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EU Law's Half-Hearted Protection of Religious Minorities Minority Specific Rights and Freedom of Religion for All

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Abstract: This article begins with some reflections on the definition of religious minorities, their needs and rights and how this relates to the discussion about the need for minority specific rights in addition to general fundamental rights as rights for all human beings irrespective of particular identity features. Secondly, an overall account of the ambiguous relationship between religious minorities and fundamental rights is presented. The third and most extensive section zooms in on the EU and religious minorities, starting with an account of the EU's general approach towards minorities and then turning to the protection of fundamental rights of religious minorities in/through the EU legal order. First, the EU's engagement with minority specific rights and the extent to which these norms have been attentive to religious themes will be discussed. Second, the CJEU's case law concerning freedom of religion and the prohibition of discrimination as general human rights is analysed. The conclusion then turns to the overall perspective and discusses whether the EU's protection of religious minorities' fundamental rights can be considered 'half-hearted' and, if so, to what extent. This in turn allows us to return to the overall focus of the Special Issue, namely the relationship between the freedom of religion for all and special rights for religious minorities.



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1. Introduction: Setting the Scene, the Special Issue, This Article

The overarching theme of the Special Issue—freedom of religion for all versus special protection for religious minorities—is related to the perceived tension concerning the protection of minorities generally between 'equal rights' (as rights for every human being, general fundamental rights) on the one hand and 'special rights' (as rights for persons belonging to minorities) on the other. This perceived tension also informs the controversies surrounding (the adoption of) minority specific rights. To some extent, the opposition of equal and special rights is indeed one of 'perception'. Namely, as so often in law, everything depends on how one defines and interprets equality, with the key here being the critical distinction between formal/mathematical equality and substantive, genuine equality. Where special measures for persons belonging to religious minorities seek to place them in a substantively equal position as members of the majority, these special measures are not privileges but rather implementations of the right to equal treatment.¹

Ultimately, the theme of the Special Issue can be traced to the more general and overarching discussion in terms of minorities' fundamental rights: Are ethnic, religious and linguistic minorities sufficiently protected by the general fundamental rights (in combination with the prohibition of discrimination) or does the effective protection of minorities also require minority specific rights (*De Azcarate 1945*)?² In this respect, two pillars of minorities' rights have been distinguished: On the one hand, general fundamental rights in combination with the prohibition of discrimination and, on the other, minority specific rights. Following the First World War, the League of Nations' instruments in relation to the treatment of minorities had extensive attention for minority specific rights. The failure of the League of Nations system informed the initial position of the UN to address minorities differently (*United Nations Commission on Human Rights 1950*, at

79). The UN started from the position that proper and non-discriminatory protection of general fundamental rights, as rights for all, would provide adequate protection for minorities. This initial position is visible in the absence of minority specific rights in the 1948 Universal Declaration on Human Rights. Nevertheless, opinion has shifted over time, and minority specific fundamental rights were gradually developed as complementary to the general fundamental rights. The first manifestation of this shift is the inclusion of one basic provision on minority specific rights in the 1966 International Covenant on Civil and Political Rights, namely Article 27 ICCPR.³ Subsequently, this *grundnorm* was further elaborated in the 1992 UN Declaration on Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and was also an important source of inspiration for the 1998 Council of Europe Framework Convention for the Protection of National Minorities (FCNM). Admittedly, a declaration is not legally binding, and there are still European states that have not ratified the FCNM, including some of the founding states of the European Union (EU).⁴ Still, the adoption of these instruments demonstrates that minority specific rights and general fundamental rights are increasingly considered to be complementary strands in the human rights paradigm.

As always in law, legal standards only tell half of the story, as the exact meaning and implications of the standards are determined by interpretation; ultimately, the interpretation adopted by international courts (Von Bogdandy and Venzke 2012).⁵ It is indeed the interpretation of the norms in the respective two pillars that determines the relative importance of the pillars. Claiming that the non-discriminatory protection of general fundamental rights does not provide an adequate minority protection presupposes an assessment in terms of the benchmarks of adequate minority protection. These benchmarks can only be determined in light of the rationales of minority protection, as related to the specific concerns and needs of ethnic, religious and linguistic minorities. To the extent that the interpretation of general fundamental rights allows the realization of the main minority protection rationales, the need for additional minority specific rights would be proportionately reduced (Henrard 2008, pp. 91–118).

As *this Special Issue* focuses on religious minorities, the rationales of minority protection are used as benchmark for the interpretation of the fundamental rights most relevant for religious minorities. The latter include not only the freedom of religion but also the prohibition of discrimination on grounds of religion. As the preceding account has revealed, the protection of the right to equal treatment is an essential pre-condition of effective minority protection.

The editors of the Special Issue are crucially aware of the fact that the approach towards religious minorities and the relationship between general fundamental rights and minority specific ones may be very different in distinctive jurisdictions given their respective characteristics and competences.

In *this article*⁶, the focus of attention is the EU, an international organization which did not have fundamental rights at its inception let alone rights of minorities, as a central concern (Desmond Dinan 2004, p. 53 ff). The focus on economic integration similarly colored the competences explicitly attributed to the EEC. Over time, however, fundamental rights became more important in providing benchmarks that the EU needed to respect in the exercise of all of its competences.⁷ As the latter competences increasingly expanded beyond the economic domain, potential interferences with fundamental rights similarly grew, as did the fundamental rights of (religious) minorities (Douglas-Scott 2011, pp. 647–50). Thus, it seems most relevant to investigate the EU's approach to the protection of religious minorities' fundamental rights, both in relation to the development of standards in terms of minority specific rights and the expansion of CJEU case law regarding general fundamental rights. In this respect, it merits highlighting that, in the past few years, the CJEU had to decide several cases concerning religious minorities and their ways of life (McCrea 2019).

This article starts with some reflections on the definition of religious minorities, their needs and rights and how this relates to the discussion about the need for minority spe-

cific rights in addition to the general fundamental rights as rights for all human beings irrespective of particular identity features. Secondly, an overall account of the ambiguous relationship between religious minorities and fundamental rights is presented. The third and most extensive section zooms in on the EU and religious minorities, starting with an account of the EU's general approach towards minorities and then turning to the protection of fundamental rights of religious minorities in/through the EU legal order. First, the EU's engagement with minority specific rights and the extent to which these norms have been attentive to religious themes is evaluated. Second, the CJEU's case law concerning the freedom of religion and the prohibition of discrimination, as general human rights, is analyzed. The conclusion then turns to the overall perspective and discusses whether the EU's protection of religious minorities' fundamental rights can be considered 'half-hearted' and, if so, to what extent. This in turn allows us to return to the overarching theme of the Special Issue. As the EU has not developed minority specific standards for internal purposes, the protection of religious minorities in the EU depends entirely on the way in which the general fundamental rights (the freedom to manifest one's religion and the prohibition of discrimination) are applied. Any flaws in the latter regard invite a call for adjustment with respect to the CJEU's jurisprudence.

2. Religious Minorities: Definition and Benchmarks of an Adequate Protection (Equality, Identity and Participation)

As the concept of minorities remains ultimately contested, the same is true for 'religious minorities'. Notwithstanding the lack of a generally agreed upon definition, the general recurring characteristics of minorities reveal that minorities concern population groups with a distinct ethnic, religious or linguistic identity that is different from and less numerous than the rest of the population, with a wish to maintain that separate identity.⁸ Religious minorities would then have a distinct religion that is different from the rest of the population of the state and wish to manifest and maintain that religion.

One of the ongoing contestations is the status of groups with a migrant background. This raises intricate questions about the notion of indigeneness, how far back this goes and, thus, also after how many generations, a group that migrated to a country can become indigenous. The relevance of this question is clearly visible not only in the US but also in other states that were subject to colonization. Migrant populations do not only bring different ethnicities and languages but also different religions to the countries where they immigrate. Put differently, the question about the extent to which 'new' minorities or minorities with a migrant background constitute minorities seems relevant for religious minorities.

