and *OP* (C-148/22). There was no evidence that the wearing of the headscarf in any way prevented them from doing their job. Apart from *OP*, all other cases concerned private employers and here the freedom to conduct a business as recognised by Article 16 of the EU Charter of Fundamental Rights played an important role. The judgments in these five cases suggest that the employer's right under Article 16 can trump the right of the employee to freedom of religion as guaranteed by Article 10 of the EU Charter. In *OP*, where the employer was a municipal council, the CJEU held that the principle of neutrality of the public service can do the same. Although the CJEU made some general and abstract comments about the importance of freedom of religion, it did not really address what the bans, in practice, meant for the individual women involved. Neither did the CJEU pay any attention to the possibility that these neutrality rules could constitute sex, race and/or intersectional discrimination. The CJEU thus provide little protection for the rights of headscarf wearing Muslim women.

Direct and indirect religion or belief discrimination

The CJEU examined the six cases under the provisions against discrimination in Directive 2000/78/EC, which prohibits both direct and indirect discrimination (Article 2(2)(a) and (b)). Direct discrimination involves less favourable treatment

because of, in this case, religion or belief; while indirect discrimination occurs where an apparently neutral provision or rule would put people having a particular religion or belief at a disadvantage, unless this is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. In contrast to this, direct discrimination can only be justified under very limited circumstances clearly laid down in the Directive.

The headscarf judgments

Although the CJEU stressed that this was for the national court to decide, it held that general neutrality rules were most likely indirect discrimination if they applied to all employees equally and covered all beliefs without distinction. The CJEU was criticised for not considering that there might be direct discrimination in these cases.[1] The CJEU held that the workplace neutrality rules were justified: For private employers, Article 16 of the EU Charter provided the legitimate aim for indirect discrimination. In addition, the bans were appropriate and necessary as long as: these bans covered all visible signs; they were genuinely pursued in a consistent and systematic manner and, thus, applied equally to all employees and did not make a distinction between different religions or beliefs; and, the ban was limited to custom facing employees. In *OP* (paras. 32-33), the CJEU held that the aim of putting into effect the principle of neutrality of the public service was a legitimate aim. That was meant to guarantee, for service users and staff, an administrative environment devoid of visible manifestations of beliefs (para. 40). For public authorities, including infra-state

authorities, the CJEU dropped the requirement that bans should be limited to customer-facing employees.

Freedom of religion in the headscarf cases

The CJEU held that "religion" in Directive 2000/78/EC must be interpreted broadly to include both the *forum internum* – the fact of having a belief – and the *forum externum* – the manifestation of religious faith in public. Wearing a headscarf for religious reasons was such a manifestation (e.g. *Achbita,* paras. 27-28 and *Bougnaoui,* paras. 29-30). In *Wabe and Müller* (para. 48), the CJEU stressed, referring to the case law of the European Court of Human Rights (ECtHR) (*Dahlab v Switzerland*[2]), the importance of the right to freedom of religion for society, as it represents one of the foundations of a democratic society and contributes to the pluralism indissociable from such a society; and, for the individual, as it is one of the most vital elements that go to make up the identity of believers and their conception of life (repeated in *LF* (para. 35)). The CJEU also pointed out (para. 84) its established case law that, when several fundamental rights and principles enshrined in the Treaties are at issue, the proportionality assessment must be carried out in accordance with the need to reconcile the requirements of the protection of those various rights and principles at issue, striking a fair balance between them.

The CJEU added to the requirements for justification of indirect discrimination that the employer had to prove that there is a genuine need for their neutrality policy and that they would suffer adverse consequences without such a policy (*Wabe and Müller*, paras. 64, 67). The employer also had to take account of the effect of such a policy on the right to freedom of religion of

their employees who want, and often feel mandated by their religion, to manifest their religion through the wearing of religious symbols (para. 69). However, the CJEU gave no indication of the weight to be given to the latter, it only stated that, in establishing whether there is a genuine need, the rights and legitimate wishes of customers or users may be taken into account (para. 65).

Article 10 v Article 16

In none of the six headscarf cases did the CJEU engage with the practical effects of the neutrality rules on the individual women. Namely, on their employment – they all lost their job – and employment opportunities, but also on their wider inclusion in society, even though it stressed the importance of freedom of religion for the individual believer's identity and their concept of life. Should this important fundamental liberty right not play a more important role when balanced against the economic fundamental right to conduct a business? In *Achbita* (para. 39), the CJEU referred to the judgment of the ECtHR in *Eweida*[3] (para. 94) – where a British Airways employee was prohibited from wearing a small cross with her uniform – to support its argument that corporate image can be a legitimate aim. However, the CJEU reference to *Eweida* (para. 94) ignored the rest of that paragraph, where the ECtHR pointed out the importance of the freedom of religion because a healthy democratic society needs to tolerate and sustain pluralism and diversity. And also because of the value to an individual, who has made religion a central tenet of their life, to be able to communicate that belief to others. The ECtHR concluded that the national courts had not struck a fair balance between the legitimate aim

and the restriction on the applicant's freedom of religion and thus stated that the uniform rule was not proportionate. The CJEU should have followed the ECtHR in requiring a strict balancing test.

The freedom to conduct a business includes, according to the CJEU, the introduction of a neutrality policy for the workplace. But why would an employer, especially a private employer, introduce such a rule which seems to target especially Muslim women wearing headscarves? This appears to be because the employer wants to present a neutral image to their customers, which is, most likely, based on the wishes or anticipated wishes of these customers who do not want to be served by someone in a headscarf.[4] But customers' wishes could very well be based on prejudice and "neutrality can be an easy cover-up for prejudice".[5] Pandering to prejudice should not be part of the freedom to conduct a business as this right does not include the right to conduct that business in a discriminatory way. Even a public employer, like the municipal council in *OP*, must show that there is a genuine need for the neutrality policy. The CJEU should have given more guidance to the national courts regarding the burden of proving this and the weight to be given to the freedom of religion of an individual employee.

The CJEU could also have mentioned that Article 31 of the EU Charter, which contains the right of every worker to working conditions which respect their dignity, should be weighed in the balance. Prohibiting the manifestation of religious beliefs in the workplace, which are a central part of a person's identity, clearly affects their dignity. Doing so would have been more in line with Article 22 of the EU Charter, which states that the Union shall respect cultural, religious and linguistic diversity.

Article 21 of the EU Charter and sex and race discrimination

Article 21 of the EU Charter prohibits discrimination on a large number of grounds, including sex, race and ethnic origin and religion or belief. In the headscarf cases, the CJEU never addressed the possibility that the neutrality rules could amount to sex and/or race discrimination, although this was raised in some of the preliminary references. This is important because the protection against discrimination on the basis of sex and racial or ethnic origin is stronger than the protection given to religion or belief discrimination in the headscarf cases. In *Wabe and Müller* (para. 59), the CJEU found indirect religious discrimination because the neutrality rule concerned "statistically, almost exclusively female workers who wear a headscarf because of their Muslim faith". This would also suggest indirect sex discrimination, as a statistical difference between men and women is a classic example of *prima facie* evidence of such discrimination (*Seymour-Smith and Perez,* C-167/97, para. 60). The CJEU did not find it necessary to examine possible indirect sex discrimination because this ground does not fall within the scope of Directive 2000/78/EC (*Wabe and Müller*, para. 58), and it never mentioned possible race discrimination. It could and should have done so, as it is settled case law that the Court may provide guidance on the interpretation of EU law, whether or not the referring court raises these issues in its questions (*Achbita,* para. 33).

Intersectional discrimination

The CJEU also did not address the possibility of discrimination on the intersecting grounds of religion or belief, sex and/or racial or ethnic origin, although these bans are often seen as prime examples of such intersectional discrimination. That is because they mainly affect Muslim women who are often from a migrant or ethnic minority background.[6] The CJEU might have felt that it could not address intersectional discrimination because of what it had held in *Parris* (C-443/15, para. 80), where a claim combining age and sexual orientation discrimination was rejected on the basis that such a claim could not succeed if discrimination on each of the separate grounds did not exist. However, there are a number of reasons why *Parris* should be revisited as developments in the law and case law and opinions within the EU have moved on. First, intersectional discrimination is now explicitly defined as a form of discrimination in the recent EU Pay Transparency directive (Article 3(2) (e) of Directive 2023/970/EC). Second, although the CJEU has not used the term "intersectional discrimination" in its case law, it has shown an awareness that intersecting grounds can lead to discrimination. In *E.B.* (C-258/17, para. 60), the CJEU took into account that the law of the time treated male and female homosexual acts differently, showing awareness of the intersection of sex and sexual orientation. Moreover, in *Bedi* (C-312/17, para. 75) the CJEU recognised the intersection between age and disability. Third, the EU Council,[7] the EU Commission[8] and the EU Parliament[9] have all recognised intersectional discrimination. The CJEU should follow suit and accept that intersectional discrimination is prohibited by EU anti-discrimination law and

that workplace neutrality rules could well amount to intersectional discrimination against Muslim women.

Conclusion

In the headscarf cases the CJEU put too much emphasis on the right of the employers to conduct a business and on the neutrality of the public service, and not enough on the freedom of religion and the right not to be discriminated against of the employees, thus getting the balance between Articles 10, 21 and 16 of the EU Charter wrong.

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Maria Francesca Cavalcanti

Beyond Religious Freedom

Rethinking the Protection of Religious Minorities in Europe

In contemporary Europe, the protection of religious minorities continues to rest predominantly on the constitutional architecture of religious freedom and non-discrimination. Yet this framework, shaped by the secular orientation of the state and the presumed uniformity of its legal order, often proves insufficient to capture the specific vulnerabilities and identity-based claims of minority communities. Therefore, legal systems that proclaim neutrality and equal treatment may struggle to provide effective safeguards in practice.

Protecting minorities therefore requires more than balancing rights. It demands recognising the specific forms of vulnerability produced by their social and constitutional position. Bridging this gap requires a legal and theoretical shift, one that brings religious freedom into dialogue with minority-rights principles and develops tools capable of responding to the real needs of minority communities.

Identity and diversity

We live in a moment in which both the rights of religious minorities and religious freedom itself are threatened by the resurgence of nationalist or populist tendencies, often justified by appealing to the role that a specific religion is claimed to have played in shaping a people's identity and culture.[1]

Today, the European debate on religious minorities and religious freedom focuses primarily on questions of identity and, more specifically, on the majority's fear of losing its own identity in the face of the cultural and religious diversity accompanying migratory flows.[2] The concerns voiced by public opinion and by parts of the political spectrum have led

several European legal systems to adopt restrictive legislative and judicial measures targeting religious practices typically associated with minority faiths.[3] Although these measures may appear neutral, their practical application inevitably produces a discriminatory impact on the lives of minority-community members.

In an increasing number of cases, appeals to religious freedom have been overshadowed by a cultural conception of religion. It is indeed difficult to argue that measures such as bans on the construction of minarets,[4] the growing restrictions on the display of religious symbols,[5] or proposals to limit the Muslim call to prayer are grounded in a legitimate limitation of religious freedom.[6] Rather, these measures appear to rest on cultural and ideological considerations.

Undoubtedly, the religious dimension is one of the oldest aspects of diversity, and it has recently re-emerged as a focal point within the evolving discourse on religious freedom. Religious diversity inevitably pushes the liberal democratic state to re-evaluate its inherent position of neutrality and challenges the ethnocentrism typically associated with Western societies in defending their essential religious and cultural traditions. Confronted with increasing religious diversity, the legal systems face the challenge of finding new, tailored mechanism for accommodating it, keeping in consideration the principles of non-discrimination, reasonableness and equality. This is particularly evident in the case of the European Islamic minority.

It is widely recognised, secular European states are not unfamiliar with the religious phenomenon and generally express a value system that is explicitly or implicitly aligned with the framework of values promoted by the dominant religion.[7] The separation between state and religion gradually took shape on

the assumption of a broadly homogeneous religious landscape within the national community. A form of religious monism that time, demographic change, and migratory movements have since fractured. Consequently, the protection of religious minorities has become one of the most contentious issues in the evolution of the European Union's law on religious freedom.

Religious minorities in EU law

Within the EU's political and legal framework, religious minorities are addressed only implicitly. Unlike other minority groups, their protection has developed indirectly, as part of the broader transformation of the human-rights framework in which the right to freedom of religion is situated.

Although Article 10 of the EU Charter recognises freedom of thought, conscience, and religion as a fundamental right, the TFEU does not confer a specific EU competence in religious matters, except with regard to the prohibition of discrimination. In particular, the interpretation of the principle of neutrality set out in Article 17 TFEU – which largely leaves decisions in this field to the Member States – makes the asymmetries affecting religious minorities difficult to address in a uniform manner. As a result, the ability of Article 10 of the EU Charter to provide effective protection is significantly weakened. Article 17 TFEU should, in fact, be balanced with the obligation imposed upon Member States to respect religious rites and cultural traditions under Article 13 TFEU, and the recognition of minority rights as a value of the Union under Article 2 TEU.

