

VUB BRUSSELS SCHOOL OF GOVERNANCE Vesalius College Brussels In affiliation with VUB

The CJEU and Muslim Minorities' Rights

A Disappointing Balance Sheet

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Introduction

- ▶ The EU as champion of human rights
 - ▶ CJEU jurisprudence important trigger
 - ▶ Foundational value
 - ▶ Charter of Fundamental Rights
- ▶ No minority specific rights in EU law
- ▶ General human rights of specific relevance to minorities
 - ▶ CJEU jurisprudence!
- ▶ Zooming in on Muslim minorities, two controversial matters, in a context of Islamophobia

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Overview

1. Adequate protection of fundamental rights of minorities?
2. CJEU case law and religious minorities – promising judgements
3. CJEU on article 17 TFEU: Quo vadis?
4. Attention points for case law analysis
5. CJEU case law – *ritual slaughter*
6. CJEU case law – *headscarves at work*
7. A disappointing balance sheet and Beyond

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1. Effective protection of minorities' fundamental rights

- ▶ practical and effective, not theoretical or illusory
- ▶ Effectiveness of protection: **parameters for case law**
 - ▶ Exceptions to be interpreted narrowly
 - ▶ Not a margin of discretion as baseline – sufficient level of scrutiny (a)
 - ▶ Context of prejudice (Islamophobia): extra vigilance required
 - ▶ not to send stigmatising message (b)
 - ▶ about hidden direct discrimination (c)

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2. CJEU jurisprudence Promising judgements

- ▶ **Prais:**
 - ▶ 1976 – early recognition of duty of reasonable accommodation on religious grounds
 - ▶ Setting the date of examination for appointment to EU bodies
 - ▶ When timely notified then duty to try avoid dates impossible for religious reasons
- ▶ **Achatzi:**
 - ▶ CJEU allows member states to recognize religious holidays of minorities
 - ▶ As long as in line with prohibition of discrimination
 - ▶ So not limited to one particular religious minority
 - ▶ Baseline: **strict scrutiny** of differentiations on ground of religion!

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3. CJEU on **art. 17 TFEU**: Quo Vadis?

- ▶ **article 17 TFEU** prescribes:
 - ▶ the EU respects and does not prejudice the status under national law of churches and religious associations and communities in the member states
 - ▶ concern ? **broad margin of appreciation to states** in religious matters and sub-optimal protection of FoR of religious minorities
- ▶ CJEU – at first – *IR* and *Egenberger* implications of article 17 TFEU are limited: it only exempts the actual rules on the organization of relations between a Member State and its churches from compliance with EU (non-discrimination) standards:
 - member state cannot exempt the employment related decisions of religious organisations/employers from the operation of EU non-discrimination law.*
 - ▶ Thus **limiting discretion of MS** (in its relations with religious organisations)
 - ▶ In favour of rights – protection against discrimination of employees

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3. 3. CJEU on art. 17 TFEU: Quo Vadis

- ▶ **C372/21 Freikirche**: a more modulated picture
- ▶ article 17 TFEU in relation to the Freedom of Establishment
- ▶ Austrian law limited funding for denominational schools of religions that are recognized under Austrian law.
 - ▶ denominational school of a religion recognized under German law but not Austrian law, did not get such funding
- ▶ The CJEU acknowledges: the Austrian rule affects the freedom of establishment (art 49 TFEU) = (the requirement is more easily satisfied by churches and religious communities established in Austria)
- ▶ Nevertheless, reading article 49 and 17 TFEU in conjunction, article 49 TFEU is not violated by the Austrian arrangement
 - ▶ **MS have broad margin of appreciation (MOA)** (in relation to religions recognized in other MS – and related religious minority)
- ▶ Quo vadis?
? Impact of embrace of **MoA** in case law on ritual slaughter and headscarves (see infra)

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4. Attention points when analysing CJEU case law

- ▶ Focusing on the most directly relevant case law for Muslim minorities:
on headscarves at work and on ritual slaughter(ed meat)
- ▶ **Attention Points** for the case law analysis:
 - a. Is the level of scrutiny adopted by CJEU high enough (given the context)?
 - b. Does the CJEU itself sends out stigmatizing messages?
 - c. Is there sufficient attention for hidden direct discrimination as distinct from indirect discrimination?