However, there appears to be a tendency to recognize that traditional, indigenous minorities on the one hand and new, migrant minorities on the other have several similar concerns and needs (Medda-Windischer 2009). This similarity would justify a broad inclusive definition of 'minority' while recognizing a sliding scale in terms of rights and entitlements to the effect that a group's rights (particularly resource intensive rights) become stronger over time when the group's connection with the country strengthens.⁹ This inclusive approach is especially apposite for religious minorities when it is not always clear-cut to demarcate a religion as having migrant origins or if it is indigenous. Islam has been present in Europe for a very long time, particularly in South Europe.¹⁰ Nevertheless, it is the more recent immigration of substantial groups of Muslims that changed the demographics in several European states, and this triggered concerns about Muslims and the Muslim minority, and their way of life was pitched as a potential threat to the 'national' way of life.¹¹

Turning to the benchmarks of minority protection, the milestone pronouncements of the Permanent Court of International Justice (PCIJ) in its *Advisory Opinion on 'Minority Schools in Albania'* (Advisory Opinion 1935) identifies two central goals/principles of minority protection, namely 'equality' (right to equal treatment) and 'identity' (right to respect for the separate identity). A third principle is more subtly present but of similar

central importance, specifically ‘participation’ (right to full and equal participation in society).

The PCIJ highlights the following in its *Advisory Opinion* of 6 April 1935:

- [48] The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of *living peaceably alongside that population and cooperating amicably with it*, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs.
- [49] In order to attain this object, two things were regarded as particularly necessary, and have formed the subject of provisions in these treaties.
- [50] The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State.
- [51] The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics.
- [52] These two requirements are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority.’ (Emphasis added.)

The *Advisory Opinion* emphasizes the importance of being treated in terms of ‘perfect equality’ ([Advisory Opinion 1935](#), para. 50), while being enabled to maintain the separate minority *identity*, ‘the preservation of their racial peculiarities, their traditions and their national characteristics’ ([Advisory Opinion 1935](#), para. 51). Still, the quote starts with the PCIJ emphasis on ‘the’ idea underlying the minorities treaties, namely to secure for minorities ‘the possibility of *living peaceably alongside that population and cooperating amicably with it*’ ([Advisory Opinion 1935](#), para. 48). The latter arguably refers to these minorities being fully incorporated in national society, fully participating in that society and, thus, identifying (*full and equal*) *participation* as a minority with a distinct *identity* as a core principle of minority protection. These three closely intertwined benchmarks are further elaborated upon.

Equality—or the right to equal treatment—as an overarching principle of minority protection, does not only concern effective protection against invidious discrimination but also duties of differential treatment.¹² While the former rules out disadvantageous treatment without reasonable and objective justification and thus aims at formal equality, the latter is aimed at substantive equality—more particularly, substantively equal and effective enjoyment of rights. In both respects, the effectiveness of the protection realized depends crucially on the level of scrutiny adopted by the courts. When courts adopt a light level of scrutiny in relation to human rights complaints, this implies that states are granted generous discretion, which in turn entails a low level of protection of the fundamental rights concerned.

The right to respect for one’s separate *identity* is interrelated with both dimensions of equality. It is indeed important that one is protected against invidious discrimination because of one’s minority identity (characteristic), while the (equal) protection and promotion of one’s separate identity may also require differential treatment. Examples of the latter include exemptions for ritual slaughter and also providing mother tongue education to minority language speakers.

The *participation* benchmark and the underlying idea to becoming part and parcel of the societal fabric is also intertwined with both dimensions of the equality principle, as well as with respect for one’s separate identity. Invidious discrimination on the grounds of minority identity features can hamper access to education/employment/services and, thus, also hinder one’s participation in society. Similarly, the lack of accommodation of the separate identity obstructs real and effective access to employment and education, etc. The underlying idea of duties of reasonable accommodation is exactly about addressing

hurdles to participation because of the interaction between an identity characteristic of a person and the way society is structured (Goldschmidt 2007, pp. 39–48).

When looking further into concerns of religious minorities, it is obvious that these have developed over time. During the persecution of religious minorities in the Middle Ages and especially during the religious wars in the 16th and 17th Century, these groups primarily wanted to be tolerated, not to be killed, not to be put in prison, not to be expropriated for belonging to a religious minority and to be allowed to perform their religious services (Defeis 2006, pp. 77–78; Tierney 1996, p. 35). In the meantime, these demands are still relevant but as these have become part of the *acquis* of liberal democracies, religious minorities formulate requests for more active tolerance and substantive *equality* through accommodation, enabling the expression of their separate religious *identity* and their visibility in public and full *participation* in public. At the same time, several developments in the western world have increased the unease among the majority about this stronger visibility of religious minorities. In Europe, in particular, the rising number of migrants and refugees in Europe from countries with a Muslim background has nurtured a sense of threat to the national identity (Bayrakli and Hafez 2018; European Commission 2019; FRA 2017, pp. 64–65).¹³ This has resulted in restrictive regulations of traditional religious practices, such as ritual slaughter and the wearing of religious garments, etc. Such regulations do not only limit the manifestation of one's religion but can also block one's equal and effective access to education, to employment and to public space/society at large. It is important to realize that these hurdles to equal access can be imposed either directly, through religious-explicit prohibitions, or indirectly through neutral measures with a disproportionate impact on particular religious groups.

This background of directly or indirectly limiting measures explains why members belonging to religious minorities and Muslim minorities in particular formulate stronger substantive equality claims and claims for active tolerance of their distinct identity and related practices, thus also enhancing their (equal) participation. Religious minorities, as minorities, have an intrinsic group dimension, and their religious practices are shared practices that are performed by a plurality of persons. The effective realization of these religious group practices can require the availability of a certain quantity of religious (food) items, which also may require positive measures of accommodation.

3. An Overall Ambiguous Relationship between Religious Minorities and Fundamental Rights

As was developed more extensively elsewhere (Henrard 2011b), religious minorities and their particular vulnerability and protection needs triggered the emergence of minority specific rights and ultimately the general fundamental rights paradigm. Indeed, the list of fundamental rights that were included in the earlier human rights declarations focused on rights of particular relevance to religious minorities in times of persecution of such minorities, more particularly religious freedom, the freedom of expression, the right not to be expropriated arbitrarily and the prohibition of discrimination (Defeis 2006, vol. 45, pp. 77–78; Tierney 1996, p. 35). However, subsequent developments rather showed a relative neglect of religious minorities and their protection needs in both the standard-setting and supervisory practice of international courts concerning general human rights and minority specific rights alike. In the brief account presented in this paragraph, the focus is mainly relative to the standards and not so much to the supervisory practice, while the remainder of this article will zoom in on EU standards and supervisory practice. Other articles in this Special Issue will focus on the supervisory practice in terms of international and European instruments.

When reading the minority specific rights instruments, it is immediately obvious that in contrast to the numerous provisions concerning language and language rights, nothing much has been specified in terms of religion, religious identity and religious rights. Article 8 FCNM does highlight, in line with the steady jurisprudence of international human rights courts, that the freedom to manifest one's religion also encompasses the right to establish

religious institutions, organisations and associations. Put differently, no clarification is provided in the minority specific instruments of what the right to practice one's religion for persons belonging to religious minorities means, in addition to the (general) freedom of religion. This can be interpreted to imply that the drafters of these minority specific instruments presupposed that the freedom of religion provides adequate protection for religious minorities in terms of the equality, identity and participation benchmarks.¹⁴

When turning to general human rights, the formulation of freedom of religion points to a mere tolerance attitude towards the practice of religion. Admittedly, the freedom to manifest one's religion encompasses the freedom in 'worship, teaching, practice and observance'. The possibility for states to limit these manifestations shifts the focus to the supervisory practice so as to distil what limitations are allowed and, thus, to what extent the manifestation of minority religions is truly protected. The analysis below in terms of EU law and several other contributions in this Special Issue demonstrate that the actual level of protection of the freedom of religion is sub-optimal.

In terms of standard setting, some striking discrepancies and lacuna can be noted. It is for example noteworthy that the 1981 Declaration on the Elimination of all forms of Intolerance and Discrimination based on Religion or Belief took no less than 10 years to complete while not adding much additional clarification to the ambit of the protection of the freedom to manifest one's belief. Furthermore, this declaration did not mature into a full-blown convention, unlike in the case of gender and race. Similarly, when considering international standards, duties of reasonable accommodation have only been identified on grounds of disability and not on the grounds of religion.¹⁵ The latter lacuna is striking given that thinking in terms of duties of reasonable accommodation started in the US and Canada exactly in relation to religious minorities (Bribiosa and Rorive 2013, pp. 12–19), and that it aims at ensuring equal participation of all at its core, irrespective of particular identity characteristics.¹⁶

The preceding discussion of the existing international, including European, human rights standards has revealed that religious minorities are in several respects 'neglected'. The remainder of this article investigates whether EU law's approach to religious minorities denotes a similar ambiguity.

