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Commentary on Kristin Henrard's 'The Margin of Appreciation for 'State-Religion Relations': Critical Reflections on the Jurisprudence of the ECtHR and the CJEU'

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Abstract
This is a commentary on Kristin Henrard's 'The margin of appreciation for 'state-religion relations': critical reflections on the jurisprudence of the ECtHR and the CJEU' addressing the contrast between the ECtHR and the HRC in relation to the wearing of religious symbols and the contrast in the case law of the CJEU in relation to religious discrimination.

Keywords Wearing of religious symbols · Discrimination on ground of religion or belief · European Court of Human Rights · Court of Justice of the European Union · State-religion relationship · Margin of appreciation

1 Introduction

In her contribution, Kristin Henrard uses the examples of two religious issues—ritual slaughter and the wearing of religious symbols—to argue that the two European regional courts—the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU)—both allow the member states a margin of appreciation when they translate international norms into domestic law. This leads both courts to adopt a lower level of scrutiny which does not embrace their supervisory role and does not give enough guidance to national authorities and courts. This goes, as she argues, against the idea that fundamental rights protection means that these rights need to be interpreted broadly and restrictions on those rights need to be interpreted strictly. This presupposes that courts adopt a serious level of scrutiny. In her conclusion, Henrard recommends that, first, both regional courts should move away from a broad margin of appreciation and scrutinise limitations on the right

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to freely manifest one's religion very closely. Second, the courts should not make the presence or absence of a European consensus the only or most important issue when deciding on the width of the margin of appreciation, but should give weight to other factors which point to a narrow margin. Third, both courts should determine the margin as concretely as possible. It is submitted that both the ECtHR and the CJEU would do well to follow these recommendations and scrutinise restrictions on the freedom to manifest one's religion very rigorously, because, in the words of the ECtHR in *SAS v France* [: para 28] as quoted by Henrard, 'a balance must be achieved which ensures the fair treatment of people from minorities and avoids any abuse of a dominant position'.10

This comment elaborates on two contrasts referred to by Henrard: first, the contrast between the ECtHR decisions on the wearing of religious symbols and clothing and the decisions of the UN Human Rights Committee (HRC); and, second, the contrast between the different CJEU judgments on religious discrimination.

1.1 Contrasts Between the ECtHR and the HRC on the Wearing of Religious Symbols

Henrard, when writing about *SAS,* refers in a footnote to the different decisions of the HRC in relation to the French law against the wearing of face-covering clothing in public. In *Hebbadj* [21] and *Yaker* [24], both concerning women who had been fined for wearing a face-covering veil in public, the HRC applied a much more rigorous proportionality test than the ECtHR did in *SAS.* It concluded that the French ban was disproportionate and violated the authors'[1] right to freely manifest their religion. It examined the French arguments for the ban: first, that it was necessary for the protection of the public order and safety, which required that everyone could be identified when necessary. The HRC recognised that it might be necessary to show the face in specific circumstances, but the French law prohibited the wearing of face covering at all times and France had not shown that such an absolute ban was necessary, that it was proportionate to achieve public order and safety, or that it was the least restrictive measure to achieve the stated aim [: para 7.7; 2124: para 8.7]. The HRC also rejected the second argument that the ban was necessary for the protection of the rights of others, based on the concept of 'living together' or respect for the minimum requirements of life in society. The exceptions in Article 18(3) ICCPR must be interpreted strictly and not applied in the abstract, according to the HRC [: para 7.10; 2124: para 8.10]. And, even if it had accepted 'living together' as a legitimate aim, it considered that a criminal ban was not proportionate and necessary. Furthermore, the HRC also concluded that the ban and the application to the authors constituted a form of intersectional discrimination based on gender and religion in violation of Article 26 ICCPR [: para 7.17; 2124: para 8.17].[2]

The contrast Henrard refers to is also present in the decisions of the ECtHR and the HRC relating to the wearing of conspicuous symbols of religious affiliation in

[1] The HRC refers to the applicant as 'the author'.