The Court of Justice's interpretation of Article 10 of the EU Charter is likewise marked by a restrictive approach, favouring a model of formal equality at the expense of the substantive

equality of minority groups, whose position is structurally more vulnerable within contemporary European social and legal contexts. The Court has addressed the religious rights of minorities only indirectly, for example when assessing whether an employer's ban on wearing religious symbols amounts to direct discrimination on grounds of religion. In this regard, the Court has held that a prohibition on wearing any visible form of political, philosophical, or religious expression in the workplace may be justified by the employer's interest in presenting a neutral image to clients or in preventing social conflict.[8] However, such justification must correspond to a genuine need on the part of the employer. In balancing the rights and interests at stake, national courts may take into account the specific context of their Member State and, in particular, any domestic provisions that offer stronger protection for religious freedom.

The Court has therefore adopted a deferential stance towards national neutrality policies, relying on a notion of neutrality as "equal treatment for all". Yet this approach, although it duly acknowledges the notion of indirect discrimination, overlooks the disproportionate effects such measures may have when the display of a religious symbol is unavoidable, as in the case of Muslim women,[9] and, more broadly, on members of non-majority faiths. This reveals an understanding of religious freedom that fails to account for the real social impact of such restrictions. It appears also insufficient to capture the specific nature of minority religious identities, which require not only freedom from interference but also the structural conditions necessary for substantive equality.

The jurisprudence of the Court of Justice mirrors, in principle, the case law of the European Court of Human Rights under Article 9 ECHR. Given this approach and considering that most

European constitutional systems contain no specific provisions on religious minorities, it is legitimate to ask why European states have created dedicated protections for ethnic, national, and linguistic minorities but not for religious groups, who remain confined to the general framework of religious freedom.[10] An even more pressing question is whether the current configuration and interpretation of religious freedom is truly capable of ensuring effective protection for religious minorities.

From a strictly legal perspective, the absence of a specific system for protecting religious minorities can be explained, at least in part, by the convergence between the secular character of the state, the uniformity of state law, and a protection framework centred on religious freedom and non-discrimination. Yet this system appears ill-equipped to address the actual needs of religious minorities, thereby creating a potentially fertile ground for intercultural conflict. It must also be noted that the notion of minority takes the form of a variable-geometry category, shaped by the different forms of affiliation that an individual may hold. This requires a conception of the individual not as an isolated subject, but as a member of multiple social groups, each characterised by its own history, culture, language, and religion. The universal value to be protected is therefore not merely religious freedom in the abstract, but the very existence of this plurality of communities and minority identities, which risk assimilation, if not disappearance, without adequate safeguards.[11]

In this context, the application of religious freedom protections can prove particularly complex in practice. While confessional practices are undoubtedly protected by the recognition of religious freedom, it can become challenging for a judge in a

secular state, where the principle of separation prevails, to consider an institution or a confessional practice within the context of a dispute. This issue becomes even more complex when the practices that contribute to defining the identity of the group to which the parties belong lie midway between the cultural and religious spheres. This makes it difficult to determine the extent to which a given behaviour derives from religious sources or traditional ones, or how much the cultural aspect influences the interpretation of a religious norm and *vice versa*.[12]

In cases where culture and religion tend to overlap, as in the case of Muslim minorities, the different legal treatment of religious and cultural practices risks creating situations of disparity and different outcomes depending on whether the judge, faced with practices difficult to classify, chooses to categorise the behaviour in one category or the other. This has inevitable negative consequences on the principle of substantive equality. The issue of the relationship between religious identity and cultural identity gains further significance when considered in the context of a multicultural society where different value systems coexist. Societies, although at the peak of the secularisation process, are permeated by religious claims.

The system of protections offered by fundamental rights in general, and by religious freedom in particular, as currently interpreted, does not appear sufficient on its own to safeguard religious minorities. The special vulnerability of these groups, especially with regard to identity rights and substantive equality, is not met with appropriate protection. A protection that need not be absolute, but reasonable and proportionate within the limits of the constitutional principles of the legal order.[13]

One of the central challenges in protecting religious minorities is therefore the identification of their real and specific needs and balance them with the fundamental principles of the legal order. This requires creating a synergy between religious freedom and religious identity, fostering a dialogue between the paradigm of fundamental rights and the more specific framework of minority rights.

Conclusion

What distinguishes minority rights from universally recognised human rights is the emphasis placed on the development of communities and the cultural identities tied to them. Whereas religious freedom presupposes the existence of religious communities within which individuals may practise their faith; minority rights identify the very existence of those communities as the object of legal protection. The key to enabling a synergy between the two frameworks lies in their shared collective and institutional dimension.

Minority rights could enrich religious freedom by incorporating the right of minority religious groups to participate in decision-making processes that affect them. At the same time, the core elements of religious freedom, such as the individual's freedom to choose, change, or abandon their faith, become essential to a proper understanding of the rights of these minorities. The protection and development of the identity of religious minorities represents a means of strengthening religious freedom for all, for the latter is indivisible, and a society in which only religious majorities are free is not one that truly respects freedom of religion. It is therefore necessary to seek legal solutions capable of providing common ground for

dialogue between minority groups and the state. The adoption of specific measures aimed at ensuring adequate conditions for the development and protection of religious minorities, measures that go beyond what follows from religious freedom alone, transcends the interests of minority groups and ultimately concerns the interests of each one of us.

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Paul Blokker

The Battle over the Sacred and the Profane

The Increased Contestation of Reproductive Rights in Europe

Sexual and reproductive rights in Europe are increasingly part of an intense struggle. This includes legal contestation through litigation and third-party interventions at, in particular, the European Court of Human Rights.[1] It is however important to recognise that contestation also takes place in other, political and public, arenas. Interconnected actions, forming part of a broader European conservative right mission, consist of political and legal mobilisation in various arenas, including in the European as well as national parliaments.

This struggle is about a political and religious backlash to a largely secular, progressive cultural and human rights revolution. It confronts opposing sides of (transnational) civil society, who both make moral, "sacred" claims, while profaning the opponent. Here, I will first discuss the European conservative right's mission, the sacred dimensions to this mission, and its increasingly dense transnational network. I will then exemplify cases of struggle by turning to initiatives both on the European level (the promotion of a right to abortion as part of the European Charter and the ECI campaign My Voice, My Choice[2]) and domestic parliamentary debates (the Netherlands).

The European Right's "sacred" mission

Struggles around sexual and reproductive rights pit more liberally, progressive-oriented or "frontlash" actors against other, including non-liberal, often radical-conservative "backlash" organisations. In the actions of the latter, religion is an explicit and core dimension. The European Right – linking a variety of right-wing populist actors with radical, religious-conservative ones – is active on various fronts in order to promote an alternative vision to what are often indicated as "woke liberalism",

"progressive ideology", "gender ideology", and the alleged European liberal hegemony. The supranational project of European integration and its complex human rights regimes, both in terms of the European Union and the Council of Europe, are a core target of these groups.

The European Right's "sacred" mission is grounded in religion and religious claims. Religion – in the form of distinctive interpretations or utilisations of Christianity – is of strategic value and is instrumentalised in variegated courses of action. It forms the background for proposals for fundamental reform of the European institutions,[3] it is used as a justification for strengthening national sovereignty, it serves as a fundamental value basis for contesting progressive rights promotion, and it provides a key legitimation for the restriction of rights on the domestic level. Regarding rights, there are roughly five areas where radical-conservative counter-movements are predominantly active, in particular in terms of third-party interventions, but not only: a) Right to family, parental authority; b) Sexual/gender identity; c) Reproductive practices; d) Euthanasia, and e) Freedom of expression. In recent years, these areas have become increasingly contested.

The sacred and the profane

The argument here follows a cultural- and political-sociological approach, and is inspired by Durkheim and later sociologists building on his work.[4] From this sociological perspective, radical-conservative actors seek to construct an alternative to liberal understandings of rights, by the profaning or desacralising of what they see as hegemonic, liberal understandings of rights. Contemporary "backlash movements" put the hegemonic

sacred (etym. "*sacer*, holy, dedicated to a god") and profane (etym. "outside of the temple") distinctions on their heads, by criticising "sacred" civil, liberal characterisations of rights – such as the liberal emphases on universalism, individualism, equality, and emancipatory rights extensions for minority groups – and turn them into profane – i.e. polluted, impure – ones (as promoting hyper-individualism, endorsing non-natural, "deviant" forms of behaviour that defy "natural" ones). In this, radical conservatives claim the status of victims for those who hold religious, that is, Christian views.

Radical-conservative actors might be understood as heterodox movements,[5] in that they contest the alleged hegemony of secular, liberal understandings of rights, and their main forms of institutionalisation. One often repeated argument from the radical-conservative right is that liberalism undermines the religious dimensions of societies. In this, they lay claim to their "sacred" commitments ("deeply held values that are non-negotiable"[6]) and the sacrality of their positions, which denies such "sacred" status to the positions of the opposition (including liberal, pro-choice standpoints).

What is "sacred" or "absolute" is expressed in recurrent claims in both judicial and political contexts. This includes an insistence on subsidiarity and national sovereignty, not least to protect national value (Christian) communities from European intervention. The radical-conservative right further stresses ("sacralises") the *collective* over the individual,[7] for instance, in terms of "sacrificial motherhood" (the subjection of the role of the mother to the "needs" of society, including in demographic terms),[8] relating children's rights and the status of the family to the best interest of the whole society, claiming euthanasia is not a strictly private matter, or safeguarding the majority's (reli-

gious) feelings against blasphemous statements by individuals in the public sphere.

The networked European right

The "sacred" mission of radical-conservative actors is transnationally organised in various networks.[9] One instance is a network called "Agenda Europe", which has links to various radical-conservative actors that engage in political and legal mobilisation. In its key statement, *Restoring the Natural Order* (original version: 2014[10]), the religious, sacred dimension is justified through natural law, strongly endorsed as an antidote to the "Cultural Revolution" of the 1960s which has allegedly led to a "process of de-civilisation".[11] Natural law is put forward as a civilising force, while human rights are profaned as at best a pseudo-religion: "[H]uman rights documents are no absolute truths, but the outcome of a political process". Natural law is instead "independent of politics, or of the human will". In fact, "[t]here is a Natural Law, which human reason can discern and understand, but which *human will cannot alter*" (italics added). In relation to the right to abortion, the preface of the document states that "[t]he culture of life associated with Christianity has been largely abandoned and replaced by a veritable 'culture of death', which, out of inner necessity, will destroy from within any society that accepts and allows it".

A right to abortion in the EU Charter

Understood in *Restoring the Natural Order* as an "encouraging" recent development, one clear point of rupture in relation to the right to abortion is the reversal of the *Roe v Wade* judgment

(1973) by the United States Supreme Court,[12] in *Dobbs v Jackson Women's Health Organisation* (2022).[13] In this judgment, the Supreme Court pushed the right to abortion into a more restrictive, conservative direction by rejecting abortion as a constitutional right and leaving authority to regulate to individual states. This constitutes a major turning point in the US, but equally provoked a reaction on the other side of the Atlantic, prompting attempts to safeguard achievements around the right to abortion in European states (culminating for instance in France in the constitutionalisation of the right to abortion in 2024).[14]

On the European level, it mobilised political forces in the European Parliament to adopt a resolution that called for the recognition of the right to abortion in the European Charter of Fundamental Rights, and which explicitly stated it acted against a pushback on gender equality and SHRH [sexual and reproductive health and rights] backsliding and to constitutionally protect the rights that are under attack.[15] In the related parliamentary debate, the initiators (of Renew) called for the entrenchment of the right to abortion in the European Charter, while opposing, right-wing actors claimed that the European Union should defend the right to life as well as children's rights, and not promote a (profane) "culture of death".[16]

Rights contestation in domestic arenas

The campaign for a European right to abortion equally triggered reactions in domestic arenas. Let us take as an example the Netherlands, a country that until recently was considered a pioneer in the advancement of progressive rights. Here, two motions, initiated by the conservative-Calvinist SGP, and

supported by radical-conservative and populist parties, were adopted by the Dutch parliament in March 2025.[17] The government was asked to evaluate the consequences of the abolition of a 5-day period of reconsideration for women who want to abort, as of January 1, 2023. The second motion asked to anticipate the evaluation regarding abortion procedures (currently planned for 2028). While for the SGP the motions were to investigate into an explosive increase in abortions,[18] according to the centre for sexual expertise "Rutgers", the two motions could have negative implications for the right of self-determination of women.[19]

In reaction, Dutch left-progressive actors put forward a parliamentary motion for the recognition of a right to abortion in the European Charter of Fundamental Rights as well as in the UN Covenant of Civic and Political Rights in September 2025.[20] The intention was to safeguard ("sacralise") the right to abortion in a world in which it is increasingly endangered. This motion provoked a further counter-move by conservative, religious political groups, to urge the government to prevent the adoption of the right to abortion in European treaties (insisting on the national prerogative to regulate abortion).[21] According to them, countries ought to retain the sovereign right to regulate abortion in ways they see fit, while the EU allegedly is trying to impose its (profaning) values on Member States in areas such as marriage, sexuality or abortion.

My Voice, My Choice Initiative

Returning to the European level, the European Citizens' Initiative My Voice, My Choice was equally a reaction to the developments around *Roe v Wade* in the US, as well as to the situation in certain European countries with *de jure* or *de facto*

restrictions on abortion. The ECI managed to collect over a million signatures, meaning it was successful.[22] On 2 December 2025, the European Parliament held a hearing with the My Voice, My Choice campaigners.[23] And on 17 December 2025, the Parliament voted – with 358 votes – in favour of a related motion.