4. The EU and Religious Minorities

Prior to zooming in on the EU's approach to religious minorities, it seems relevant to consider the overall picture concerning minorities in the EU legal order. Subsequently, recent proposals for minorities' fundamental rights are analysed so as to identify the extent to which these cater for religious minorities. The paucity of religious themes that feature in the minority specific standards buttresses the importance of a close analysis of the relevant CJEU case law in terms of the general fundamental rights, particularly the freedom of religion on the one hand and the prohibition of discrimination on grounds of religion on the other.

4.1. Minorities in the EU Legal Framework

As a supranational organization, the EU only has competences that the member states delegate to it, leaving all remaining powers with the member states.¹⁷ So far, the elevation of the protection of the fundamental rights of minorities to one of the EU's foundational values in the Lisbon treaty (Van Bossuyt 2010, pp. 440–44)¹⁸ has not gone hand-in-hand with an extension of the EU's explicit competences in relation to minorities. In the end, EU member states have no minority protection obligations in positive EU law (Carrera et al. 2017, p. 58). The ambiguous position of the EU in relation to minority protection generally is also visible in the claim about double standards in terms of what was expected from the first 10 member states on the one hand and from the states subsequently acceding on the other. Since 1993, candidate countries need to satisfy—as one of the accession criteria—'respect for and protection of minorities', which translates into an obligation for these states to ratify the Council of Europe's Framework Convention for the Protection of

National Minorities (FCNM).¹⁹ However, several of the older member states have still not ratified this convention, and there is no pressure on them to do so.²⁰ Furthermore, even the new member states are no longer monitored in terms of the minority rights criteria post accession.

Nevertheless, the recognition of minorities' rights as a foundational value of the EU supports the gradual emergence of a minority-conscious implementation of non-minority specific EU policies, particularly those that are especially relevant for minorities. This mainstreaming exercise has been widely employed and generally perfected in relation to fundamental rights first by the CJEU and its jurisprudence considering fundamental rights as general principles of EU law and, subsequently, by the European Commission and the Council of the European Union (De Schutter 2005, pp. 37–72). The increasing prominence given to fundamental rights in the EU legal order ultimately resulted in the development and subsequent inclusion of the EU Charter on Fundamental Rights into primary law²¹. Admittedly, the latter Charter does not include minority specific rights; instead, the discussions on the inclusion of a minority specific right in the EU Charter on Fundamental Rights resulted in the compromise inclusion of article 22 in the chapter on Equality stipulating that 'The Union shall respect cultural, religious and linguistic diversity' (De Witte and Horvath 2008, pp. 268–376; Schwellnus 2001). While this has been considered an important avenue to protect and promote minorities' rights (Carrera et al. 2017, p. 56), the avoidance of an explicit reference to minorities and minorities' rights is striking. The Charter does include 'membership of a national minority' as an explicit prohibited ground of discrimination.²² Nevertheless, the jurisprudence of the ECtHR in relation to the similar ground of prohibited discrimination in article 14, has revealed the limited use and, thus, impact of this ground.²³

Still, the possible impact of mainstreaming has extended over time, hand-in-hand with the widening and deepening of the EU integration project and the related expansion of the competence base beyond economic fields, towards the social dimension (policies concerning social inclusion and integration of TCN) and even to the cultural dimension to some extent (Prechal 2010, vol. 3, p. 8; Pollack 1994, vol. 14, p. 95).

The question then arises whether and to what extent *the interrelated and intertwined goals (benchmarks) of minority protection concerning equality, identity and participation* can be realized within the EU legal order. Before entering this analysis, some remarks need to be made about the scope of application of the concept of minorities and, more particularly, 'migrant' minorities in the EU legal order. The special position of EU citizens in the overall EU integration project needs to be emphasized. More particularly, the internal market as the central focal point of the EU integration process has proceeded hand-in-hand with the strong protection of EU citizens that have made use of their free movement rights²⁴ and reside in a different member state than the one of their nationality. The extension of the integration project beyond the economic sphere has also further entailed a strengthening of the rights of EU citizens in the social and even cultural domain (Kostakopoulou 2010; Jacqueson 2002, vol. 27, p. 260).

This special position of EU citizens in the EU in turn entails the need to distinguish within the category of minorities with migrant origin in member states between EU citizens on the one hand and third country nationals (TCN) on the other. The rights of EU citizens having moved to another member state are also critically safeguarded by the CJEU. The position of TCN is radically different, as will become clear in the following analysis, even when considering the long term residents directive, which provides equal treatment between long term resident TCN and nationals in a wide range of areas (Council Directive 2003/109 EC 2003; European Commission 2020, art. 11).

Of direct relevance to the *equality benchmark of minority protection* are the steadily expanding norms and jurisprudence regarding the right to equal treatment and the prohibition of discrimination, especially on grounds of race and religion. It is particularly important that the CJEU has recognized that the right to equal treatment does not only encompass protection against differential treatment of comparable situations without

reasonable and objective justification but also ensures a right to differential treatment of non-comparable situations (SCAC 1995, §27; EARL de Kerlast 1997, §35; Karlsson 2000, §39). Put differently, the EU's understanding of the right to equal treatment potentially provides both adequate protection against invidious discrimination (ensuring formal equality) and an avenue for special measures aimed at substantive equality. The latter measures would not only 'complete' the equality benchmark but would also contribute to the identity and participation benchmarks in so far as they are tailored to the minority identity.

It is hence not surprising that EU's non-discrimination law is generally recognized to carry considerable potential towards the protection of minorities in the EU legal order. The addition with the Treaty of Amsterdam of race and religion as grounds of prohibited discrimination relative to the legislative competence of the EU has been hailed as an important step forward for the protection of (religious) minorities (Carrera et al. 2017, p. 55; Peers et al. 2014, chp. 21). Soon thereafter, two prominent equality directives were adopted: One on the prohibition of racial discrimination in a broad range of competence spheres, and one on the prohibition of four other new discrimination grounds, including religion or belief, but confined to the employment sphere (Council Directive 2000/43 EC 2000; Council Directive 2000/78 EC 2000). Particularly relevant for religious minorities, the European Commission has put forward a proposal in 2008 for a new Council Directive extending the scope of application of the prohibition of discrimination on religious grounds beyond the sphere of employment to include education, social protection, social advantages and access to goods and services, i.e., the same level as the Race Directive (Council Directive (Proposal) 2008/426 COM (2008)). Sadly, the proposal has met with resistance from several member states and has, thus, little chance of materializing in the near future.²⁵

The EU also has considerable policy development (and related practice) in relation to two domains that are closely interwoven with the prohibition of discrimination, more particularly social inclusion and social protection, in which particular attention is focused on the protection of minorities. Strikingly, these measures aimed at the socio-economic participation of these groups benefit persons belonging to minorities across the board, irrespective of their nationality ('ethnic minorities and migrants') (SPC 2019, p. 37; Favell 1998).

For the *identity* benchmark, the provisions in EU law concerning the protection of diversity seem relevant. Article 3(3) TEU proclaims that 'the Union shall respect its rich cultural and linguistic diversity'. While it can be noted already that there is no explicit reference to religious diversity, the diversity envisioned in this article is rather diversity among member states than diversity within member states.²⁶ Put differently, article 3 TEU aims at signaling to all member states that they are part and parcel of the union that is being built, and thus at optimizing the European integration process, and does not announce a plan to develop minority protection standards that are respected by the member states internally (Henrard 2011a, vol. 17, pp. 57–99). Similarly, article 22 of the EU Charter of Fundamental Rights does not provide a competence basis to the EU for the development of EU minority protection standards (Kochenov and Agarín 2016, vol. 1, p. 9). Nevertheless, the intent behind this provision, together with the inclusion of respect for the rights of persons belonging to minorities as one of the EU's foundational values, bolsters a minority-conscious interpretation of the general human rights enshrined in the EU Charter of Fundamental Rights (Communication from the Commission COM/2005/0172 2005).²⁷ The ensuing mainstreaming exercise would contribute to the (substantive) *equality, identity and participation* benchmarks.