[2] On intersectional discrimination in relation to the wearing of Islamic headscarves and face veils, see [: ch 7].27

schools, which was prohibited by law in France in 2004. In six applications in 2009,[3] four Muslim girls were expelled from school for wearing a headscarf (which did not cover their face) and two Sikh boys were expelled for wearing a *keski* or under-turban. All six complained to the ECtHR, alleging that France had violated their right to freely manifest their religion. The ECtHR held that there was an interference with their religion, but that this was justified for the protection of the rights of others and public order. The ban was based on the constitutional principle of secularism. In contrast, the HRC held in a case concerning a boy who was denied access to school because he wore a *keski* that this was an interference with his right to freedom of religion under Article 18 ICCPR and that France had not justified why this prohibition was necessary, as it had not shown that the boy had posed a threat to the rights and freedoms of other pupils or to the order within the school [: para. 8.7].20

The HRC also came to a different conclusion than the ECtHR in their decisions in cases concerning Sikh men and the French requirement to appear bareheaded in photographs for identity documents. In *Mann Singh v France* [22], the ECtHR held that this interference with the applicant's freedom to manifest his religion was justified for public safety and law and order. In two very similar cases, the HRC found that requiring Sikh men to appear bareheaded in photographs for passports and residence permits, thus requiring them to take off the turbans they wore for religious reasons, was a violation of their right to manifest their religion. The HRC again acknowledged that identification was important for public safety, but that France had not explained why a turban, which leaves the face clearly visible, would make identification more difficult, nor had it indicated why it would be easier to identify a person with an identity photograph on which that person appears bareheaded, while in his day-to-day life he always wears a turban [: para 8.4]; [2322: para 9.4].[4]

The contrast between the judgments of the ECtHR and the decisions of the HRC shows that the latter scrutinises the restrictions imposed on the right to freely manifest one's religion very strictly and that it examines the effects of these restrictions not just 'in the abstract', but with a consideration of what these bans mean for the people affected in their everyday lives. This means that the HRC does not leave a margin of appreciation to the member states and is, thus, much clearer in its guidance on how the right to freely manifest one's religion must be translated into national law. The HRC takes it supervisory role more seriously and, as Henrard correctly argues, this is what the ECtHR and the CJEU should do as well.

1.2 Contrasts in the CJEU Case Law on Religious Discrimination

The judgments of the CJEU on religious discrimination under Directive 2000/78/EC also show a contrast between the cases concerning the wearing of Islamic headscarves at work[5] and some of the other decisions on religious discrimination, which

[3] *Aktas* [3]; *Bayrak* [4]; *Gamaleddyn* [5]; *Ghazal* [6]; *J. Singh* [7]; *R. Singh* [9].

[4] For more information on this see [27].

[5] *Achbita* [11]; *Bougnaoui* [12]; *Wabe and Müller* [19]; *SCRL* [17]; *Commune d'Ans* [18].

Henrard also mentions.[6] The six headscarf cases all concerned women who wished, for religious reasons, to wear a headscarf at work that covers their hair but leaves their faces free. The employers refused to allow them to do so, and the women were dismissed or, in *SCRL* [17], not given an internship. In all six cases, the CJEU stressed that it was up to the national courts to decide in each case whether there was direct or indirect discrimination, but held that rules prohibiting the wearing of all religious, philosophical, or political clothing and symbols in the workplace most likely constituted indirect rather than direct discrimination. This, as Henrard points out, ignores the possibility of hidden direct discrimination, where rules which are dressed up as neutral target a particular group. Therefore, the CJEU refused to engage with the claim that these neutrality measures are actually targetting adherents of a particular religion. In *Wabe and Müller* [19], the CJEU stressed that the prohibition of discrimination on grounds of religion or belief in Directive 2000/78/EC was not limited to differences in treatment between persons having a particular religion or belief and those who do not. This was also pointed out in *Achatzi* [: para 69]. Does a workplace-neutral rule not make a difference—or, in the definition of direct discrimination, not treat less favourably—people who feel mandated by their religion to wear certain clothing and those who are religious but do not feel mandated to do so or those who do not have a religion? In 14*Achatzi*, Austrian national legislation determined that Good Friday was a public holiday only for those employees who were members of certain specified Christian churches and that only those employees, if they were required to work on that day, were entitled to an extra payment in addition to their regular salary. The conclusion of the CJEU was that this amounted to *direct* religion or belief discrimination against Achatzi, who was not a member of any of the specified churches [emphasis added]. This contrasts with the above conclusion in the headscarf cases that there is more likely to be indirect discrimination. These contrasting judgments do nothing to take away the uncertainty of national courts, mentioned by Henrard, concerning the difference between direct and indirect discrimination. Moreover, the CJEU headscarf judgments also contrast with what the CJEU held in *Chez* [: para 82], a case concerning racial discrimination, that, when deciding whether a practice amounts to direct discrimination, the courts should take into account whether that practice is based on stereotypes and prejudices. Henrard mentions Islamophobia and the prejudice against hidden minorities in the West and concludes that the CJEU has refused to engage with this issue. If it had done so, it should have followed 13*Chez* and found direct discrimination.[7]