The visibility of the campaign provoked a clear reaction from radical-conservative forces. In preceding months, Agenda Europe had claimed on its blog that it is "in fact a resounding defeat for the abortion lobby", not least because the earlier "diametrically opposed" ECI One of Us gathered 1.7 million signatures in 2014.[24] One of the promoters of this ECI claimed that "[t]his result proves once again that Europe is pro-life at its core".[25] The ECI depicted the liberal-progressive position in profane, impure terms, denouncing abortion as "prenatal child murder", a call for EU-funded "abortion tourism", and a "normalisation of baby-killing", while understanding human dignity in the sacred terms of including the dignity of all human beings, ostensibly including "children in utero".[26] In the Netherlands, the pro-life organisation *Schreeuw om leven* (Cry for Life) organised a petition campaign to be presented to the Dutch Commissioner Wopke Hoekstra.[27] And in the run-up the December 2025 hearings and vote, various counter-events were organised at the EP, such "Real Choice Means Real Support" and "My Voice My Choice: A Legal, Moral and Financial Fraud".[28] The pro-abortion motion was accompanied 4 other motions against abortion,[29] tabled by radical-conservative right-wing MEPs and party groups, stressing the principle of subsidiarity, the lack of EU competence, respect for national identity, and "motherhood as an essential contribution to society".[30]

Conclusion

The battle over the sacred and profane is evidently not a new phenomenon in Europe (just think of the debates over the preamble of the European Constitution[31] or the *Lautsi v Italy* case[32]). What does seem novel is the intensity, visibility, and active engagement in multiple arenas of increasingly well-organised radical-conservative actors, greatly facilitated by an ever more hostile international environment.

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Peter Bußjäger

Compulsion to Freedom

The Austrian Headscarf Ban and the Political Elephant in the Room

On 11 December 2025, just before the Christmas holidays, the Austrian National Council introduced amendments to the School Education Act (Schulunterrichtsgesetz, SchUG), banning headscarves for students under 14 in the name of protecting children's freedom of development and fulfillment.[1] This regulation constitutes the second attempt by the Austrian legislature to introduce a headscarf ban. The initial attempt was subsequently overturned by the Constitutional Court on the grounds of its unconstitutionality.

This chapter therefore examines the extent to which the legislature has taken the requirements of the Constitutional Court into account. Although the legislator has been largely successful in this, two crucial aspects have been overlooked: the resulting stigmatisation and the underlying patriarchal structures.

The (renewed) headscarf ban

The primary component of this "protection of children's freedom" entails the compulsion that students up to the age of 14 are prohibited to wear a headscarf that covers the head in accordance with Islamic traditions. The ban applies to all public and private schools in Austria. Parents or guardians are obliged to ensure that the ban is observed. The objective is to facilitate optimal development and fulfilment of all pupils, with a particular emphasis on self-determination, equality, and the enhancement of visibility for girls. This approach is deemed to be in the best interests of the child.

In the event of a first violation of the ban, the school management must immediately convene a meeting with the pupil concerned and her legal guardians in order to clarify the

background to the violation. It is evident that this aims at persuading parents to adhere to the headscarf prohibition. In the event of a subsequent violation of the headscarf ban, the school management must inform the responsible school authority, whereupon a further discussion is held with the parents or guardians. Should this discussion also prove unsuccessful, the legal guardians are threatened with an administrative fine ranging from 150 to 800 euros, and the youth welfare authority must also be informed.

The headscarf ban, which was passed with the votes of all parties represented, except of the Greens, is the second edition of an attempt that was first made in 2019. The law was introduced by the then center-right ÖVP/FPÖ coalition under massive criticism from the opposition parties (the social democratic SPÖ, the liberal NEOS and Greens) at the time. The legal provisions adopted in 2019 applied, in contrast to the recent law, only to public schools and exclusively to girls of primary school age. These provisions were declared unconstitutional by the Constitutional Court (Verfassungsgerichtshof, VfGH) in 2020.[2]

Judgement of the Constitutional Court

The primary rationale was that a regulation counteracting undesirable gender segregation and thus serving the educational goal of social integration and gender equality pursues an important constitutional objective in general (Article 7 para. 2 Bundes-Verfassungsgesetz, B-VG) and for schools in particular (Article 14 para. 5a B-VG). However, such a regulation must be proportionate and objective, particularly in alignment with the other fundamental values of the school.

The Constitutional Court has stated that the wearing of the Islamic headscarf is a practice that can be carried out for various reasons. For instance, it could simply be an expression of affiliation to Islam or the orientation of one's own life towards its religious values. Furthermore, the wearing of the headscarf can also be interpreted as a sign of belonging to the Islamic culture or of adherence to the traditions of one's country of origin. Consequently, the Islamic headscarf is not characterised by a clear and unambiguous meaning. The Constitutional Court's position is therefore in opposition to the attribution of a fundamentalist significance to the headscarf. However, given that the headscarf is not necessarily an expression of Islamic fundamentalism, the Constitutional Court does not see itself in a position to measure the constitutionality of banning headscarves in state educational institutions against this possible interpretation.

The selective ban, which affected only Muslim girls, under Section 43a SchUG of 2019 prohibited girls from wearing a headscarf until the end of the school year in which they turn ten. The Constitutional Court found that these measures were from the outset unsuitable to achieve the objective formulated by the legislator itself. Rather, the 2019 ban could also have a detrimental effect on the inclusion of Muslim girls and lead to discrimination, as it potentially hinders their access to education or socially excludes them. The 2019 regulation of Section 43a SchUG was identified as a factor that marginalises Islamic origin and tradition. The deliberate prohibition of the Islamic headscarf, predicated on a single religious or ideological clothing regulation, would have – according to the Constitutional Court – a stigmatising effect on a specific group of people.

Furthermore, the Constitutional Court contended that the prohibition on headscarves might result in pupils opting for private schools without the benefit of public rights or to attending lessons at home. This, in turn, could potentially lead to social exclusion and deny affected girls access to other ideological concepts within the meaning of the constitutional educational mandate under Article 14 para. 5a B-VG.

The Constitutional Court acknowledged the legislator's legitimate concern regarding the protection of Muslim girls who do not wear a headscarf, and thus to ensure a free decision on the practice of religion. However, this circumstance could not justify the selective ban under Section 43a SchUG. For the Constitutional Court, it was not objectively justifiable that the solution to such conflict situations starts with girls wearing headscarves, instead of addressing those persons who exert pressure on them to do so, for example in the form of hostility, devaluation or social exclusion in its decision VfSlg 20.435.[3] The 2019 headscarf ban had, from the point of view of the Constitutional Court, the effect of discriminating against Muslim pupils by creating a distinct separation between them and other pupils. The enforcement of the religious and ideological neutrality of the state could, in principle, also justify restrictions on the individual legal sphere. However, the emphasis on a specific religion or ideology and its particular manifestation in a singular type of attire, which is also comparable to other non-prohibited clothing habits in one way or another, is incompatible with the principle of neutrality.

Navigating the Constitutional Courts' requirements

In light of the aforementioned context, the question arises as to whether the headscarf ban that will enter into force with the beginning of the upcoming school year on 1 September 2026 fulfils the requirements formulated by the Constitutional Court. The Federal Government seems to be convinced that it does, and also refers to the accompanying measures, in particular the discussions held with those affected.[4] However, there is little more detail on this; the measures are not explicitly delineated within the legislative amendment. Instead, they appear to be, at best, support measures intended to prevent the emergence of situations in which Muslim girls are exposed to pressure from young moral guardians at schools.

When the recent legislative regulation is evaluated in this context, it is evident that the legislator has made a concerted effort to mitigate the rigid headscarf ban: The consequence of the offence is a result of discussions with the legal guardians; the sanction ultimately affects them, not the girls concerned. It is acknowledged in the law that wearing a headscarf is a matter of personal preference, and that this choice should be respected. It is evident that the ban does not permit teachers to remove the headscarf. It is also evident that the Federal Government is keen to establish an environment that is conducive to the integration of Muslim girls into society and that reduces external pressure on them to wear a headscarf.

However, these efforts are now being thwarted by the fact that these girls, or rather their legal guardians, are being pressured to force them not to wear headscarves. The ban, targeting a single religion, criticised by the Constitutional Court

in 2020, remains – albeit in a new form – in place, as does the stigmatisation of those affected. Whether this result can be justified by the fact that the sanctions are not disproportionate is questionable. In addition, the accompanying measures are only very vaguely known.

The assertion made by government officials that legislators were as certain of the constitutionality of the new law as they profess to be is questionable. In fact, it was also reported in the media that there was a degree of discussion about the possibility of ascribing the headscarf ban constitutional status.[5] In such a scenario, with the backing of the FPÖ, it would have been feasible to insulate the headscarf ban from constitutional scrutiny by elevating it to constitutional status. With few exceptions, the Austrian Constitutional Court lacks jurisdiction to review constitutional provisions with regard to contradictions between these provisions and fundamental rights. It is praiseworthy that the ruling parties resisted this temptation, which would have have elevated a fundamental rights restriction to constitutional status and, moreover, would have documented through this constitutional status that the headscarf represents a significant obstacle to integration in Austria.

Addressing the result, not the source of the problem

A constitutional analysis of the law commences with the fact that the obligation not to wear the headscarf – even for children and young people – constitutes a restriction of their freedom of religion in accordance with Article 9 ECHR and Article 10 EU Charter or an interference with the parents' right to religious education on this basis. Furthermore, it is a restriction of private and family life in accordance with Article 8 ECHR and

Article 7 EU Charter. Finally, there is also the question – particularly emphasised by the Austrian Constitutional Court – of unequal treatment in comparison to members of other religious communities, where there is no ban on visible signs of religious affiliation.

In contrast to the classic secular model in France, for example, the Austrian state is not entirely neutral in religious terms, especially not in the context of the education system. Despite the fact that the cross in the classroom is regarded as a symbol of Western culture rather than of Christianity, as established by the case law of the Constitutional Court,[6] it nonetheless represents a significant instance of unequal treatment, particularly in the context of the headscarf ban.

Nevertheless, this distinction is not inherently unconstitutional, provided it can be objectively justified. The legislative documents make such an eloquent attempt at justification when they refer to the number of women wearing headscarves in Austrian schools and the importance of integration. The number of women who choose to wear headscarves is not, in itself, problematic; however, there is an issue when this garment is worn as a result of social coercion, which promotes and perpetuates patriarchal structures. The public interest in counteracting such conditions can also justify treating this religious symbol differently from other religions, where such fears are not justified either due to the small size of the groups concerned or for other reasons.

Conversely, with the extension of the headscarf ban to all schools, the legislator has considered a justified concern of the Constitutional Court regarding the legal situation in 2020 and, additionally, has also extended the group of those affected from the age of 10 to the age of 14. This exacerbates the problem. The

Constitutional Court's objection that the headscarf ban could lead to a switch to private schools has at least been countered by the legislator by extending the ban to such educational institutions, but it cannot cover home schooling, which is permitted in Austria. Above all, the legislator does not know how to respond to the Constitutional Court's indication that – in short – the patriarchal structures should be addressed rather than the result and how to deal with the fact that the headscarf ban stigmatises.

The political elephant in the room

In light of the aforementioned circumstances, the elephant in the room is the question of whether a headscarf ban that is (also) supported by the Austrian political and societal mainstream could induce the Constitutional Court to depart from its previous case law, where it annulled a similar ban adopted by a centre-right government. That the mere breadth of political or societal support for a piece of legislation cannot serve as a constitutional argument requires no further explanation. Yet one may wonder whether such support is truly irrelevant in practice. This question becomes more pressing due to the constitutional concerns in relation to the renewed ban.

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Michael Lysander Fremuth

Lifting the Veil? Oops, They Did it Again

On the Headscarf Ban for Schoolgirls in Austria

From September 2026 onwards,[1] girls up to the age of 14 will be prohibited from wearing Islamic headscarves in Austrian public and private schools.[2] Although the ECtHR allows states to establish schools as religiously neutral places of encounter and to prohibit pupils from visibly displaying religious symbols,[3] it remains doubtful whether this new legislative attempt will be upheld by the Austrian Constitutional Court (Verfassungsgerichtshof, VfGH), as it narrowly targets only Muslim headscarves.[4] Already in 2020, the VfGH ruled that a comparable law was unconstitutional.[5] The girls' freedom of religion, as well as the principle of equality and neutrality, pose significant obstacles to the constitutionality of such a selective restriction. Although the legislator must protect the young girls' autonomy from external pressure to wear a headscarf, and is justified in ensuring integration and combating radicalisation, it is meeting its obligation to protect at the expense of those girls who voluntarily choose to wear one. However, this "collateral damage" may prove necessary in view of many reports from teachers and sociologists stating that the autonomy and determination of many girls' identities in schools are increasingly threatened by societal forces. These significant social changes may induce the Constitutional Court to reassess its jurisprudence and adapt it accordingly.