When considering cultural competences that could allow for the mainstreaming of minorities concerns, it needs to be highlighted that, so far, the EU has very few cultural competences and rather weak ones at that (mainly supporting and coordinating national competences).²⁸ When considering the policies that have been developed in this respect, the predominant goal seems to be the promotion of a European cultural identity and protecting European cultural heritage in reference to EU citizens, with scant attention for migrants' cultures and languages.²⁹ Admittedly, the cultural policies do contribute to the *equality*

and participation benchmarks, as these policies are increasingly seen as instrumental for the socio-economic integration project,³⁰ through their focus on social inclusion as interrelated with the fight against discrimination. In the Council conclusions on the Work Plan for Culture 2019–2022 (2018/C 460/10), it is striking that no reference to minorities and only one reference to migrants can be found, namely the need to have regard for interests and needs of specific groups, including migrants in order to optimize social cohesion (p. 14). Similarly, in the Commission Implementing Decision on the adoption of the 2020 annual work programme for the implementation of the Creative Europe Programme, C(2019) 6151 of 23 August 2019, only three references to migrants are made throughout its 157 pages and only in relation to intercultural dialogue and social inclusion. Put differently, the scant attention for migrants in relation to policies developed under the umbrella culture is not so much in relation to migrant culture that is respected and promoted, but rather aimed at improving mutual understanding, reducing prejudice and thus also discrimination.

Returning to the distinction between EU Citizens and TCN as minorities with migrant backgrounds in the EU legal order, TCNs do benefit fully from the range of measures countering discrimination and promoting social inclusion, but the promotion of their specific identities is not really part of EU policies.

4.2. EU and Religious Minorities: Minority Specific Rights?

The lack of explicit EU competence and related EU standards on minorities' rights has not prevented the European Parliament (EP) in adopting resolutions on rights for minorities and how these rights can be strengthened in the EU legal order (European Parliament 2005, 2013, 2015, 2017, 2018a; European Commission 2006, p. 405; 2016a, p. 4; 2016b, p. 52; 2018, p. 171), with the latest prominent resolution dating back to 13 November 2018 elaborated as the 'Minimum standards for minorities in the EU' (European Parliament 2018b). The Resolution stresses that merely protection against discrimination is not sufficient for the adequate protection of minorities fundamental rights but should be accompanied by the protection of minorities' right to identity (European Parliament 2018b, preamble Y). The EP calls for a legislative proposal on the minimum standards of protection of minorities in the EU, while respecting subsidiarity and proportionality (European Parliament 2018b, §10).

When looking more closely at the more specific paragraphs concerning minorities' rights, it is striking that there is virtually no attention for religious rights. Admittedly, the provisions on equal opportunities for ethnic minorities to participate in public and social life (European Parliament 2018b, §36) and recognizing the contribution of ethnic minorities to Europe's cultural heritage of course also benefits religious minorities in terms of the equality and participation benchmarks (European Parliament 2018b, §31). Still, it cannot be denied that the Resolution has overall a strong focus on linguistic and cultural diversity without touching on religious diversity and the protection of distinct religious identities. It is remarkable that, even in relation to the right to education, the topics that receive attention are linguistic diversity and the possibilities of minority language education (European Parliament 2018b, §50–65), but there is nothing pertaining to religion in education (the curriculum and dress code, etc.).

The part on 'combating discrimination, hate crime and hate speech' does call on the Commission and the Member States to promote a culture of tolerance in the schools as part of the curriculum and, more generally, to introduce awareness-raising in order to sensitise the population to diversity. These important points pertain primarily to the field of providing effective protection against discrimination and thus contribute to the equality and participation benchmarks but not to a more active protection and promotion of the separate and also religious identity of minorities.

While the chances of this resolution actually resulting in a legislative proposal by the European Commission are slim, the lack of attention for religious-specific themes is striking. Religious minorities will obviously benefit from the EU's fight against discrimination and intolerance and for social inclusion in terms of the equality and participation benchmarks, but the lack of attention for religious specific themes and, thus, also for (the protection of

the) religious identity arguably points to a half-hearted protection of religious minorities in the EU legal order.

4.3. EU and Religious Minorities: General Rights—Freedom of Religion and Non-Discrimination?

The lack of minority specific standards in the EU legal order renders the way in which general human rights and the prohibition of discrimination are framed and interpreted very important when measuring the extent to which the EU legal order provides protection for (religious) minorities. In this part of the article the analysis turns to case law of the CJEU concerning the religious minorities' most relevant provisions in the EU Charter of Fundamental Rights (the freedom to manifest one's religion)³¹ and Directive 2000/78.

Overall, the CJEU case law of particular relevance relative to religious minorities is scarce. Prior to the adoption of the Charter, only one case merits attention. The European Court of Justice identified in the Prais judgement (1976) a duty for EU institutions akin to duties of reasonable accommodation on grounds of religion, in particular, in relation to the setting of a test date for particular appointments (Vivien Prais 1976). The Court opined, in reference to the freedom of religion as a general principle of EC law and enshrined in article 9 ECHR, that if a candidate informs the appointing authority that particular dates would be impossible for religious reasons, the authority should take this into account and endeavour to avoid these dates. As the freedom to manifest one's religion is not an absolute right, the Court did identify a reasonability constraint in that the candidate would have to inform the appointing authority 'in good time' of the difficulties for the latter to have to take them into account (Vivien Prais 1976, § 16–19).³²

A few more cases have been decided only in the last few years: one on the freedom of religion, one where the freedom of religion was forgotten altogether and five under Directive 2000/78.³³

Some of these seven cases concern the tension between the autonomy of religious employers (employers with a religious ethos) on the one hand and the protection of the rights of individual employees on the other (Egenberger 2018; IR 2018). While the cases at hand do not concern religious minorities, the tension is also often debated in relation to religious minorities and, thus, provides important insights relative to the Court's approach in this respect. Furthermore, these cases allowed the Court to develop its promising stance about the implications of article 17 TFEU following which the 'EU respects and does not prejudice the status under national law of churches and religious associations and communities in the member states'. One case concerns the regulation of public (paid) holidays in relation to the holy days of a particular minority faith and how the benefit for that religious minority needs to be reconciled with the prohibition of discrimination as enshrined in Directive 2000/78 (Cresco Investigation GmbH v Achatzi 2019). The remainder, which is more than half of these cases, concerns limitations on the freedom to manifest religion of the Muslim minority in European states, particularly two cases on ritual slaughter (Liga van Moskeeën 2018; OABA 2018) and two cases on the wearing of headscarves at work (Achbita 2017; Bougnaoui 2017).

The following paragraphs will analyse these judgments in the order in which they are announced, as this corresponds to their increasing relevance for the evaluation of the EU's legal order protection of religious minorities.

4.3.1. Egenberger and IR

Directive 2000/78 has not generated abundant case law pertaining to religion as a ground of prohibited discrimination: So far, only five cases have been decided. The two cases concerning employers with a religious ethos and the restrictions/obligations they can impose on (prospective) personnel are relevant in at least two respects. First, the CJEU provided an important clarification about Article 17 TFEU's prescription that the EU respects and does not prejudice the status under national law of churches and religious associations and communities in the member states. The Court limited the related exemption (of compliance with EU rules, including EU non-discrimination law) to the

actual rules on the organization of relations between a Member State and its churches. Put differently, states cannot exempt the way religious organisations/employers operate from the operation of EU law (IR 2018, §48; Egenberger 2018, §56–58). Second, the Court confirmed that employers with a religious ethos only have a limited possibility to impose their religious beliefs and related moral codes on (prospective) personnel. Egenberger highlighted the restricted scope of what could count as a religious organization and what states may allow a religious organization to invoke as a genuine and occupational requirement under article 4(2) Dir 2000/78. When a certain job of definite duration concerns an operational activity which is not connected to or important for the manifestation of a particular religion (in casu preparing a report on Germany's compliance with the United Nations International Convention on the Elimination of All Forms of Racial Discrimination), a Church cannot limit applications for the post to persons adhering to its religion. Here, the CJEU closely scrutinized whether the link between the ethos of the organization and the envisaged job activity is sufficiently strong (proportionate) (Egenberger 2018, §83(1) and (2)).³⁴ IR demonstrated states' duty to ensure that the religious organisations' demands in terms of loyalty (and related sanctions) are proportionate to the function concerned (IR 2018, §50–60).³⁵ Both cases confirmed the strong protection of the right to effective judicial protection, resulting in a state duty to ensure that the decisions of religious organisations are subject to review by national courts (IR 2018, §62–71; Egenberger 2018, §48, 49, 53, 54).³⁶

Overall, Egenberger and IR reveal that the CJEU allows states to protect religious organisations' autonomy as long as this does not compromise the effective protection of the fundamental rights of the individual employees. Put differently, the CJEU strictly reviews that the protection of the religious (group) ethos and identity does not disproportionately limit the rights of the individuals concerned. However, the ensuing limitations to religious (minority) communities' autonomy does not appear disproportionate.