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5.1 EU and Ritual slaughter : explicit legal standards

- ▶ **Article 13 TFEU:** the Union and Member States shall
 - ▶ Pay full regard to animal welfare
 - ▶ While respecting ...customs of the Member States relating in particular to religious rites...
- ▶ **Regulation 1099/2009:**
 - ▶ Principle of prior stunning
 - ▶ BUT article 4(4) allows derogation for ritual slaughter
 - ▶ Article 26: ok to protect animal welfare more, while respecting **freedom of religion**
- ▶ *Both are considered protection worthy – balancing !*

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5.2 CJEU cases and ritual slaughter

- ▶ *Liga van Moskeeën (C-426/16)* - strict regulation of ritual slaughter leading to insufficient meat during peak demand of Feast of Sacrifice
- ▶ *Centrale Israëlitische consistorie (C-336/19)* a requirement of reversible stunning for ritual slaughter
- ▶ *OABA –organic food label (C- 497/19)* excluded for ritually slaughtered meat

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5.2.a CJEU & ritual slaughter

a) **LEVEL OF SCRUTINY: INSUFFICIENT**, particularly having regard to Islamophobic context

- *Liga van Moskeeën*:
 - Narrow approach to 'interference' –
 - Formal equality approach: focus on technical requirements applicable to all – no regard for possible indirect discrimination
 - Disregarding positive state duties to ensure effective enjoyment of rights
 - No regard for Islamophobic background (role of nationalists)
- *Centrale Israëlitische consisterie*: copying ECtHR **broad margin of appreciation (article 9 ECHR)**

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5.2.b/c CJEU & ritual slaughter

b) **POSSIBLY STIGMATISING REASONING BY CJEU**

- *Organic food label*: contra legem adding requirement
- With very particular understanding of animal welfare
- Playing into prejudice against ritual slaughter

c) **INSUFFICIENT REGARD FOR POSSIBLE HIDDEN DIRECT DISCRIMINATION**

- Islamophobia background/masked as...
- *Liga van Moskeeën*: even glossing over possible *indirect* discrimination

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6. CJEU and headscarves at work

- No explicit norms:
CJEU jurisprudence in terms of the prohibition of discrimination on grounds of religion:
not allowing employees to wear a headscarf in light of employer's neutrality policy?
- Overview of cases: 3 waves
 1. *Achbita*, C-157/15 (receptionist)
Bougnaoui, C-188/15 (design engineer)
 2. *Wabe*, C-804/18 (special needs carer in day care facilities)
Müller, C-341/19 (sales assistant and cashier)
 3. *SCRL*, C-344/20 (internship)

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6.1.a CJEU: headscarves at work, neutrality policy – ? discrimination

- *Neutrality policy employer:*
 - *No direct discrimination on grounds religion when general policy, and applied consistently*
 - *But what about hidden Islamophobia?*
Or going along with islamophobic prejudice of clients?
- *Neutrality policy employer: possibly indirect discrimination?*
 - *Particular disadvantage/disproportionate impact*
 - *Justification?*
 - *Neutrality policy as legitimate aim*
 - *Proportionality and necessity?*

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6.1.a CJEU: headscarves at work, neutrality policy – ? discrimination

- FIRST WAVE: **LEVEL OF SCRUTINY** high enough?
 - both cases confirm the *possibility* of having a neutrality policy (as related to 'freedom to conduct a business')– while emphasising that it should be *applied consistently – systematically*
- Bougnaoui:
No general neutrality policy - particular complaint of client about headscarf triggered employers action = direct discrimination = prohibited
 - Very strict about what amounts to 'genuine determining occupational requirement'

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6.1.b Headscarves, Neutrality policy: Achbita