The headscarf as a subject of controversy

Even though wearing the Islamic headscarf is primarily an expression of religious belief and identity, it is often attributed with strong political and cultural significance. This appears to be leading to a new "culture war" which has also reached the European Parliament (on hijabs).[6] Unlike in the context of equal

treatment in employment and occupation, where the EU has adopted secondary legislation and the ECJ, in principle, accepted the prohibition on wearing headscarves imposed by employers,[7] there is no respective legislative competence related to the situation in schools that could trigger the applicability of the Charter of Fundamental Rights under its Article 51. Wearing clothing with religious connotations is, however, undoubtedly protected by the freedom of religion, as enshrined in constitutions and the ECHR, which enjoys constitutional rank in Austria. Courts in Europe are regularly confronted with questions related to headscarves and have upheld restrictions, *inter alia*, for teachers,[8] legal trainees,[9] and judges,[10] in particular to maintain peace in schools or to protect confidence in the judicial system. The ECtHR has also accepted the ban of full-face veils in public to protect the right of others to "live in a space of socialisation",[11] as it has accepted headscarf bans in educational institutions for university students and teachers.[12]

The fact that all these decisions have met with considerable criticism highlights the growing concerns over religious symbols in increasingly diverse, yet secular societies, as well as the difficulties of balancing individual freedoms with conflicting – and often controversial – public interests. A rather recent twist is the extension of bans on religious symbols in schools also to pupils;[13] i.e. persons not serving a public function,[14] including schoolgirls who wear headscarves.[15] Yet, such bans must not intend to protect a woman from herself or impose an abstract concept of dignity against her will.[16] Accordingly, the Austrian legislator – with a broad majority in the parliament[17] – invoked several other grounds, including the protection of the child's best interests and the girls' autonomy, the prevention of

segregation, and the promotion of integration and gender equality.

Beyond the absolute - striking a fair balance

The measure particularly interferes with the freedom of religion, the parental rights to education, and equality. Even though the legislator doubts that girls under the age of 14 have the intellectual capabilities and maturity to fully assess the various dimensions of wearing a headscarf, it has to be stressed that the Convention on the Rights of the Child does not set a strict age limit for exercising the freedom of religion.[18] Consequently, the headscarf ban can also restrict the rights of very young girls.[19] Freedom of religion, however, is not an absolute human right and does not confer the right to always and everywhere fully comply with one's own religious beliefs.[20] Moreover, the principle of equality allows for differentiation, provided it is based on objective grounds. The intention behind the headscarf ban in Austrian schools serves legitimate public aims, which, in principle, can justify limitations and differential treatment.

Proportionality reloaded

Overturning the first headscarf ban in 2020, the VfGH argued that the measure was not even capable of serving the integration of girls as they could withdraw from public schools and attend private schools instead, to which the ban did not apply, and thus become even more marginalised. The new legislation extends to private schools as well, hence only raising the question of whether its objective could be prevented by a substantial shift towards homeschooling (which in Austria is guaranteed by

constitutional law[21]).[22] Due to the strict requirements for home-schooling, a mass shift is unlikely, as evidenced by other countries that have introduced a headscarf ban in schools.[23] This also minimises concerns regarding the girls' right to education, which, in principle, is not infringed by such a ban.[24]

In addition, the VfGH emphasised that where autonomy is threatened, measures must be directed against those persons exercising coercion. To ensure proportionality, such measures should be pursued as the least intrusive means of protecting the girls' autonomy, provided that alternatives are equally effective. Yet, referring to the private authors of coercion alone (classmates and parents) arguably risks misjudging the limits of control and the influence of clandestine social power dynamics, as well as paternalistic structures. Peer pressure from boys or other girls may often go unnoticed by teaching staff. This is even more true for coercion exerted by parents endowed with strong authority. Teachers not only lack the competence to intervene in such cases, but family life and the right to raise children enjoy special protection under Article 8 and 9 of the ECHR, as well as under Article 2 of the (first) Protocol to the ECHR. Equipping girls with the possibility to invoke a legal prohibition on wearing the headscarf against individuals and structures that put them under pressure represents a highly effective method of empowerment, guaranteeing their autonomy.

Concession of solidarity

Anyway, the regulation is only problematic insofar as it also prohibits girls from wearing headscarves voluntarily. In such cases, they are denied the exercise of their own freedom to

enable others to exercise theirs (self-determination and negative freedom of religion) in a situation where those responsible cannot be effectively prevented from infringing their rights. Nevertheless, the ECtHR has deemed such a restriction permissible in the school context.[25] Such a ban, which also applies to girls who are not responsible for threatening the autonomy of others, constitutes a significant restriction of their freedom, but it can be considered as a concession of solidarity. To ensure proportionality, the ban is strictly limited to the school environment, meaning that girls are not prevented from wearing a headscarf outside of schools.

Furthermore, potential circumventions of the ban must be considered: In countries with headscarf bans, girls often resort to turbans, baseball caps, or wigs.[26] Corresponding pressure could be exerted at least with regard to these alternative forms of head coverings; yet, since the law expressly refers to the traditional Islamic headscarf, no broader interpretation can be considered in this respect. Although these alternative head coverings lack a comparable religious or political significance, the coercion to wear them could still undermine the protection of autonomy under Article 8 of the ECHR. However, beyond questions of decency, manners, and respect, school rules may prohibit all headwear in class.

Thou shalt have no other gods before me - equality and religious neutrality

Even if a restriction of religious freedom were permissible in principle, differential treatment remains and entails two dimensions. First, the VfGH has derived the principle of religious

neutrality from the principle of equality in conjunction with the right to religious freedom. In contrast to states with a laicist tradition, Austria perceives itself as merely secular, i.e. it does not relegate religion to the private sphere and does not enforce a strict separation.[27] Instead, religious communities in Austria enjoy a special legal status.[28] In some of its pertinent decisions,[29] the ECtHR was seized with situations in states with a laicist tradition, a constitutional decision it respected. But the fact that the ECtHR has also granted a corresponding margin of appreciation to Belgium shows that no stricter standard applies to merely secular states.[30] Nevertheless, Austria must treat all religions equally.

Furthermore, and combined with this state-theoretical dimension of the principle of equality, it also has an impact on individual legal relationships, guaranteeing the right not to be treated unequally in similar circumstances without a sufficient objective reason. The respective restriction on wearing the headscarf concerns two instances of differential treatment: First, with regard to the subject matter, it is selective because only one specific religious symbol will be banned. Originally, the draft law referred to head coverings for "cultural reasons", although it was already clear from the explanatory notes at that time that it was intended to target the Islamic headscarf. The final legal provision no longer conceals this intention. In doing so, it makes it clear that it specifically addresses only one item of clothing and religious symbol of a particular religion. Second, the measure is also selective in terms of gender. Islamic clothing worn by men, such as the caftan or the shekia, is not covered; nor is the kippah worn by Jewish boys, or the patka worn by Sikh boys. This unequal treatment requires justification which, in the case of differentiation based on religious affiliation or gender

(so-called "*verpönte Merkmale*" under Austrian law[31]), requires a higher level of justification.

First question: Is the headscarf even comparable to other religious symbols?

Such a requirement for justification would not even emerge if comparability were already denied so that a claim to equal treatment would not arise. As an expression of religious belief, the headscarf is comparable to other items of clothing with religious connotations. Comparability could only be denied if one were to reinterpret the headscarf in such a way that it was primarily attributed political or cultural significance, which would largely emancipate it from its religious meaning. However, the VfGH,[32] the ECtHR[33] and other courts[34] emphasise that the religiously neutral state cannot claim interpretative authority in this regard. It seems highly unlikely that the Austrian Constitutional Court would accept a legislative reinterpretation of the headscarf this time.

The crucial question: Can a clearly selective measure be exceptionally justified?

If there is a right to equal treatment, the question arises as to whether it is permissible to address only girls and only the headscarf worn in accordance with Islamic tradition. The legislator assumes that boys are not subject to comparable social pressure. Obviously, this still needs to be substantiated with facts because *prima facie*, it does not appear impossible that young men are also under considerable pressure, for example

from their parents or classmates, to dress in accordance with religious norms. Even if boys are not subject to the same cultural expectations and forms of sexualisations, their autonomy is no less important.[35] With regard to the unequal treatment of Islam and girls, justification can also only come from a changed factual situation. There is an increasing number of reports from teachers and sociologists stating that the climate in schools has changed: Girls who are perceived as Muslim are pressured by male and female classmates to conform to orthodox religious practices, to distance themselves from (ostensibly) Western and "corrupting" values through their clothing, and thus to consciously adopt an ideology that makes integration more difficult.[36] If this is sufficiently proven, it may not only result in an obligation to protect the autonomy (Article 8 of the ECHR) and negative freedom of religion (Article 9 of the ECHR) of the girls, but also to enforce the state's core interest in fighting radicalisation and facilitating integration in order to ensure a peaceful, tolerant coexistence. Reaching out to young people in the school context is of utmost importance. Although the parental right to religious education and teaching of their children must be respected, this right has to be balanced and protected particularly against indoctrination.[37] It is precisely this that should be ruled out. Of course, the teaching and school environment must not be geared towards arguing in favour of or against a certain religion,[38] and stigmatisation must be avoided.

Accordingly, it is mostly the unequal treatment of persons and religions that raises questions about the measure's compliance with human rights. On the one hand, the ECtHR has stressed the neutrality of the ban on religious symbols in schools to justify a respective law,[39] while also referring to the

domestic constitutional principle of neutrality.[40] On the other hand, it also accepted limitations – at least *de facto* – confined to women.[41] The VfGH has not only stressed equal treatment in religious matters, but it has also invoked the risk of stigmatisation as a consequence of the differential treatment. This could only be rejected if the legislator were able to prove a real and factual problem with Islamic headscarves worn by schoolgirls. To be on the safe side and to leave no doubts about its neutrality, however, the legislator should have opted for a full ban on the wearing of visible symbols of belief.

To have or not to have … a margin of appreciation

The decisive factor will be the margin of appreciation that courts grant to politics to strike a fair balance between conflicting rights and interests. What makes the debate on headscarves in schools special is that the boundaries are less clear-cut than is often the case. It is not simply a matter of the state versus civil society. Instead, there are also women's rights NGOs,[42] feminists, and religious representatives who argue in favour of the ban.[43] In diverse, multi-ethnic, and multi-religious societies, the role of the state as an arbitrator is becoming increasingly important. In particular, in the context of the state's educational mandate,[44] this requires leeway, which must be utilised through a process of social deliberation;[45] and the number of states banning religious clothing in schools shows that there is no consensus[46] among the parties to the ECHR going in one direction.[47] At best, schools are places of encounter, experimentation, and identity formation, and possibly the only safe space where young people can experience freedom, personal responsibility, and self-efficacy, enabling them to make truly autono-

mous decisions as they mature. In Austria, there has been a response to the concerns of teachers and sociologists that girls perceived as Muslim are under considerable pressure to behave in accordance with religious norms. Such a response is not generally problematic in terms of human rights, but rather a necessity. However, it may prove problematic that the final step has not been taken to design schools in a manner reflecting full equality, where the visible display of all religious symbols is prohibited, where pupils can meet without becoming an object of projection for social conflicts, and where they can savour a taste of freedom.

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Lucy Vickers

The Fragility of Proportionality Review

Egenberger Revisited

The latest decision in *Egenberger*[1] illustrates both the importance of the EU framework for protecting against discrimination on the grounds of religion and belief as a mechanism for protecting religious freedom,[2] and at the same time its fragility. Since the CJEU decision,[3] two German courts have taken turns at assessing the proportionality of the Church's refusal to employ Ms Egenberger, with different results: one ruled that the Church should have employed her, the second, and latest, ruled that it was entitled not to. The fact that two courts could consider the same facts and reach opposite conclusions without either seeming to have misapplied the law shows how flexible the law can be. This flexibility is, of course, a great strength, allowing decisions of nuance and fact sensitivity. But it is also a great weakness, demonstrating the fragility of the protection against discrimination on grounds of religion and belief in EU law.

The autonomy to decide and proportionality

The original decision in *Egenberger* (C-414/16) involved a protestant organisation looking to employ a member of the protestant religion to write a human rights report and undertake associated tasks. Vera Egenberger was not appointed to the role and claimed that she had been discriminated against on grounds of religion. The relevant German equality law (Allgemeines Gleichbehandlungsgesetz, AGG) did not directly match Directive 2000/78. Under Article 4(2) of the Directive, employers may impose occupational requirements of religious loyalty on their staff where legitimate and justified, having regard to the organisation's ethos. In contrast, under the AGG, the employer had autonomy to decide whether loyalty was needed "in accor-

dance with their self-perception", giving total freedom to religious employers to employ in accordance with their religious rules. The question for the CJEU was whether the self-determination test in the AGG was compatible with Article 4(2).

The case effectively sets two significant interests against each other: the right of religious organisations to religious autonomy versus the right of individuals to equality and non-discrimination on grounds of religion. In common with other situations in which fundamental rights conflict, the CJEU's response was to undertake a balancing exercise, in which the competing rights and interests were weighed against each other. Significantly, in confirming the need to undertake a balancing exercise, the Court did not only apply the wording of Article 4(2) but also relied on general principles of Community law to rule that any requirement should be subject to the test of proportionality. It was clear that the CJEU was recognising and respecting the legal obligations in EU law to uphold religious autonomy, but also firm that this had to be held in balance with the principle of equality.

The strengths and weaknesses

The original CJEU decision has been noted as a positive step towards upholding the EU's equality-agenda.[4] From a reading of the CJEU decision, one might well have predicted that, when the case returned to the domestic court, the outcome would be a ruling in favour of Egenberger: the role of report writer did not appear to have sufficient link to church doctrine for a requirement to be a member of the protestant denomination to be proportionate. And indeed, this was the decision of the Federal Labour Court when it heard the case again.