4.3.2. Achatzi

The Achatzi preliminary ruling is in several respects important for religious minorities. Firstly, Achatzi shows how the prohibition of discrimination constrains measures aimed at the protection of religious minorities, in particular, by identifying subsidiarity limits. If the minority can be suitably protected by a measure without excluding adherents of other religions from the benefits of this measure, the benefits of the measure should not be limited to one minority. At the same time, the ruling is important because it shows that the CJEU scrutinizes possible exceptions to the prohibition of direct discrimination strictly, thus implying a high level of protection against differential treatment on the grounds of religion. The case law also confirms that the CJEU does not easily accept measures as amounting to legitimate forms of affirmative action.

The Achatzi case concerns a rule in the Austrian Labour legislation that granted the members of three small Christian minority churches Good Friday as a paid public holiday, while others would have to work. The CJEU first of all confirmed the limited scope of article 17 TFEU in that this would not provide an exemption of all religious matters from the duty to comply with EU (non-discrimination) norms (Cresco Investigation GmbH v Achatzi 2019, §29–33). Furthermore, the Court established direct discrimination on grounds of religion (Cresco Investigation GmbH v Achatzi 2019, §51)³⁷ for which, following a strict proportionality review, none of the two possible exceptions provided in Directive 2000/78 would apply (Cresco Investigation GmbH v Achatzi 2019, §69). The exception laid down in article 2(5) of the Directive the Court highlighted the potentially broad nature of the exception and the need to conduct a strict proportionality review (Cresco Investigation GmbH v Achatzi 2019, §51). According to the Court, the measure did not pass the strict proportionality review in casu because other religious minorities did not receive similar protections towards their religious festive days (Cresco Investigation GmbH v Achatzi 2019, §60–66). For similar reasons, the Court did not accept that the national measure could qualify as a measure to compensate for a disadvantage under article 7(1) (Cresco Investigation GmbH v Achatzi 2019, §65–68). Finally, the CJEU confirmed its steady

line of jurisprudence that (until national legislation is adapted) national courts need to ensure equal treatment by levelling up, instead of levelling down, so that the protection is maintained for the religious minorities concerned, while extending them to other religious communities as well ([Cresco Investigation GmbH v Achatzi 2019](#), §79–82).

Put differently, Achatzi paints a rather promising picture for religious minorities in terms of the equality and identity benchmarks in that it shows that the EU legal system is set to provide suitable protection against invidious discrimination on the grounds of religion, while accepting special rules for religious minorities as long as they fit the EU's non-discrimination framework.

4.3.3. Case Concerning the Muslim Minority in Europe

Unfortunately, the four cases concerning the Muslim minority in European states have raised several critical remarks about the Court's reasoning *inter alia* because the Court would not sufficiently acknowledge and counter the Islamophobic context that color measures that disproportionately affect Muslim minorities and would even send itself problematic symbolic messages about particular Muslim rituals. First, the analysis turns to two cases concerning the employment sphere and more particularly assesses to what extent the prohibition of discrimination on the grounds of religion addresses religious minorities' concerns about restrictions on the wearing of religious clothes at work. Subsequently, two cases will be analysed: whether and how the freedom to manifest one's religion protects religious minorities against regulations that amount to restrictions of ritual slaughter and of (the status of) ritually slaughtered meat.

Two preliminary questions concerned employees that were fired because they refused to take off their headscarves at work, one coming from the Belgian Court of Cassation ([Achbita 2017](#)) and the other from the French Court of Cassation ([Bougnaoui 2017](#)). As the factual settings also had marked differences, the cases enabled the CJEU to identify some parameters that firms need to respect when imposing restrictions on the expression of religious identity. At the same time, the Court's reasoning also raises critical questions about the extent to which it ensures effective protection against discrimination on grounds of religion given the interplay with the EU Charter of Fundamental Rights.

Headscarves at Work: Achbita

The Achbita case concerns a woman who worked as a receptionist at a firm and who, at some point, wanted to start wearing a headscarf for religious reasons. The firm told her that this would be against the unwritten rule in the firm that employees—following the firms' neutrality policy—would not wear visible signs of their political, philosophical or religious beliefs while at work. The firm then also adopted a written rule to this effect, after which Achbita was fired for non-compliance with this rule. The Belgian Court of Cassation asked whether banning an employee to wear the Islamic headscarf amounts to direct discrimination on the grounds of religion when that firm prohibits any exhibition of political, philosophical or religious beliefs at work.

The CJEU argued that when the firms' rule applies to all expressions of convictions, be it political, philosophical or religious, it does not amount to direct discrimination on grounds of religion ([Achbita 2017](#)). The Court did add that the rule might be indirectly discriminatory in so far as it places persons adhering to a particular belief at a particular disadvantage ([Achbita 2017](#), §34). In the evaluation of this possible instance of indirect discrimination, the CJEU argued that a firm's desire to project an image of neutrality would be legitimate, also in view of article 16's EU Charter's freedom to conduct a business. For the rule to be appropriate, it would then still have to be part of a neutrality policy that is 'genuinely pursued in a consistent and systematic manner' ([Achbita 2017](#), §40). The Court added, in its guidance to the national courts, that for the rule inspired by a neutrality policy to be proportionate, it should only apply to employees who interact with customers ([Achbita 2017](#), §42). In this respect, firms would have to try to accommodate employees by giving them a non-customer-facing role ([Achbita 2017](#), § 43).

At first sight, it may seem appropriate to qualify the rule in *Achbita* as not amounting to direct discrimination. However, what are we to make from the fact that the firm only made its neutrality policy visible in written rules following a request to wear a Muslim headscarf? Unfortunately, the Court highlights the relevance of the timing of establishment of the policy only regarding the proportionality test for a possible justification of indirect discrimination (*Achbita* 2017, §41). Would it not be all too easy to de facto target religious beliefs with manifestations in terms of dress code and external appearance under the guise of a ‘general neutrality policy’ (Loenen 2017, vol. 10, pp. 65–66)? In this respect, one should ask oneself what the manifestation of a particular political or philosophical conviction could look like (Davies 2017). What does this mean for the further guidance by the CJEU that the national court should review in terms of the appropriateness (as component of the proportionality) requirement that the neutrality policy has ‘genuinely pursued’? Similarly, criticisms were voiced against the Court’s reasoning about the criterion of limiting neutrality policies to employees who interact with customers. Bell justifiably highlights that ‘it would surely be firmly rejected if an employer sought to place other groups vulnerable to discrimination in job roles that avoided contact with customers’ (Bell 2017, p. 796). Other authors similarly pointed to negative implications of this reasoning which would basically enable employers to push religious minorities to non-representative positions, thus countering EU policies of inclusion and integration (Vickers 2017, p. 252; Jolly 2017, p. 313).

More critically even, one could question whether there should not be inherent limits relative to what limitations firms can impose in terms of a neutrality policy, even if it could be consistently applied and even if it could be limited to employees who interact with customers,³⁸ particularly when it would entail a limitation of the fundamental right to manifest one’s religion (*Achbita* 2017, para. 39).³⁹ Strikingly, the Court underscores that the prohibition should be strictly required (*Achbita* 2017, para. 42), thus hinting at a heightened level of scrutiny of the proportionality requirement. However, it goes on to limiting the relevance of this requirement in *Achbita* to the question whether the limitation was indeed limited to employees who interact with customers (*Achbita* 2017, para. 42). The CJEU’s more general use—a few paragraphs below the strictly necessary test in its overarching guidance to the national courts (*Achbita* 2017, para. 43)—holds potential for a higher level of protection but ultimately leaves considerable lack of clarity for the national courts on how to approach these issues (Loenen 2017, pp. 69, 72–73). Hopefully, future cases will enable the Court to further tease out the relevant parameters.