- No direct discrimination – when general neutrality policy
 - ? CJEU does not pick up: from unwritten rule to written rule after request?
- Indirect discrimination?
 - Particular disadvantages yes
 - but justified as long as 'genuinely pursued in consistent and systematic manner'
- Insufficient level of scrutiny?
 - ? Link between freedom to conduct a business in Charter FR and adopting a neutrality policy?
 - no clear proportionality limits on neutrality policy – no further guidance offered by CJEU
 - ? Employers could impose neutrality policy on employees with customer facing role

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6.1.c Level of scrutiny SECOND WAVE: Wabe - Muller

- ▶ Repeating/confirming that general neutrality policies could allow for restrictions on the manifestation of religion
- ▶ Further emphasis on neutrality policies' need **to be applied in general and undifferentiated way** (actual scrutiny)
- ▶ Then no hidden direct discrimination
- ▶ Possible indirect discrimination!!!
 - ▶ No longer sufficient just to state neutrality aim – employer needs to demonstrate that there is a 'genuine need' for such a neutrality policy
 - ▶ Further guidance on what amounts to 'genuine need'
 - ▶ 'wishes of customers' only when 'legitimate': good!
 - ▶ adverse consequences - freedom to conduct one's business would be undermined – specific risk is required

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6.1.d Level of scrutiny THIRD WAVE SCRL case

- ▶ Question about possible *direct* discrimination:
 - ▶ Confirmation *Achbita*
 - ▶ THEN Par 37-41: reasoning about *indirect* discrimination
 - ▶ par 40: confirmation 'the Court has specified to justify indirect treatment based on religion or belief ... **only where there is a 'genuine need'** which is for the employer to demonstrate'
 - ▶ Positive addition in par 41: promoting acceptance of greater degree of diversity and to avoid abuse of a policy of neutrality ... to the detriment of workers who ...
 - ▶ BUT Conclusion for that question in par 42 (nothing about indirect discrimination??)

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6.1.e Level of scrutiny and margin of appreciation

- ▶ *Muller* and *SCRL*:
 - ▶ Par 48:
Confirmation of adoption 'margin of appreciation' doctrine ECHR: BUT
TRANSPOSING TO NON-DISCRIMINATION/religion!
--MoA for states in the application of Directive 2000/78 when no European consensus
 - ▶ Par 49-50: Directive 2000/78 EU legislator did not effect reconciliation between FoR and legitimate aim to justify indirect discrimination: reconciliation left to national courts = (broad) margin of appreciation

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6.2 headscarves at work, possibly stigmatising reasoning CJEU

- ▶ *Achbita*:
employer would have to try to accommodate employees by giving them a non-customer facing role
On the one hand: duty to limit neutrality policy to customer facing roles= proportionality check = ok
On the other hand: seemingly 'inviting' employees to push personnel with headscarf to back-office
- ▶ *Wabe*:
different take - neutrality policy legitimate 'in particular when limited to workers having contact with customers'
 - ▶ One hand: limiting permissible use of neutrality policy= good
 - ▶ Other hand: still risk of employees with headscarves being relegated to back office

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6.3 Headscarves at work, neutrality policy, insufficient regard for **hidden direct discrimination**

Argument: Visible signs typical for religions, for some religions in particular...so ??targetted (hidden)??

Wabe: argument was made – not accepted by CJEU

Müller: critical – if only large signs then hidden direct discrimination!!!

SCRL: striking how the many questions of the national court invited the CJEU to delve a bit deeper on possible hidden direct discrimination

CJEU chose not to pick this up – confirming its lines of jurisprudence since *Achbita* on direct v indirect discrimination

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7. A Disappointing **Balance Sheet** and Beyond

a) Adopting ECtHR broad margin of appreciation

Level of scrutiny – overall not critical enough: neutrality policy?

b) Stigmatising messages (towards Muslim minorities)

c) Not sufficient attention for hidden direct discrimination (*Müller* step in right direction)

► **Disappointint balance sheet**

► **CJEU invited to revisit its jurisprudence** – particularly attention for Islamophobia context

► Critical approach – high level of scrutiny

► Move away from 'broad margin of appreciation' baseline

► Avoiding stigmatising messages

► Attention for hidden direct discrimination

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