However, while this outcome might have been expected, it is equally clear that the outcome was not inevitable. The decision of the CJEU merely required that the need for occupational requirements had to be subject to external review. Hence, it did not mandate any particular outcome of that review. As a result, the outcome of the Federal Constitutional Court (FCC) judgment is also consistent with the outcome of the CJEU decision: Article 4(2) applies and adequate weight must be given to the interest in religious autonomy in the proportionality review. The decision provides a clear example of the strength and weakness of the proportionality approach as a mechanism for protecting equality.

The strength of proportionality review

The concept of proportionality is firmly embedded as a principle of EU law. It provides a clear language in which to advocate for the protection of rights, and allows for a fact-sensitive, nuanced assessment of a wide range of contextual factors. In the context of religious freedom and employment in religious organisations, proportionality can ensure that religious autonomy is not given automatic priority but is counterbalanced with the right to non-discrimination and equality on grounds of religion.

Proportionality provides a mechanism by which one can challenge whether the result is correct, particularly if an important element is left out of the equation. For example, as the FCC noted in *Egenberger*, the fact that the role involved not only producing the report but also representing the employer when disseminating and discussing the report had not been treated as significant in earlier decisions in the case. Leaving the representational role of the report writer out of the balance could affect

the outcome of the balancing process as more weight would be given to the autonomy interests of the organisation if the job had a religious function.

The ability of proportionality review to take into account both case facts and wider context, including the national context, means that it is rightly the standard mechanism for reconciling competing interests in EU law, and unsurprisingly read into Article 4(2) by the CJEU. However, as seen in the most recent FCC decision, this very flexibility is also its greatest weakness.

The weakness of proportionality review

Although adopted in EU and human rights law as the means of resolving conflicts between rights, the proportionality approach is of course highly problematic. Proportionality review can result in inconsistency, uncertainty, and false objectivity. The use of mathematical terminology suggests that the balancing is objective, but inevitably subjective judgments are made as to the relative importance of the different interests. Effectively, unless one or other of the interests is declared trumps, the metaphorical balancing can continue *ad infinitem*, with no clear outcome being inevitable. The result is huge uncertainty for the parties, as illustrated in the *Egenberger*-story where two courts followed the same set of rules, but reached different conclusions.

Decisions on proportionality depend not only on whether the right factors were put into the balance at all, but also the relative metaphorical weight of those factors. Again, this is illustrated clearly in *Egenberger*: both courts considered religious autonomy and equality, but the FCC gave greater weight

to religious autonomy compared to the Federal Labour Court. Indeed, it is arguable that before the FCC, the notion of religious autonomy was overvalued, with its significant focus on the self-determination of the religious organisation.

Overvaluing religious autonomy

Religion and belief include both individual and collective elements, and so for religious autonomy to be protected adequately, there clearly needs to be a collective or corporate dimension to the right. Yet the theoretical basis for that collective dimension is contested. On one view (the soft view), collective rights gain their validity and value from the individuals who make up the collective, as they maximise their ability to act on their religious choices. A second, stronger, collective religious autonomy claim can be made which encompasses an independent interest in collective autonomy which amounts to more than the sum of the individual autonomy interests of a religious community.[5] This strong version of religious autonomy advocates not only for autonomy over doctrine, but also self-determination with regard to the internal governance of the organisation.

This strong form of religious autonomy is threatened by the equality-agenda, as religious groups' freedom to organise their internal affairs is restricted when they are required to comply with equality law in relation to those they employ. The decision of the FCC in *Egenberger* reflects this stronger form of autonomy, with the considerable weight it afforded to the autonomy and self-determination of the Church.

However, such an approach to religious autonomy remains hard to justify. It is not clear whether the collective interests

have a separate independent existence, nor whether group rights should be protected in the absence of individual members supporting the views of the church leadership. For example, it is unclear whether ordinary members of the church in Germany would support the need for all Church employees, including report writers, to be Church members; and if many of them would not, why this would be required in the name of "religious autonomy".

The "soft" view is easier to justify, as it is based on the aggregate interests of the church membership, and it is also sufficient to ensure that religious organisations' interests are protected when balanced against equality. Indeed, it is arguable that it is easier to undertake such a balancing exercise when both interests are understood as aspects of the same underpinning principle of individual dignity and autonomy, for then the competing interests are no longer entirely incommensurable. They are potentially easier to weigh against each other as they share a common denominator of individual dignity and autonomy. With such an approach, religious autonomy is taken into account, but equality is less likely to be outweighed.

Alternative approaches

The use of proportionality to determine the rights of religious organisations is clearly imperfect. Its flexibility allows for fact-sensitive and nuanced review, but at the same time leaves courts and parties uncertain not only as to which facts should be taken into account but also unclear about the relative weight of their fundamental rights. As a result, the protection of equality remains in a fragile state.

Although far from perfect, it is unclear that any alternative would lead to an improvement in the protection for equality. The alternative to undertaking a balancing exercise is that a prior decision would have to be taken as to which of the incommensurable interests of autonomy and equality should prevail. If equality, this could severely limit the scope for religious freedom. To take an extreme example, it would mean that equality law could forbid the Catholic Church to require that its priests be male Catholics. If autonomy were to be given precedence, it would enable religious organisations to reserve large numbers of jobs for religious adherents, regardless of the nature of the job. Clearly legal systems that recognise both the right to religious freedom and the right to non-discrimination have to accept some form of balance, albeit imperfect.

Reflections

In the case of Egenberger, we see two courts reach two different decisions on one set of facts. One court gave significant weight to the equality rights of the report author; the other gave heavy weight to church autonomy, recognising it as a prevailing right which tipped the balance firmly in favour of the Church employer. Thus, from an equality-perspective, the outcome is disappointing. It demonstrates the fragility of the proportionality principle, providing a prime example of its potential to mean all things to all people, or at least different things to different people.

Nonetheless, the case also demonstrates the impossibility of any other approach. While the approach does not mandate any particular answer, it does make absolutely clear that there has to be a process of review, and that all elements of any case have

to have a chance to be put in the balance. The approach also provides the language and process by which reasoned debate about which elements should be weighed in the balance can take place, including debate over the theoretical underpinnings of religious autonomy itself.

The alternative to the approach in *Egenberger*, for all its imperfections in terms of certainty and clarity, as well as disappointment from an equality-perspective, would be for one interest to prevail in all cases, to the exclusion of the other. Where both the right to religious freedom and the right to equality have standing as international human rights, that conclusion is clearly unacceptable. While the decision of the FCC provides an excellent illustration of its fragility, a balancing approach remains the only realistic option for courts when dealing with an issue which is not only deeply contested, but which is also a key aspect of national identity in many EU Member States.

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Matthias Mahlmann

Winning by Losing

The Egenberger Decision and the Reconfiguration of Religious Freedom in Germany

Up to now, religious communities in Germany could require religious affiliation as an occupational requirement for almost all kinds of employment. Following the CJEU's intervention, the Federal Constitutional Court (FCC) in November 2025 changed this decades-long practice and adapted its two-pronged test in light of the CJEU's *Egenberger* (C-414/16) requirements, subsequent to Article 4(2) of Directive 2000/78/EC, that occupational requirements imposed by religious employers must be genuine, legitimate, and justified.[1]

First, the FCC determined that the occupational requirement must plausibly reflect the religious community's ethos and that there must be, objectively, a direct link between the requirement and the tasks in question, taking into account the nature of those tasks and the context in which they are performed. Second, the requirement must be proportionate in light of the occupational activities and their context, necessitating a differentiation between categories of employment.

The FCC thus accorded significantly greater constitutional weight to equality and non-discrimination and potentially other fundamental rights in relation to the right to religious self-determination derived from corporate freedom of religion than it had in the past. Yet it did more than that: It also reinforced the protection of religious freedom itself, both of religious communities and of individuals. This decision is of great social importance, given that the Christian Churches and their organisations are the second largest employers in Germany. Moreover, the decision affirmed the supremacy of EU law and the authority of the CJEU in times of fundamental challenges to the transnational rule of law in Europe. *Egenberger* by the FCC, thus, constitutes a substantial, constitutionally well-justified, fundamental-rights-friendly, and welcome shift.

High stakes

The case concerns a constitutional complaint filed in 2019 against a ruling by the German Federal Labour Court that implemented the CJEU's *Egenberger* decision into German law. That decision had been prompted by a preliminary reference from the Federal Labour Court itself to the CJEU.

Vera Egenberger had applied for a fixed-term, part-time position with Diakonie, an association registered under German law, affiliated with the Protestant Church of Germany. The main task of the position was to produce a shadow report on the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Diakonie had made membership in a Christian church a precondition for employment. As Vera Egenberger had no religious affiliation, she was not invited to a job interview.

Applying the CJEU's interpretation of Article 4(2) of Directive 2000/78/EC (Employment Equality Directive), the Federal Labour Court held that both the nature of the work and the context in which it is performed must be considered when assessing whether a religious affiliation constitutes a genuine and proportionate occupational requirement for a specific position. It found Diakonie's requirement disproportionate and awarded compensation for discrimination on the grounds of religion.

In its constitutional complaint, Diakonie argued that the Federal Labour Court's decision violates its right to religious self-determination derived from its corporate freedom of religions guaranteed by Articles 4(1) and 4(2) in conjunction with Article 140 of the Basic Law and Article 137 of the Weimar

Constitution (WRV). Moreover, Diakonie claimed that the CJEU's *Egenberger* judgement, on which the Federal Labour Court's ruling was based, constituted an *ultra vires* act and infringed Germany's constitutional identity.

The complaint thus framed the case as a legal battleground with potentially Europe-wide ramifications. A finding by the FCC that the CJEU's *Egenberger* decision was *ultra vires* and violated Germany's constitutional identity could have dealt a serious blow to the supremacy of EU law – particularly at a time when that principle faces challenges in the context of the EU's rule-of-law conflicts with Hungary and Poland. The challenge was significant given the FCC's firmly established case law granting religious communities wide discretion over the occupational requirements they chose, the FCC's *ultra vires* jurisprudence, and critical remarks about the CJEU's *Egenberger* decision and its parallel case, *IR v JQ* (C-68/17), made by then-sitting FCC judges (these comments gave rise to a demand that the judges recuse themselves from the proceedings).[2] The stakes were therefore high.

Reconfiguring the normative matrix of religious freedom in Germany

The FCC found in the *Egenberger* case that the complaint was well-founded. In its view, the Federal Labour Court had violated Diakonie's right to religious self-determination derived from the corporate right to freedom of religion through the specific outcome of its weighing and balancing exercise. It therefore overturned the challenged judgement and remanded the matter to the Federal Labour Court.

However, the FCC's reasoning implies a significant reconfiguration of its previous understanding of the right to religious self-determination, corporate religious freedom and its relation to individual religious freedom, constitutional equality guarantees, and anti-discrimination law. Moreover, the FCC found that both the *ultra vires* claim and the claim of a violation of Germany's constitutional identity were without merit, which is good news for the integrity of the European legal order.

Thus, while Vera Egenberger ultimately lost her case, she succeeded in prompting a decision that not only strengthens the supremacy of EU law and the normative effects of equality guarantees and prohibitions of discrimination in both constitutional and Union law, but also – crucially – serves to enhance the protection of religious freedom in Germany.

No ultra vires act

The FCC did not engage substantively with the challenge to the decision of the Federal Labour Court based on an alleged violation of Germany's constitutional identity. It declared it inadmissible. Such a claim derives from the guarantee of human dignity under Article 1 of the Basic Law and the right to vote under Article 38(1) of the Basic Law, both of which are limited to natural persons. Consequently, the complainant, as a registered association, lacked legal standing.

The FCC did, however, engage substantively with the *ultra vires* claim. It reiterated the established standards in its *ultra vires* jurisprudence: to constitute an *ultra vires* act, an act of an organ of the EU must amount to a manifest violation of the principle of conferral, which is based on an interpretation of an EU competence that is manifestly unjustifiable and is of struc-

tural importance for the allocation of competences between the EU and Member States (para. 229).

The FCC addressed three important questions. First, regarding Article 17(1) Treaty on the Functioning of the EU (TFEU), which stipulates that "the Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States," the FCC held that the CJEU was correct in not interpreting this provision as a "carve-out" (*Bereichsausnahme*). Such an interpretation would have prohibited any EU legislation that limits the established rights of religious associations. Rather, Article 17(1) TFEU requires that Member States' special constitutional arrangements concerning religious communities be appropriately taken into account in any balancing exercise – a requirement that, in the FCC's view, the CJEU adequately met in its judgement (para. 246).

Second, the CJEU did not misinterpret the scope of the EU's competence under Article 19 TFEU to adopt anti-discrimination legislation. The scope of this competence does not prevent the Union from enacting legislation that incidentally affects matters beyond its direct competence. The FCC rightly drew a parallel to comparable cases (para. 248 ff.) in which the CJEU held that the absence of competence to regulate relations between the state and religious communities does not preclude the application of laws pursuing unrelated purposes – such as data protection (cf. CJEU, *Tietosuojavaltuutettu,* C-25/17, para. 74, General Data Protection Regulation, Article 9(1), Article 9(2)(d)) – that nevertheless have indirect effects on religious communities.