Headscarves at Work: Bougnaoui

The Bougnaoui case was more straightforward in that, in this case an employee working as a design engineer for an information technology consulting company had been fired because she refused not to wear her headscarf. The firm had asked her to stop wearing the headscarf in response to a customer’s complaint about the headscarf. The case went up to the French Court of Cassation, which asked as a preliminary ruling of the CJEU whether the firm could rely on the customer’s wish as ‘genuine and determining occupational requirement’. While this question implies that the national court assumed that direct discrimination was at issue, the CJEU left the question to be determined by the national court. In this respect, it confirmed the rule in *Achbita* that when the prohibition in casu stemmed from a more general rule, prohibiting all visible signs of political, philosophical or religious beliefs, this would need to be assessed as a possible case of prohibited indirect discrimination, referring to the justification criteria it had outlined in *Achbita* (Bougnaoui 2017, para. 32–33). The Court implicitly acknowledges that if there would not be such a general policy, the case needs to be investigated in terms of direct discrimination, and thus one of the few explicitly provided exceptions (Bougnaoui 2017, para. 34). The Court confirms its very narrow understanding of what amounts to a genuine, determining occupational requirement and adds that recital 23 of Directive 2000/78 would reveal that ‘only in very limited circumstances a characteristic related, in particular, to religion

may constitute a genuine and determining occupational requirement' (Bouagnaoui 2017, para. 38). The Court goes on to highlight that it should concern a 'requirement which is objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out. It cannot, however, cover subjective considerations, such as the willingness of the employer to take account of the particular wishes of the customer' (Bouagnaoui 2017, para. 40).

The CJEU case law regarding religious expression at work clearly has some positive features for religious minorities and more particularly includes the clear signal that the Court confirms about customer preferences: companies cannot invoke (alleged) customer preferences to justify direct discrimination on the grounds of religion. Unfortunately, the Court does not signal critical scrutiny in relation to the disproportionate effects of a neutrality policy (Vickers 2017, vol. 8, pp. 249, 253; Howard 2018, vol. 18, pp. 71–73). It is not so self-evident that neutrality is a legitimate aim for a private employer, especially as 'neutrality can be an easy cover-up for prejudice' (Howard 2018, vol. 18, p. 71). Relatedly, the CJEU does not give clear guidance to national courts when they are testing the proportionality of these neutrality policies. Indeed, a more critical attitude could have been adopted in relation to Achbita, where it is rather striking that the internal rules were only formalized when she notified her employer that she wanted to wear a headscarf (Lahuerta 2016). Similarly, while Bouagnaoui sets clear limits to explicit Islamophobic concerns of customers, it leaves the door open to generally formulated neutrality rules with the same effects, thus enabling firms to put in place rules targeting Muslim (women) under the guise of a general neutrality policy. The latter lack of guidance entails a suboptimal protection for religious minorities and is particularly problematic in the current era of rising Islamophobia in most European states (Loenen 2017, vol. 10, p. 67).

Ritual Slaughter: Liga van Moskeeën

The first CJEU preliminary ruling on ritual slaughter concerned an implementation of an EU regulation which inhibited the availability of ritually slaughtered meat during the Muslim Feast of Sacrifice. The Belgian Liga of Mosques and Islamic Organisations challenged the validity of article 4(4) of Regulation No 1099/2009 in so far as this required that ritual slaughter without prior stunning should at all times take place in an approved slaughterhouse (respecting the technical requirements laid out in Regulation No 853/2004). Regulation 1099/2009 had led the Flemish regional minister to stop—from 2015 onwards—issuing an approval for temporary slaughterhouses to address the peak in demand of ritually slaughtered meat during the Muslim Feast of Sacrifice (Liga van Moskeeën 2018, para. 17–19). The stricter approach entailed that several Muslims in the Flemish region were unable to obtain ritually slaughtered meat during the Feast of Sacrifice. According to the applicant, the Regulation thus implied a violation of the freedom of religion enshrined in article 10 EU Charter of Fundamental Rights, as well as of article 13 TFEU in which animal welfare is to be mainstreamed by the EU and its member states while respecting national provisions concerning religious rites (Liga van Moskeeën 2018, para. 21).

While the CJEU acknowledged that the matter falls into the scope of application of the freedom of religion (article 10 Charter), it does not even establish a restriction or interference with the freedom to manifest one's religion, which would require justification to not amount to a violation (Liga van Moskeeën 2018, para. 68). To arrive at this conclusion, the Court combines two lines of argumentation that highlight the positive features of the Regulation while minimizing the negative impact on ritual slaughter (and the availability of ritually slaughtered meat). On the one hand, the CJEU adopts a formal equality approach (the same technical requirements are set for all forms of slaughter), which ignores a possible indirect discrimination. On the other, the Court emphasizes the alleged positive baseline of article 4(4) of the Regulation, which is not to prohibit but rather to enable ritual slaughter (without stunning) as long as some technical requirements aimed at animal welfare and food hygiene/human health are met (Liga van Moskeeën 2018, para. 56–68). Furthermore, the CJEU—continuing its minimalistic reasoning—emphasized that the problem was not

inherent in the Regulation and its requirements but rather confined to a particular region in a particular member state during a very short period of time due to a lack of slaughter capacity (Liga van Moskeeën 2018, para. 78–80). For the same reasons that the Court had concluded that the regulation would not entail a restriction of the freedom of religion of Muslims, there would also not be a violation of article 13 TFEU (Liga van Moskeeën 2018, para. 83).

It is certainly positive that the CJEU does not enter religious debates about the extent to which ritual slaughter would be a religious obligation and, relatedly, does not narrow the question to the possibility of buying ritually slaughtered meat in a neighbouring country.⁴⁰ However, the Court's reasoning can be criticized for unduly reducing the freedom to manifest one's religion through its narrow construction of an interference, while adopting a formal equality approach, that glosses over a potential instance of indirect discrimination (in the application of the Regulation) (Peters 2018).

The Court starts by arguing that the Regulation concerned cannot qualify as an interference with the freedom of religion as it merely sets a technical framework within which the Regulation actually enables ritual slaughter (Liga van Moskeeën 2018, para. 56–59). The CJEU highlights that the Regulation reconciles animal welfare and public health on the one hand and the freedom of religion on the other, just as article 13 TFEU on the need to mainstream animal welfare is qualified by the freedom of religion (Liga van Moskeeën 2018, para. 62). The Court argues that only in slaughterhouses that would respect all the technical requirements would it be possible to minimize animal suffering (Liga van Moskeeën 2018, para. 65). Interestingly, the national court in its preliminary question had taken the position that the strict rule in the Regulation would seem to go beyond what is required for animal welfare as Belgian temporary slaughterhouses did reduce animal suffering and sufficiently ensured public health (Liga van Moskeeën 2018, para. 24). In any event, it seems obvious that even measures that do not intend to restrict the freedom to manifest religion may very well do so in application. When conducting a proportionality review, would it not also be relevant that the peak demand during the Muslim Feast of Sacrifice is well known to the authorities, both at EU level and at national level? Would this not rather point to more far-reaching positive obligations aimed at the effective enjoyment of the freedom of religion, especially during religious feasts of special significance to a religious group?

When the CJEU emphasizes the fact that the regulation applies to 'any method of slaughter of animals within the EU, regardless of the method followed' and thus 'applies in a general and neutral manner to any party that organizes slaughtering of animals and applies irrespective of any connection with a particular religion and thereby concerns in a non-discriminatory manner all producers of meat in the European Union' (Liga van Moskeeën 2018, para. 60–61), it adopts a formal equality approach. This formal equality approach is difficult to reconcile with the CJEU's long and steady line of jurisprudence on indirect discrimination, reflecting a thorough understanding of the wrongfulness of treating different situations in the same way without objective and reasonable justification (Sermide SpA 1984, para. 28; Advisory Opinion of AG Van Gerven 1993).⁴¹ However, would there be a reasonable and objective justification for this disproportionate impact considering that it affects the exercise of a fundamental right and that the authorities, both at EU and the national level, are well aware of a peak in demand (and potential resulting capacity problems)?