There is also a contrast between the judgments in *Egenberger* [15] and *IR* [16] and those in the headscarf cases.[8] According to Article 2(2)(b)(i) of Directive 2000/78/EC, indirect discrimination can be justified if it pursues a legitimate aim and if the means used to achieve that aim are appropriate and necessary. The CJEU held that the workplace rules in *Achbita, Bougnaoui, Wabe and Müller* and *SCRL* had a legitimate aim: the freedom to conduct a business, which can be found in Article 16

[6] *Egenberger* [15]; *IR v JQ* [16]; *Achatzi* [14].

[7] For more information on this see: [: ch. 4].26

[8] On this contrast and the consequences for religious employees who want to manifest their religion at work through religious clothing, see [25].

of the EU Charter of Fundamental Rights. They were appropriate and necessary if: they prohibited all visible signs of religious, philosophical, and political beliefs; if they were genuinely pursued in a consistent and systematic manner and did not distinguish between different religions or beliefs; and if they only applied to employees who came into contact with customers. It was up to the national courts to examine this. In *Wabe and Müller,* the CJEU added that the employer must prove that there is a genuine need for imposing a neutrality rule. This, as Henrard mentions, appears to heighten the scrutiny of the proportionality of the neutrality rules, but the CJEU still did not scrutinise the rules in those cases very strictly. Moreover, in *Commune d'Ans* [18], which was the first headscarf case concerning a public employer (a municipal council), the CJEU held that the workplace neutrality rule had a legitimate aim—to put into effect the principle of neutrality of the public service—and it dropped the requirement from the earlier cases that such rules must be limited to customer facing employees. Therefore, it left, as Henrard writes, a broad margin of appreciation to states and infra-state bodies to decide on their definition of neutrality. It also did not apply a very strict proportionality test.

Article 4(1) of Directive 2000/78/EC determines that direct discrimination can be justified if there is a genuine and determining occupational requirement to have a certain religion or belief (or any other characteristic covered by the Directive) as long as the objective is legitimate and the requirement is proportionate. Article 4(2) adds another occupational exception for organisations with a religious ethos, which means that they can treat a person's religion or belief as a genuine, legitimate, and justified occupational requirement as long as this is, first, needed because of the nature or the context of the activities and, second, does not justify discrimination on another grounds.

In both *Egenberger* [: paras 65–68] and 15*IR* [: paras 51–54], the CJEU explained this exception in detail: 'genuine' means that the requirement of professing the religion on which the ethos of the organisation is based 'must appear necessary because of the importance of the occupational activity in question for the manifestation of that ethos'. 'Legitimate' means that the requirement must not be used to pursue an aim that has no connection to the ethos. And 'justified' means that the religious organisation must show that the supposed risk of causing harm to its ethos is probable and substantial, so that imposing such a requirement is indeed necessary. The occupational requirement must also, the CJEU continued, comply with the principle of proportionality, as one of the principles of EU law. Here, the CJEU gives very clear and specific guidance to national authorities and courts on the justification and proportionality test for occupational requirements. This contrasts sharply with the headscarf cases, where, as Henrard writes, the CJEU failed to do so. In those cases, it left it to the national courts to decide on the justification and proportionality of the neutrality rules without giving them much guidance as to the criteria for doing so.16[9] The reason behind this contrast is not clear, but it can be asked whether the fact that the headscarf judgments all concerned a minority religion (Islam), while *Egenberger, IR* and *Achatzi* all concerned the majority Christian religion played a role.

[9] Sharpston comes to the same conclusion: see [28].

2 Conclusion

The ECtHR and the CJEU should follow Henrard's recommendations and rigorously scrutinise limitations on the right to freely manifest one's religion and the right not to be discriminated against because of one's religion or belief and give more guidance to the national courts, as the HRC and the CJEU in other religious discrimination cases do. Only in that way can they fully exercise their role and provide effective protection of fundamental human rights of all people, including minorities.

Declarations

Conflict of interest The author has no competing interests to declare that are relevant to the content of this article.

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