Finally, the CJEU's interpretation of Article 4(2) of Directive 2000/78/EC, in the FCC's view, struck a fair balance between

corporate and individual religious freedom and guarantees of equality and prohibitions of discrimination under Article 21 of the EU Charter, which enjoys direct horizontal effect in Union law. The FCC noted that this interpretation is consistent with the case law of the European Court of Human Rights (ECHR). The CJEU rightly emphasised that courts must be empowered to ensure that the standards set out in Article 4(2) of Directive 2000/78/EC are respected (para. 254 ff.).

Moreover, the FCC concluded that the level of fundamental rights protection required by the Basic Law is maintained under EU law as interpreted by the CJEU. Importantly, the FCC stressed that the CJEU and the FCC overall apply comparable standards when assessing the admissibility of religious exceptions in employment law (para. 215 ff.).

Changing course by sharpening and concretising

The FCC emphasised that the fundamental rights enshrined in the Basic Law constitute the standard for assessing the constitutional complaint. However, these rights must be interpreted in light of EU law and the guarantees of the ECHR, in accordance with the Court's established case law on the interaction of fundamental rights within Europe's multilevel system of fundamental rights protection. The FCC also reaffirmed the supremacy of EU law over constitutional law.

Drawing on the reference in EU law to Member States' national traditions governing the relationship between the state and religious communities, as well as on recent CJEU case law, the FCC recognised a normative space for what it called a "pluralism of fundamental rights" (para. 159 ff.). Although the Court did not spell out this concept in detail, it can be under-

stood as functionally equivalent to a "margin of appreciation", leaving Member States a certain amount of room for interpretation when applying Union law.

Building on this approach, the FCC reformulated the criteria developed by the CJEU – that religion must constitute a genuine, legitimate, and justified occupational requirement – into its own two-pronged test.

The first stage consists of a plausibility review of a religious community's claim that certain forms of employment are connected to its ethos. Hereto, the FCC introduced the first major modification of its earlier test. Courts are no longer limited to verifying whether an occupational requirement is a plausible expression of the religious community's ethos. They must now also determine whether there is, objectively, a direct link between the occupational requirement and the tasks in question, considering the nature of those tasks and the context in which they are performed (para. 217).

The second stage involves balancing the right to religious self-determination derived from corporate religious freedom against the employee's rights. At this stage, the FCC introduced the second – and crucial – modification: The occupational requirement must be proportionate in light of the nature of the occupational activities and the context in which it is performed. Accordingly, when assessing the permissibility of religious affiliation as an occupational requirement, it is necessary to differentiate between different categories of employment. Moreover, the FCC clarified that the concept of a Christian "community of service" (*Dienstgemeinschaft*) does not provide a blanket license to make church membership a legitimate occupational requirement across all types of employment – from priest to gardener (para. 219).

Through this reformulation, the FCC effectively incorporated the central element of the CJEU's *Egenberger* decision into German constitutional law: a proportionality analysis relative to the nature of the activity and its context. The admissibility of such an analysis has been a point of contention in German law for decades. It is incorrect to assume that the strong protection of corporate religious freedom has always been the uncontested interpretation of Article 4 of the Basic Law, in conjunction with Article 140 of the Basic Law and Article 137 WRV. On the contrary, already during the Weimar Republic, influential figures such as Gustav Anschütz held a different view.[3] In the 1970s and 1980s, the Federal Labour Court applied proportionality tests until it was overruled by the FCC in 1985.[4] Since then, many scholars and courts have advocated for a constitutional course correction by reintroducing such proportionality tests.

The incorporation of the proportionality test is therefore the pivotal point of the judgement. It represents more than a "concretisation" or "sharpening" of the former standard, as the FCC describes this change of course in the respective judgement. Rather, it constitutes a substantial, constitutionally well-justified, fundamental rights-friendly, and most welcome shift in normative perspective.

BVerfG - the ultimate court of appeal?

In light of these standards, the FCC assessed the constitutionality of the Federal Labour Court's decision (para. 267 ff.). It held that the latter had not properly applied the two-pronged test to the occupational activity in question.

First, the Federal Labour Court had failed to adequately consider that the activity involved externally representing a

Christian perspective on racism – an activity that the FCC believed required credibility grounded in the employee's affiliation with a Christian church. The Federal Labour Court had therefore overlooked the objective link between the occupational activity and the occupational requirement.

Second, the FCC found that this occupational requirement was proportionate to the tasks of preparing the shadow report and credibly presenting Diakonie's Christian stance on racism to the public. Accordingly, Diakonie's right to religious self-determination derived from corporate religious freedom should have been accorded greater weight than the Federal Labour Court had assumed.

In the course of its reasoning, the FCC made an important observation: It accepted the Federal Labour Court's conclusion that Article 9(1), first alternative, General Equal Treatment Law (Allgemeines Gleichbehandlungsgesetz, AGG) (allowing occupational requirements solely on the basis of a religious community's ethos) violates EU law and is therefore inapplicable (para. 269) – a conclusion that many commentators had maintained since the provision's enactment.

Some critical questions

The FCC's decision invites a number of critical questions. For instance, one may ask what "fundamental rights pluralism" will concretely mean in the future when balancing the right to religious self-determination, corporate freedom of religion, individual freedom of religion, and equality – especially given that the FCC repeatedly emphasises that corporate religious freedom carries greater weight under German constitutional law than under EU law.

At the same time, considering the substantial modifications introduced by the FCC's new test, there appears to be no normative space to re-establish the strong protection of corporate religious freedom of the past through the back door of "fundamental rights pluralism". Moreover, it is correct that EU law concerning the relationship between the state and religious or belief communities allows for such a "margin of appreciation". Furthermore, the CJEU has expressed similar ideas to reinforce protection against discrimination. CJEU, *Wabe and Müller* (C-804/18 and C-341/19), held that Article 2(2)(b) Directive 2000/78/EC must be interpreted as meaning that national provisions protecting the freedom of religion may be taken into account as more favourable provisions, within the meaning of Article 8(1) Directive 2000/78/EC, in examining the appropriateness of a difference of treatment indirectly based on religion and belief.

What is more, it is worth considering whether the FCC's evaluation of the Federal Labour Court's decision is entirely convincing and whether the FCC may, in this instance, have assumed the role of a specialised court. After all, the Federal Labour Court conducted a detailed analysis of the facts and their legal implications.[5] The FCC's exact competences in this area are, however, far from precisely circumscribed. It is thus not obvious that the FCC usurped the powers of specialised courts. Nevertheless, it is significant that the FCC applied a standard – credible external representation – for justifying an occupational requirement that reflects a legitimate concern of religious and belief communities.

Making EU law count

Ultimately, the decision must be welcomed for several reasons. It strengthens the European legal order by reaffirming the supremacy of EU law – even over constitutional law – at a time of crisis. It upholds the CJEU's interpretation of EU law and rejects the claim that the CJEU's *Egenberger* judgement constituted an *ultra vires* act, thereby reinforcing the CJEU's legitimacy. In this context, the FCC accepts the CJEU's balanced interpretation both of Article 17 TFEU and of the Union's competence under Article 19 TFEU to enact anti-discrimination legislation as applicable also to religious communities. This is crucial, as such laws safeguard religious freedom from politically motivated reinterpretations of the basic framework of state–church relations in Member States, which could be employed to limit the rights of certain religious groups.

Moreover, it is noteworthy that the FCC refrained from engaging with the claim of Germany's constitutional identity and did not relax the strict standards of admissibility for such claims.

Universalising freedom through equality

By incorporating a proportionality review relative to the nature of the occupational activity and the context in which it is performed, the FCC has constitutionally enabled a more differentiated approach to this multi-polar conflict of rights. This allows both the rights of religious communities and those of employees – including their individual freedom of religion – to be accorded their proper weight.

This development is particularly significant given that the number of employees working for the Christian churches and their affiliated organisations has grown substantially since 1945. Today, apart from the state, these churches and affiliated organisations constitute the largest employers in Germany, the latter employing about 1,3 million employees. In several sectors, individuals may have no realistic alternative but to seek employment with church-affiliated organisations. This can create pressure to maintain formal church membership not out of genuine belief but as a means of securing employment – an outcome that not only is problematic from the perspective of freedom of religion but also is deeply at odds with the ethos of any religious community.

Finally, the FCC emphasised the necessity of judicial control over compliance with these standards. It rejected the complainant's argument that such judicial oversight would amount to a "theocracy of judges", rightly distinguishing between the legal delineation of the limits of religious freedom and any theological evaluation of religious doctrine. To determine whether wearing an Islamic headscarf as a teacher in a public school or as an official in a court proceeding is permissible is equally not a question of a theological evaluation of this practice but of determining the justified limitations of a fundamental right.[6]

A future task will be to develop, on the basis of the constitutional standards outlined above, a differentiated body of case law determining under which circumstances religious affiliation constitutes a permissible occupational requirement and when it does not. In recent years, German courts have already made progress in this regard,[7] while controversial cases are currently

pending before the CJEU, whose forthcoming judgements will provide further clarification.[8]

The FCC's decision poses no substantial practical challenge for the Christian churches, which in recent years have already adjusted their employment practices along the lines demanded by the CJEU – and now confirmed by the FCC.[9] There is no reason why the same should not apply to other religious or belief communities.

Importantly, the FCC accorded significantly greater constitutional weight to equality and non-discrimination in relation to the right to religious self-determination derived from corporate freedom of religion than it had in the past. Yet it did more than that: It also reinforced the protection of religious freedom itself. Religious freedom is not only – or even primarily – the freedom of organised, institutional religious bodies, but also the right of individuals. Crucially, this includes individuals who, regardless of their personal faith, now enjoy a broader and legally secured opportunity to access the many forms of employment offered by organisations with a religious ethos in Germany.

This observation points to an insight already noted above in connection with the interpretation of Article 17 TFEU: Equality guarantees and anti-discrimination law not only strengthen equality but also increase freedom. They are instruments for universalising freedom and establishing an order of liberty for all. Accordingly, the CJEU, *Commune d'Ans* (C-148/22, para. 40), stated that the prohibition of any discrimination based on religion enshrined in Article 21 of the EU Charter is the "corollary" of the right to freedom of thought, conscience, and religion guaranteed by Article 10 of the EU Charter.

This role of anti-discrimination law as a safeguard for freedom of religion and belief may become even more important in the future. This is especially true given the disturbing rise of antisemitism and islamophobia in Europe, alongside the unsettling spread of identitarian political ideologies of exclusion and intolerance.

Disclaimer: *The author prepared the legal expert opinion submitted by the Senator for Integration, Labour and Social Affairs (Berlin) to the German Federal Constitutional Court in the Egenberger case*.[10]

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Hans Michael Heinig, Frank Schorkopf

Religiously Sensitive Union Law in Fundamental-Rights Pluralism

Egenberger Strengthens Both, Corporate Religious Self-determination and EU Law

"Doomsday"[1] did not occur. The ghastly fascination with this legal conflict, shared by some observers in the media and in legal scholarship, has not been given new fuel. With its long-awaited order in the *Egenberger* case, the German Federal Constitutional Court has delivered a prudent and balanced decision.[2]

It has neither musealised ecclesiastical labour law and abandoned its established case law, nor initiated a trial of strength with the Court of Justice of the European Union by denying the primacy of Union law. At the same time, the Federal Constitutional Court has asserted itself vis-à-vis the Federal Labour Court, which had sought – using support from Luxembourg[3] – to overturn Karlsruhe's prior jurisprudence on ecclesiastical labour law.[4]

From the perspective of the successful complainant, this assessment is easily written. The opposing side may see matters differently. Yet even the opposing side and the neutral observers cannot avoid acknowledging that the complainant – the Protestant Agency for Diakonia and Development (*Evangelisches Werk für Diakonie und Entwicklung e.V.*) – unexpectedly prevailed with its constitutional complaint: The ecclesiastical right of self-determination was affirmed, while at the same time the normativity of Union law within the German legal order was strengthened.

The existing case law is reviewed in dense language; the systematics of review reservations following incidental and principal *ultra vires* complaints are differentiated; and the *effet utile* principle is casually re-anchored in Article 4(3) TEU. The *Solange* reservation is classified by the Federal Constitutional Court as a further constellation of the review reservation that, exceptionally, allows the primacy of Union law to lapse.

Nevertheless, both the decision and the proceedings as a whole give rise to deeper reflection and critical questioning. Four aspects will be examined more closely in what follows.

Dynamics between constitutional law and Union law

When the constitutional complaint was filed at the end of 2018, the legal landscape was still a different one. In May 2020, the Federal Constitutional Court for the first time upheld a constitutional complaint based on a competence violation by European institutions.[5] Such an *ultra vires* decision had already been in the air in the late 2010s – and it was clear that the Federal Constitutional Court would not be able to invoke this reservation twice within this short period.

Shortly before that, in November 2019, the First Senate fundamentally recalibrated the delineation of fundamental-rights protection between the German Basic Law and Union fundamental rights in cases involving European law. *Right to Be Forgotten I*[6] altered the architecture of fundamental rights: The dichotomy – a strict separation between constitutional and Union-law fundamental-rights protection – was transformed, in constellations where Germany retains some of the regulatory discretion, into a system of interlocking norms, in which constitutional requirements must be taken into account within the Member State's margin of discretion.