In any event, the CJEU's adoption of a formal equality approach to slaughter regulations extends its approach to the neutrality requirements in the workplace and also its failure to acknowledge and factor in an Islamophobic context in Europe in its analysis. In regard to neutral slaughter regulations with a disproportionate impact on ritual slaughter during religious festivals, it is important to be aware that these neutral rules were not only pushed by animal welfare advocates but also by right wing nationalists. Howard questions the extent to which these stricter slaughter regulations can be considered as bigotry under

the guise of animal protection (Howard 2019, vol. 56, p. 804; Liga van Moskeeën 2018), thus hinting at direct discrimination (Howard 2019, vol. 56, pp. 816–18).

Ritual Slaughter: OABA (C-497/17)

The second case in which the CJEU was confronted with a question pertaining to ritual slaughter arose in relation to a contestation in France about a possible organic food label for meat that is ritually slaughtered. Several of the French national courts, as well as AG Wahl, had highlighted that the regulation on organic food labelling exhaustively identifies the requirements for this label and that it does not provide any rule on stunning (OABA 2018, para. 74–104). Relatedly, the requirement regarding animal welfare does not as such exclude ritual slaughter, as is also visible in Regulation 1099/2009 which rather points to two different regimes of animal welfare protection (OABA 2018, para. 81). However, the CJEU, throughout the essential requirement, emphasizes ‘high animal welfare standards’ in relation to organic production (OABA 2018, para. 36–37, 44–46), while highlighting the importance of stunning prior to death (OABA 2018, para. 47). The CJEU then argues that ritual slaughter cannot ensure that the suffering of animals is kept to a minimum (OABA 2018, para. 48–50). Hence, in order to also ensure consumer’s confidence, the organic label should not be given to meat obtained through ritual slaughter (OABA 2018, para. 51–52).

Unfortunately, in this case the CJEU prioritises animal welfare above the manifestation of the freedom of religion, contrary to the clear wording of article 13 TFEU and Regulation 1009/2009, both of which indicate that the freedom of religion should not be disproportionately curtailed by animal welfare concerns (Hehemann 2019, vol. 4, pp. 301–5). In this respect, the concern is expressed that this judgement will be relied upon to further try to suppress the free exercise of religion under the guise of protection of animal welfare (Hehemann 2019, vol. 4, p. 305). In this case, the problem with CJEU’s reasoning is not merely that it appears to ignore the social context of Islamophobia in which this contestation about organic labels for ritually slaughtered meat takes place. The Court’s arbitrary refusal of an organic label for ritually slaughtered meat can also be seen to stigmatise ritual slaughter while fueling anti-Islam stereotypes. Put differently, the CJEU case law concerning ritual slaughter seems to fall below the equality and identity benchmarks of minority protection.

5. Conclusions

The preceding analysis has revealed that the overall approach of EU law in relation to religious minorities is indeed one that is rather half-hearted. The inclusion of the respect for the rights of minorities as one of the foundational values of the EU has, so far, neither entailed the development of minority specific standards nor entailed a marked improvement in terms of main-streaming minorities’ special needs and concerns. The EU Charter of Fundamental Rights avoids explicit reference to minority rights and rights concerning the minority identity, and no amendments or additional instruments on minority specific rights are forthcoming. Furthermore, the European Parliament’s attention for minority specific rights and initiatives to bring fundamental rights of persons belonging to minorities more to the forefront, has strikingly glossed over the concerns of religious minorities. Its Resolution of 13 November 2018 on minimum standards for minorities in the EU confirms this relative neglect of religious minorities since none of the standards encompass rights aimed at the protection of the religious identity of minorities.

This in turn invites a return to the overarching theme of the Special Issue. As the EU has not developed minority specific standards for internal purposes, the protection of religious minorities in the EU depends entirely on the method in which general fundamental rights (the freedom to manifest one’s religion and the prohibition of discrimination) are ultimately interpreted and applied by the CJEU.

Unfortunately, the preceding analysis has revealed that the EU law’s contribution to the realisation of *the equality, identity and participation* benchmarks regarding religions

minorities by general fundamental rights, particularly the freedom of religion as well as the prohibition of discrimination on grounds of religion, can similarly be called half-hearted.

It is certainly welcomed that the CJEU adopts a firm position regarding Article 17 TFEU and does not follow the ECHR's line of jurisprudence that uses a very broad understanding of what concerns the relations between states and religions, triggering a broad margin of appreciation. Indeed, according to the CJEU, the EU's duty to respect and not prejudice the status under the national law of churches and religious associations and communities in the member states does not exempt any religious matter from the operation of EU law, including non-discrimination law. More particularly, the CJEU has strictly scrutinized employment decisions by religious organisations invoking their religious ethos, as well as the organization of religious holidays.

In this regard, EU law and its strong non-discrimination framework appears to entail an appropriate (proportionate) adjustment of the possibilities for employers with a particular religious ethos to limit the rights of individuals and also of national minority protection rules (affecting religious holidays). Regarding the former, case law can be seen to confirm that the importance the EU attaches to the protection of the fundamental rights of individuals does not allow disproportionate interferences inspired by autonomy and integrity concerns of (religious) groups/communities. Concerning the latter, the religious holidays are maintained for the religious minorities concerned, thus enabling them to manifest their religious identity, while the extension to the population at large remedies discrimination concerns.

However, the case law analysed above demonstrated that both third country nationals and EU citizens belonging to religious minorities can face discrimination on religious grounds that is not adequately countered by the CJEU, while the CJEU's reading of the freedom of religion similarly fails religious minorities at least in some respects. Indeed, the CJEU case law pertaining to Muslims, the expression of Muslim faith in the workplace and the regulation of ritual slaughter invites critical reflection.

Unfortunately, all the cases concerning the limitations on the manifestation of the Muslim faith have one feature in common, namely the Court's lack of acknowledgement of and engagement with a context of rising Islamophobia in Europe, both in its assessment of the freedom of religion and of the prohibition of discrimination on grounds of religion. More particularly, in an atmosphere of Islamophobia, it is important to investigate whether neutral measures with a disproportionate impact on Muslims (women) amount to indirect or even to hidden direct discrimination. The cases on headscarves at work and the one on ritual slaughter during the Muslim Feast of Sacrifice are illustrative of this point. Furthermore, in the case of the organic food label, the Court can even be seen to be stigmatizing ritual slaughter, with a concomitant risk of strengthening the stereotype against the practice of Islam. Unfortunately, the Court's balancing of interests in these cases seems to be skewed in favour of either the protection of business interests to portray an image of business neutrality or animal welfare to the disadvantage of the freedom to manifest a minority religion. The related flaws in the Court's reasoning result in a sub-optimal protection of religious minorities' fundamental rights, inhibiting the realization of the minority protection's goals of equality, identity and participation.

The preceding identification of flaws in the CJEU's jurisprudence regarding the general fundamental rights of religious minorities calls for an urgent adjustment of the CJEU's jurisprudence, particularly as there are no minority specific rights to provide solace.

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Notes

- ¹ This line of thinking goes back to the formula of Aristotle following which like things needed to be treated alike and different things differently, to the extent of the difference.