This development opened the possibility for the Second Senate to insist on the characteristics of its balancing doctrine in ecclesiastical labour law vis-à-vis the Federal Labour Court in the *Egenberger* case. The recalibration effected by *Right to Be Forgotten* affords the Federal Constitutional Court avenues of intervention beyond maximal confrontation, such as *ultra vires*

or identity review. In particular, the supreme federal courts can no longer lightly neutralise the Federal Constitutional Court by means of references to the Court of Justice of the European Union. The *Egenberger* decision demonstrates the institutional foresight of the First Senate.

At the same time, after the constitutional complaint had been filed, the Court of Justice set new accents in its handling of the heterogeneity of religion-state arrangements within the European Union. Whereas the European Court of Human Rights has long worked with the concept of a margin of appreciation in order to accommodate differing emphases in the understanding of religious freedom – including in institutional terms – the Court of Justice initially refused to develop functional equivalents under Union-law conditions. This changed at least gradually with the Court's decision in *Wabe and Müller* (C-804/18, C-341/19), to which the Federal Constitutional Court now repeatedly refers when emphasising the space for "fundamental-rights plurality" (paras. 153, 159 f., 160, 168).

Article 17 TFEU: impotent primary law

Article 17 TFEU played a significant role in the constitutional-complaint proceedings. Inserted into primary law in 2009 – though materially traceable to a declaration of similar wording annexed to the Amsterdam Treaty – the provision recognises the Member States' status arrangements concerning churches as well as religious and philosophical communities. This particularity is protected under Union law by a strong formulation combining a duty of respect with a prohibition of impairment. Not a few commentators and observers have viewed Article 17

TFEU as a negative competence norm, although its dogmatic function remained contested.

The Court of Justice and the Advocate General devoted little to moderate attention to the provision in the *Egenberger* case. Because it was mentioned in a recital of the decisive anti-discrimination directive (Directive 2000/78/EC), the Union legislature must have taken its content into account – a position adopted by the Federal Labour Court.

The Federal Constitutional Court has now engaged extensively with Article 17 TFEU (paras. 237 ff.). In doing so, it indirectly signalled that the Court of Justice's previously sparse engagement was insufficient – albeit in a courteous tone. The provision, the Second Senate held, is not a sectoral exemption but a balancing mandate (para. 242). The Senate develops a dogmatic vocabulary and argumentative evaluation that it offers to the Court of Justice in the spirit of best cooperative understanding.

In fact, Article 17 TFEU played virtually no role in Luxembourg's adjudication of religion-related cases; the Court of Justice's decisions would not have turned out differently even without the provision, including in their essential reasoning. As a factor in balancing, the norm carried no weight whatsoever. This also poses a problem from a democratic-theoretical perspective: The Member States, as masters of the Treaties, entrench a primary-law clause designed to protect their competences in matters of religion – and the Court of Justice effectively refuses to activate it. This is precisely the kind of fuel that feeds right-wing populist movements and that, in this instance, fails to ignite politically only because the churches and the AfD Party (Alternative for Germany) maintain maximum distance from one another.

The Federal Constitutional Court now skilfully exploits the argumentative potential inherent in Article 17 TFEU without seeking direct confrontation with the Court of Justice. The provision, it argues, indicates space for fundamental-rights plurality, for integrating balancing considerations developed by the Court of Justice into established constitutional doctrine. Hence, the Federal Labour Court had unconstitutionally failed to recognise this margin of discretion.

Competing models of religious freedom

The proceedings revealed a fundamental disagreement over the scope of religious freedom. For readers of the reasons, this is discernible only indirectly, namely in the statement of facts, where the submission of the Senator for Integration, Labour and Social Affairs of the State of Berlin is mentioned (para. 111). The Senator – like other competent federal and state authorities – had been given an opportunity to submit observations by the Federal Constitutional Court (§ 23(2), § 94(2) of the Federal Constitutional Court Act).

The central argument in the Senator's submission – based on an expert opinion by a colleague, Mahlmann,[7] from constitutional-law scholarship – was a sharp opposition between individual and corporate religious freedom.[8] The core of religious freedom, it argued, lies in the believing human subject. The core of human dignity guaranteed by constitutional identity protects only this individual freedom and dignity.

Anti-discrimination prohibitions were not mere restrictions of freedom but rather enabled individual freedom. They did not restrict freedom; instead, they constituted "the legal safeguarding of universalised freedom accessible to all".[9] Protection

against unjustified unequal treatment on grounds of religion, as invoked by Ms. Egenberger, therefore also served religious freedom and might gain even greater importance "in Europe's increasingly harsh climate" for preserving that freedom.[10]

The aim of this argumentation was nothing less than to reconstruct the scope of protection of religious freedom – understood as encompassing both individual and corporate dimensions – by recourse to Union law.

That this submission represents more than a particular voice from federal diversity is shown by the current criticism of the order emanating from the broader environment of the Federal Labour Court and from proponents of a "law of worldviews",[11] who had commissioned their own constitutional-law expert opinion appended to the complaint.

The criticism is directed at completely decoupling positive individual religious freedom from church membership. One could be religious and yet unaffiliated with any church. Or, put differently, a causal connection between a Christian outlook and church membership is allegedly not as self-evident as assumed. Ecclesiastical labour law is perceived as a privilege of social power to be deconstructed. From this perspective, curtailing corporate autonomy becomes an Enlightenment-inspired act of guaranteeing individual freedom.

This atomistic conception of freedom, however, ignores the communal dimension of religious practice. Individual religious freedom also depends on forms of communal organisation – in which citizens, of course, participate voluntarily. In the sociology of religion, "believing without belonging" is as old a concept as "belonging without believing". At the same time, a wealth of studies demonstrates that religious identity formation, commu-

nication, and practice require certain forms of institutionalisation.

The right of self-determination of religious communities does not stand in principle against individual freedom; rather, it is its necessary complement. This is why the right of self-determination is the organisational consequence of the unified fundamental right to religious freedom. Corporate religious freedom, in turn, is organised individuality.

The community-oriented nature of the individual, which the Federal Constitutional Court occasionally emphasises – for example, in its anthropological conception of the person (*Menschenbild-Formel*)[12] – is not realised only, or even primarily, in the state community. It is realised above all in freely chosen corporations. This nexus, incidentally, does not apply exclusively to religious communities but to all forms of corporate freedom – within intermediating institutions.

If the opposing argument is pursued to its logical conclusion, intermediaries are neutralised as reservoirs of freedom in a liberal society by being subjected to quasi-state fundamental-rights obligations. Citizens then confront the caring power of the state and the Union directly. One may perceive the societal conditions for religiosity in this way and demand corresponding changes in constitutional interpretation. But this has nothing to do with the constitutional-law situation in the Federal Republic of Germany, which the Second Senate has reaffirmed once again (paras. 177–187).

The Federal Constitutional Court's remarks on religious freedom also have a second addressee: the Court of Justice of the European Union. Once again, Karlsruhe employs the technique of a friendly embrace. The Constitutional Court emphasises that, under the EU Charter, the Court of Justice expressly

recognises a corporate dimension of religious freedom and, in doing so, draws on the jurisprudence of the European Convention on Human Rights. This is reflected, *inter alia*, in the Court's view that it is inappropriate to judicially assess the legitimacy of a religious community's ethos. Neutrality and secularism of the law thus remain intact.

Yet matters are not quite so simple, as becomes clear from the reasoning as a whole. Following the trajectory of the Court of Justice's case law, the Federal Labour Court substituted its own understanding of ecclesiastical service for a theologically grounded ecclesiology – thereby engaging indirectly in judicial theology.

At the same time, the jurisprudence of the Court of Justice reveals that religious freedom, when weighed against competing Union-law interests, (almost) always gives way, as if it were a structurally subordinate right; *Wabe and Müller* thus far remain an outlier in this respect. Luxembourg's case law therefore stands in stark contrast to that of the European Court of Human Rights, which has "sharpened" Article 9 ECHR as a corporate right in its jurisprudence. By contrast, the Court of Justice has so far shown little sensitivity to the cultural deep structures of religiously shaped situations – such as the historical resonance space underlying minority protection in Austrian public-holiday law or the long shadow of state-church coercion informing data-protection restrictions on proselytism in Finland.[13]

One may therefore read the Federal Constitutional Court's reasoning on Article 10 of the EU Charter and Article 9 ECHR as an attempt to illustrate to the Court of Justice how a religiously sensitive application of the law can function – without neglecting secular public-interest concerns.

The FCC refuses to be sidelined by federal courts

The order of the Federal Constitutional Court set aside the judgment of the Federal Labour Court against which the constitutional complaint had been directed. According to the operative part, the latter had violated the complainant's fundamental right under Article 4(1) and (2) of the Basic Law in conjunction with Article 140 of the Basic Law and Article 137(3) of the Weimar Constitution. The conflict with the Court of Justice was avoided also because it was the national referring court that had acted unlawfully. The Eighth Senate in Erfurt, so the argument goes, failed, in applying § 9(1) second alternative of the General Equal Treatment Act, to give due weight to the complainant's right of religious self-determination. Instead, it should properly have taken the complainant's self-understanding – not "its own viewpoint" – as the starting point of the balancing exercise (paras. 267, 275, 282).

That the margins of discretion under Union law remained unobserved in German law resulted from a conscious course set by the Federal Labour Court. That court treats the Court of Justice as a kind of "super-court of revision" and readily aligns itself with its interpretation of Union law also because it substantively shares that interpretation. The *Egenberger* proceedings are a paradigmatic example of attempts by specialised judicial jurisprudence to assert itself materially against the Federal Constitutional Court – conflicts with the supreme federal courts that have accompanied the nearly 75-year history of German constitutional adjudication.

The substantive disagreement, particularly concerning ecclesiastical labour law, is only thinly camouflaged. When a

delegation of the Federal Labour Court visited the Federal Constitutional Court in February 2019 – one month before the constitutional complaint was filed – the discussion included, *inter alia*, the labour-court review of ecclesiastical self-determination (the "chief physician" case was still very present to all involved).[14] It is not without a certain irony that, on the very day the *Egenberger* order was announced, the Federal Labour Court itself published a landmark decision of its Eighth Senate that reads like a defiant methodological advance comment from Erfurt. In a press release, the claim for pay differentiation due to gender discrimination in a pairwise comparison was justified by stating that the outcome recognised by the Federal Labour Court was dictated by the case law of the Court of Justice of the European Union.[15]

One may rightly be sceptical as to whether it is a prudent overall strategy to overcome unwelcome Karlsruhe jurisprudence through emphatically deterministic interpretations of Union law. What presents itself as "EU-law-friendly" cooperation in labour-law anti-discrimination protection ultimately amounts to an erosion of constitutional standards of protection. Fundamental-rights plurality within the judicial network must also be institutionally cultivated.

With its order in the *Egenberger* case, the Federal Constitutional Court has exemplarily demonstrated how such cultivation can look. It did not simply discard the well-established doctrine protecting state neutrality and secularism, but instead carefully integrated the Luxembourg requirements into it. The Federal Labour Court now has the opportunity to follow Karlsruhe's example: A renewed oral hearing in the revision proceedings has been scheduled for 21 May 2026.

Disclaimer: *Frank Schorkopf has represented the complainant in the proceedings 2 BvR 934/19 (Egenberger) before the Federal Constitutional Court.*

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Fundamental Rights Pluralism with an Element of Surprise

Solange in Egenberger

The *Egenberger* decision by the German Federal Constitutional Court (FCC) is not only about church labour law, but touches on fundamental issues of national and European constitutional law.[1] Through its balanced, conciliatory and nuanced decision, the FCC's Second Senate prevented an unnecessary conflict with the Court of Justice of the European Union (CJEU). Taking into account both the standards of EU law as a framework and the specific requirements of German fundamental rights, the FCC adjusted judicial review with regard to conflicts between the right to religious self-determination and non-discrimination at the workplace. By integrating the requirements of EU law while maintaining domestic specificities, the decision provides a valuable example of how to manage different layers of fundamental rights. Nevertheless, the *Egenberger* decision carries an element of surprise. The FCC performed a *Solange* test in the reasoning on the merits of the case, elaborating on the question of whether the relevant European standard falls short of the minimum standard required under German law and therefore justifies an exception to the primacy of EU law. This raises the question of the conditions under which the *Solange* reservation, which was thought to have become more or less hypothetical, could be invoked in future cases.

Granting the constitutional complaint without coming into direct conflict with the CJEU

The long-awaited *Egenberger* decision had the potential to spark renewed conflict between the FCC and the CJEU, for the complainants requested nothing less than for the FCC to disregard the *Egenberger* (C-414/16) judgment of the CJEU of

2018, arguing that it constituted an *ultra vires* act and violated German constitutional identity. A particular merit of the *Egenberger* decision is that the FCC essentially defused the constitutional complaint which was framed in terms of the ultimate and conceptually overstretched constitutional boundaries vis-à-vis European integration and downsized it to the core issue: determining and enforcing the proper standard for constitutional review by coordinating multiple layers of fundamental rights at the national and European levels.

This allowed the FCC to even declare the constitutional complaint, which was formally directed against a prior judgment of the German Federal Labour Court (FLC), to be partially admissible and well-founded without provoking an open conflict with the CJEU. The FCC held that the FLC had misconceived the margin of discretion (or leeway) that the relevant EU law on anti-discrimination, as interpreted by the CJEU, leaves to Member States when implementing it and that the FLC had, as a result, not given the "constitutionally required effect to the complainant's right to religious self-determination" when carrying out the balancing of interests (para. 143).

Applying national fundamental rights within the framework of EU non-discrimination law

The central theme of the decision is undoubtedly the emphasis on the diversity of national fundamental rights in an area where EU law does not effect full harmonisation, i.e. where Member States enjoy a certain margin of discretion in implementing EU law. In this respect, the *Egenberger* decision builds on the *Right to Be Forgotten* case law, which differentiates between two

scenarios: In the first scenario, EU fundamental rights can directly be invoked as a standard of review in constitutional complaints before the FCC insofar as EU (secondary) law fully determines the case at hand (*Right to Be Forgotten II*).[2] In the second scenario the FCC continues to apply "primarily" German fundamental rights as far as EU law does not effect full harmonisation and the primary application of German national standards does neither undermine the level of protection under the EU Charter nor specific fundamental rights requirements as set out by EU secondary law (*Right to Be forgotten I*).[3] The decisive test for determining the relevant scenario and the applicable standard of review (European or national) before the FCC is therefore the degree of harmonisation of the relevant EU law (test of discretion).[4]

In this regard the *Egenberger* decision convincingly classified the relevant Equality Framework Directive, including its Article 4(2), as a normative framework that leaves discretion to the Member States when implementing it (paras. 155 et seq). Against this backdrop, the FCC primarily relied on German fundamental rights, which were considered to offer a level of protection not inferior to that afforded by the EU Charter. However, the question remains as to whether the fact that the specific prohibition of discrimination under Article 3(3) of the Basic Law has no direct horizontal effect, whereas the principle of non-discrimination under Article 21 of the EU Charter can have such an effect, really makes no difference in terms of the level of protection, as claimed by the FCC (para. 175).

Translating European requirements into the domestic standard of review

At the same time, however, the FCC rightly emphasised that the discretion granted to Member States when implementing the Directive is also limited by the latter, a point which is central to the case. In particular, the conditions set out in Article 4(2) of the Directive have a limiting effect on Member States' discretion (paras. 165, 209 and 211 et seq). The Directive aims to strike a balance between the right to religious self-determination and the protection of employees against discrimination, while leaving a certain, but not unlimited, room for manoeuvre at national level in weighing and balancing the conflicting legal interests (para. 166). The FCC translated this European framework requirements into its standard of fundamental rights review by interpreting national constitutional law in consistence with EU law (para. 210). Regarding the question of whether the limitation of the right to religious self-determination is justified, the FCC adhered, in principle, to its two-stage test for balancing conflicting legal interests in church labour law (paras. 203 et seq), but adjusted this test in accordance with the requirements of EU law (paras. 209 et seq).

This act of translating European requirements into the domestic standard of review led to visible modifications at both stages of the test. At the first stage, according to the FCC's established case law, the churches' assertions as to which matters are to be regarded as religious and what significance they have according to the churches' self-perception were subject only to a plausibility check. In principle, the state could

neither examine nor judge the religious ethos itself. However, by taking into account EU law, the FCC reshaped this part of the test: In order to satisfy the requirements of the Directive, the courts under review must now determine in each individual case whether the nature of the occupational activity or the circumstances in which it is carried out "objectively give rise to a direct link" between the required church membership and the activity in question (para. 217).

At the second stage, established FCC case law had required an overall balancing of the conflicting legal interests, which is subject to full judicial review and in which the principle of proportionality is of fundamental importance (para. 221). Again, taking into account the requirements under the Directive, the FCC reshaped its traditional approach. In this context it is certainly questionable whether the criteria set out in Article 4(2) of the Directive can be assigned to the doctrinal topoi of suitability, necessity and appropriateness as seamlessly as the FCC would have us believe (para. 224). All in all, however, the FCC succeeded in translating the requirements of EU law, including the demand for a full judicial review of the balancing, into German constitutional law and thereby enforcing them through constitutional review.

Limiting access to identity and ultra vires review

Of the three strands of the defensive triad developed by the FCC in recent decades to serve as a constitutional shield against potential excesses of EU law – *Solange* reservation, *ultra vires* review, identity review – the Diakonie had invoked two: *Ultra vires* review and identity review. The *ultra vires* claim was raised both "incidentally" – as part of the claim that the right to

religious self-determination had been violated – and "principally" under the so-called right to democracy, which, according to the FCC's settled case law, is supposed to protect the inalienable core of the principle of democracy and can be invoked within the framework of a *de facto actio popularis*. Moreover, the Diakonie argued that the inalienable core of the German Basic Law, its identity, had been violated.

With regard to legal entities, the *Egenberger* decision provides a relevant clarification: Legal entities cannot invoke either the right to vote, which forms the basis of the right to democracy, or human dignity, which forms part of the inalienable core of the German Basic Law. For this reason, the FCC's Second Senate convincingly rejected both the admissibility of the principal *ultra vires* claim and the identity claim. As a private-law association, the Diakonie was not entitled to rely on either the right to vote or human dignity. Consequently, the constitutional complaint was only declared admissible with regard to the incidental *ultra vires* claim, i.e. the argument that the FLC had violated the Diakonie's right to religious self-determination by closely following the approach of the CJEU's *Egenberger* judgment, which allegedly constituted an *ultra vires* act that had to be disregarded (para. 119).

No ultra vires act

In its reasoning, the FCC's Second Senate convincingly explained why the CJEU's *Egenberger* judgment of 2018 does not constitute an obvious and structurally relevant transgression of competences according to the narrowly defined standards of *ultra vires* review under the FCC's own case law. After thoroughly assessing the CJEU's interpretation of primary and

secondary law, the FCC underlined that the CJEU's interpretation was at least defendable and by no means methodologically arbitrary. This is true for the CJEU's interpretation of the scope and substance of the anti-discrimination law based on Article 19 TEU as well as for the CJEU's reading of Article 17 TFEU as a provision that does not exempt Member States from obligations under EU law when it comes to the autonomy of churches, but protects the autonomous status of churches (as defined by national law) as a legal interest that can be balanced against other principles (paras. 236 et seq).

Interestingly, since the Diakonie could not rely on the right to vote, which gives concrete expression to the principle of democracy, the FCC rooted *ultra vires* review predominantly in the principle of conferral and, in particular, in the principle of the rule of law (see para. 227) which is, in its essential core, also protected under the so-called eternity clause under Article 79(3) of the German Basic Law. This new line of reasoning had already been hinted at in the *NGEU* case,[5] but is only now revealing its full significance.

As convincing as the outcome of the FCC's *ultra vires* review may be, and as much as it may be regarded as an act of friendliness towards EU law on the part of Karlsruhe, it nevertheless highlights the structural problems of *ultra vires* review by national apex courts. Ultimately, the FCC is reviewing the interpretation of *EU law* by the competent European body, thereby undermining the CJEU's exclusive competence in delivering the definitive interpretation of EU law. The substantive and methodological standard of this review is ultimately a European one. The FCC's limited ability to conduct such a review is illustrated, amongst others, by the fact that the spectrum of academic writing used by the FCC as a point of reference for

assessing the acceptability of the CJEU's interpretations of EU law is derived exclusively from German-language literature. On the one hand, this is understandable, as the FCC is a German court. On the other hand, such an approach is, from a European perspective, insufficient given the linguistic and legal diversity of EU law. This diversity is not reflected institutionally in Karlsruhe, but in Luxembourg.

And all of a sudden: Solange ex machina

Then a curious occurrence. Choreographed for maximum surprise effect and doctrinally free-floating, a *Solange* test suddenly glides into the scene. Unprepared readers may rub their eyes in bewilderment, wondering if they had overlooked something important before. After all, only the incidental *ultra vires* claim had been declared admissible by the FCC (paras. 119 and 128 et seq). And yet, in the reasoning on the merits of the case, clearly separated from the *ultra vires* review, the FCC elaborates on the question whether the relevant European standards do not fall short "of the fundamental rights standards guaranteed as indispensable by the Basic Law" and therefore do not justify an exception to the primacy of EU law in this respect (paras. 233, 254 et seq). In short, the FCC carries out a substantive *Solange* test in the reasoning on the merits of the case.

Once again, the result reached by the FCC may be regarded as "friendly" towards EU law, as the FCC emphasised the structurally comparable protection of fundamental rights at European level. Not only the abstract body of norms as such, including Article 10 of the EU Charter, but also its concrete application by the CJEU – drawing on the case law of the ECtHR – guarantees a European level of protection of the right to religious self-

determination that does not fall short of the minimum level required by the Basic Law (paras. 254 et seq). Being specified by secondary law, EU fundamental rights offer a level of protection in the area of religious self-determination that is structurally comparable to that required by the Basic Law (para. 266).

The *Solange* test in the reasoning on the merits raises a number of questions that can only be touched upon here briefly. Mostly, can there be a *Solange* test without – and beyond – admissibility? It is surprising that the *Solange* test, which is also explicitly designated as such (para. 233), is carried out in the *Egenberger* decision in the reasoning on the merits, whereas the concept is classically tied to the admissibility. According to the long-established *Solange II* case law,[6] the FCC does not carry out fundamental rights review on the basis of German fundamental rights in areas fully determined by EU law "as long as the EU fundamental rights guarantee effective protection of fundamental rights in general that is essentially equivalent to the fundamental rights protection that is regarded as indispensable under the Basic Law, respectively [jeweils], and as long as EU fundamental rights guarantee the essence of the fundamental rights in general".[7]

The general presumption of sufficient protection of fundamental rights at EU level translates into high hurdles at the admissibility stage. Accordingly, constitutional complaints were "inadmissible from the outset" if the complainants did not sufficiently substantiate that "the evolution of European law, including the rulings of the Court of Justice [...], has resulted in a decline below the required standard of fundamental rights after the 'Solange II' decision" and did not "state in detail that the protection of fundamental rights required unconditionally by the Basic Law is not generally assured in the respective case".[8]

Until now, it seemed rather certain that this procedural hurdle could hardly be overcome, given the current state of EU fundamental rights protection on the basis of the EU Charter and the case law of the CJEU. The *Solange* test had therefore become rather a hypothetical instrument. With *Egenberger*, the Second Senate now carries out a substantive *Solange* test in the reasoning on the merits without having dealt with it at the stage of admissibility. This raises the question of whether the application of the *Solange* test (*ex officio*?) in the reasoning on the merits will have significance beyond the individual case. The *Egenberger* decision suggests that in future cases the FCC could assess in substance – regardless of the admissibility review – whether certain fundamental rights standards at the EU level fall short of the minimum level required at the national level and must therefore remain inapplicable.

Furthermore, an increased operationalisation of the *Solange* test could become all the more relevant now that the FCC is serious about focusing this doctrine on the level of protection offered by each guarantee rather than on the general level of fundamental rights protection as a whole. As already announced in *Right to be forgotten II*,[9] the little word "jeweils" (respectively), which was not contained in the original *Solange-II*-formula of 1986,[10] but introduced in the *Banana Market* case in 2000 and reiterated ever since, does not refer to the *general* minimum standard required *at the time in question*.[11] Instead, according to the FCC's recent case law, it means that the test of equivalence must be made "on the basis of a general assessment of the *respective fundamental rights guarantee* in question" (para. 233, emphasis added). In other words, the FCC refers to a test of equivalence that does not relate (anymore) to the general level of protection as a whole, i.e. across all guaran-

tees, but to each specific fundamental rights guarantee in question. And it is precisely this kind of test that the FCC has now carried out with regard to the right to religious self-determination.

Conclusion

Although the outcome of the *Egenberger* decision may be described as "friendly" towards European law, the exercise of *ultra vires* review in itself remains problematic, as does the surprising application of the *Solange* test in the reasoning on the merits of the case. Overall, the *Egenberger* decision is particularly convincing due to its differentiated determination of fundamental rights standards, combining national discretion with European framework standards. By acknowledging and integrating the requirements of EU law while maintaining domestic specificities with regard to fundamental rights assessments, the decision provides a valuable example of how to manage different layers of fundamental rights.

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5. German Federal Constitutional Court, *Act Ratifying the EU Own Resources Decision – Next Generation EU* (BvR 547/21, 2 BvR 798/21), Judgment of 6 December 2022, para. 127.
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7. See for the currently used formular German Federal Constitutional Court, *Subscriber Data II* (1 BvR 1873/13, 1 BvR 2618/13), Judgment of 27 May 2020, para. 84 with further references.
8. German Federal Constitutional Court, *Banana Market* (2 BvL 1/97), Judgment of 7 June 2000, para. 62.
9. German Federal Constitutional Court, *Right to Be Forgotten II* (1 BvR 276/17), Judgment of 6 November 2019, para. 47, last sentence.
10. German Federal Constitutional Court, *Solange II* (2 BvR 197/83), Judgment of 22 October 1986, para. 117.
11. German Federal Constitutional Court, *Banana Market* (2 BvL 1/97), Judgment of 7 June 2000, para. 62; German Federal Constitutional Court, *Subscriber Data II* (1 BvR 1873/13, 1 BvR 2618/13), Judgment of 27 May 2020, para. 84, but note that several English versions do not accurately translate the original German versions.

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