- 2 During the time of the League of Nations the Minorities treaties included three categories of rights: rights for all persons, rights for all nationals and rights for nationals belonging to minorities.
- 3 Article 27 ICCPR reads: In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.
- 4 France and Belgium continue to resist ratification of the FCNM.
- 5 Critical discussion of two opposite paradigms regarding judicial law-making, cf. (Jacob 2011, vol. 12, pp. 1005–32).
- 6 The CJEU case law on freedom of religion and discrimination on grounds of religion (Directive 2000/78) is steadily expanding. The article was submitted 15 December 2020 to the editors and that is also the cut-off point after which no new case law has been taken into account.
- 7 Inter alia articles 2, 3, and 6 TEU.
- 8 Traditionally, another criterion was added, namely having the nationality or long standing ties with the state concerned. While several states still hold on to a nationality requirement, increasingly it is accepted that also immigrant groups can qualify, especially when they have been in the country for several generations, cf. (Eide 2010, pp. 165–94).
- 9 This line of thinking is arguably visible in the FCNM where some of the rights are reserved for minorities that inhabit areas either traditionally or in substantial numbers: inter alia article 11(2) FCNM.
- 10 In Western Europe parts of the Iberian peninsula were under Muslim rule between the 8th and 15th Century, while in Eastern Europe Islam was introduced by Mongol Rulers in the 13–14th Century, and further consolidated during the rule of the Ottoman Empire, cf. (Nielsen 2011). In the countries of the European part of the former Soviet Union (the Baltic states and Belarus) Muslims have been present over more than 600 years, cf. (Larsson and Raciuc 2010, vol. 3, pp. 350–73).
- 11 See inter alia Benton, Meghan, and Anne Nielson. 2013. Integrating Europe’s Muslim Minorities: Public Anxieties, Policy Responses. *Migration Policy Institute*, May 10. Available online: <https://www.migrationpolicy.org/article/integrating-europes-muslim-minorities-public-anxieties-policy-responses> (accessed on 12 December 2020).
- 12 These two dimensions of the right to equal treatment were already visible in Aristotle’s understanding of equality, captured in the dictum ‘treat like cases alike and different cases differently to the extent of the difference’: Aristotle, *Nicomachean Ethics*, 1130b–32b; cf. Plato, *Laws*, VI.757b–c.
- 13 Several reports by prominent NGO’s, as well as various bodies of the Council of Europe and the EU’s Fundamental Rights Agency document the worrying trend of multiple manifestations of intolerance against Muslims: Parliamentary Assembly of the Council of Europe (PACE), *Islam, Islamism and Islamophobia in Europe* (Resolution 1743) Council of Europe 2010.
- 14 Article 26,2 FCNM. It is important to realise that while the AC only advises the Committee of Ministers of the Council of Europe, the latter tends to adopt the recommendations formulated by the AC. Admittedly, the interpretation by the FCNM’s Advisory Committee does tend to identify several positive state obligations to protect religious pluralism, a positive duty to protect the identity of religious minorities, while recognizing several de facto duties of reasonable accommodation: duties to revitalize religious heritage (Advisory Committee 2003, §592; 2009, §97), to respect burial customs of religious minorities (Advisory Committee 2008, § 65–6; 2010, §95), and to facilitate the availability of kosher food (Advisory Committee 2006, §68; 2014, §68). Importantly, given the rise in Islamophobia in the western world the latest round of periodic state reporting elicited several expressions of concern about the spread of Islamophobia and the concomitant stifling effect of attacks against people wearing religious dress, and of state imposed restrictions on ritual slaughter (Advisory Committee 2016, pp. 6, 15, 17–8). Notwithstanding the positive and inclusionary signals the supervisory practice of the AC sends about religious minorities, the information in periodic reporting and shadow reports has not yet induced the AC to identify explicit duties of reasonable accommodation in relation to religion in the working and educational environment. Put differently, the interpretation and application of minority specific rights has not fully matched the lacuna left by the formulation of the standards.
- 15 Article 2 jo. 5(3) UN Convention on the Rights of Persons with Disabilities; Article 5 of EU Directive 2000/78 (Employment Equality Directive).
- 16 Adoption of the Directive under Article 19 TFEU would require unanimity in the Council.
- 17 The principle of conferral is enshrined in article 5(2) TEU.
- 18 See Article 2 TEU.
- 19 See ‘Accession Criteria (Copenhagen Criteria)’ [https://eur-lex.europa.eu/summary/glossary/accession_criteria_copenhagen.html, accessed on 24 September 2021] with reference to articles 49 and 6(1) TEU. See also [https://www.europarl.europa.eu/enlargement/briefings/20a2_en.htm, accessed on 24 September 2021] with reference to the translation in terms of ratification of the FCNM.
- 20 Belgium, France, Greece are indeed missing from the list of state parties to the FCNM: <https://www.coe.int/en/web/minorities/etats-partie> accessed on 24 September 2021.
- 21 The Treaty of Lisbon amended article 6 TEU so that its first paragraph reads The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on

12 December 2007, which shall have the same legal value as the Treaties. Hence by reference the Charter now has the same legal value as the primary treaties.

22 Article 21(1) EU Charter of Fundamental Rights.

23 See also Guide on Article 14 of the ECHR and on Article 1 of Protocol No 12 to the convention, [https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf accessed on 24 September 2021], p. 29.

24 Furthermore and relatedly, the still overriding value of the free movement principle/Internal Market within the EU's integration project has been seen to put a strain on existing national minority specific standards (towards the protection of indigenous minority languages) (Von Toggenburg 2008, p. 95; Kochenov 2010, vol. 35, p. 307) (Groener 1989; Angonese 2000; Bickel and Franz 1998). Limiting the national rules aimed at protecting an endangered official language in order to secure the free movement of EU citizens, curtails national minority protection rules for the sake of the EU internal market project (See in this respect the Groener case and the rules aimed at protecting the Irish language in the educational system: the CJEU in the end validated these linguistic requirements for teachers but only after a most strict proportionality test). Any extension of benefits to the EU citizens making use of their free movement rights, may at first sight not dilute the rights of the national minorities concerned but it does alter the equilibrium (Von Toggenburg 2008, p. 111). Again, the centrality of the position of EU citizens for the overall EU integration project is confirmed as is the extent to which this concern is allowed to outweigh (national) minority protection concerns and laws.

25 See note 16.

26 See inter alia articles 13 and 17 TEU.

27 The extent to which the European Commission is willing to see article 22 as aimed at the protection of minorities, could influence its pre-legislative scrutiny of legislative proposals against the Charter: since 2001 the Commission has engaged in a fundamental rights compatibility check, which was further strengthened in 2005.

28 See articles 165 and 167 TFEU.

29 Parliament and Council Decision 1855/2006, Establishing the Culture Programme 2007–2013, 2006 OJ (L372) 1 EC: notwithstanding its huge scope and its aim to promote cultural diversity and dialogue it only has one reference to minorities, and non to migrants.

30 The focus on language learning and linguistic diversity is all about promoting employability and mobility, and thus again the optimisation of the EU's economic integration project. In contrast to Commission Communication on Promoting Language Learning and Linguistic Diversity: An Action Plan 2004–2006, COM (2003)449 final (24 July 2003), the 2014 Council of the European Union's Conclusions on multilingualism and the development of language competences no longer includes migrant languages.

31 There is not yet any case law regarding article 14 Charter's parental rights in relation to the public education of their children Art. 14(3) charter reads: '... the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

32 Because in *casu Vivien Prais* had given a very late notice of the religious constraints she faced on the chosen date, the Court concluded that no violation of the freedom of religion took place: para 20.

33 The article was submitted to the editors on 15 December 2020 and later case law has not been included in the analysis. The CJEU's case law in relation to religious minorities is steadily expanding and requires sustained follow up.

34 *Egenberger* concerned the demand to be a member of a Protestant church for making a report, an operational activity which as such is not that important for the manifestation of the particular religion concerned.

35 *IR* was fired for having divorced and remarried which would be incompatible with the Catholic ethos of the organization where he worked, while these demands were only imposed on Catholic employees with managerial roles.

36 *IR*: In relation to the disapplication of the rule of German law following which the religious organisations own assessment about the nature of an occupational requirement as being justified.

37 The Court highlighted the fact that official members of these religious minority communities do not all perform religious duties on this day, nor do they all have the feeling of constraints when they have to work anyway on this day. These members of the religious minorities would be in a comparable situation as members of other religious communities, and hence the Austrian rule would amount to a differential treatment of comparable situations on grounds of religion: para. 45–50.

38 This requirement that the rule would be limited to employees with interaction with customers would in any event burden a very large group of workers, cf. (Loenen 2017, vol. 10, p. 67).

39 The CJEU acknowledges the interference with the freedom to manifest one's religion but it does not give that any particular weight, it simply incorporates it in the justification analysis of a potential case of indirect discrimination.

40 For an example of this problematic type of reasoning, cf. (*Cha'are Shalom Ve Tsedek v France* 2000).

41 The CJEU has long recognized the right to equal treatment as a general principle of EC law, which would preclude not only that comparable situations are treated differently, but also that different situations are treated in the same way.

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