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Wearing Headscarves in the Workplace : Comparing Approaches of the Court of Justice of the European Union and the European Court of Human Rights

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Abstract

The article sets a brief comparative review of the jurisprudence of the European Court of Human Rights as well as the Court of Justice of the European Union with respect to the limitations imposed on the right to freedom of religion, by shedding light on the example of wearing the Islamic headscarf in the European sphere. It examines the background giving rise to the first European ban on wearing the headscarf in schools, followed by a reflection on its proscription in the university stage. The analysis explicates the interaction between the unhindered state interventions on the one hand, and the extent of the supervisory role exercised by the esteemed supra-national courts. In so doing, it unveils the recurring deference of Europe's top courts to the arguments of the member states regarding the manifestation of the right to freedom of religion in public space. Arguments such as preserving secularism, state neutrality and respect for the rights of others were rhetorically employed in tandem with a wide margin of appreciation accorded to the member states to the extent of inconsistency with the provisions of the normative instruments (the ECHR and the EU Charter of Fundamental Rights) and former jurisprudence of the courts.

Keywords : CJEU, ECtHR, **discrimination on grounds of religion, Islamic headscarf, Stasi Commission.**

A. INTRODUCTION

This article presents a humble contribution to the discussion of one of the problematic issues pertaining to antidiscrimination laws within the European legal order, namely, discrimination on grounds of religion. Given the sensitivity of the topic and its intrinsic tendency to stir varying sorts of reactions, it is fair to argue that attempting to address such a matter is as hazardous as defusing land mines. Hence, not only is it a brave decision to engage in such a discussion, but more importantly, it is an indispensable endeavor for any person vigilant of international human rights law violations. Nevertheless, and in spite of the formal confinements, this article embraces the task ahead in good faith, hoping it would constitute a decent extension to the existing literature over the topic.

At the outset of the text, and in order to avoid confusion, it is important to point out that the article at hand does not represent any sort of militancy or campaign of beliefs. As a matter of fact, it neither engages in religious antagonisms, nor does it discuss the topic in essence on the platform of theological doctrines. Conversely, the article is primarily concerned with the European human rights law approach

to the cases of headscarf worn voluntarily and willfully by an adult⁽¹⁾, with the exclusion of cases in which the headscarf is worn under some sort of compulsion or coercion, as well as the cases of headscarf worn by minors or children. In other words, even though references to other forms and/or conditions of wearing religious attire will be made, the main aim remains focused on the dialectic discourse evolving from imposing restrictions upon (a) fundamental freedom(s) on the one hand, and how to analyze and balance the limits of said freedom once placed against other interest(s) or right(s) within a particular context on the other. Thus, the headscarf debate is demarcated to serve as an example of the manifestation dimension of the right to freedom of religion, which exists within the peripheries of the rule of law in Europe. The topic can be viewed as an exemplary stress test, which is deemed necessary in any democratic society. It examines the limits of said freedom once practiced under the premise of pluralism, being an integral pillar of a democratic state governed by the rule of law, which by its turn reveals the actual, not the presumed, standard of protection provided for in a given society. Accordingly, the article entertains a comparison of the adopted approaches by the two pre-eminent supranational courts of Europe as a mode of international human rights legal protection. It contrasts their stances toward the imposed restrictions on the right to freedom of religion by means of the total or partial bans on the wearing of headscarf in public space, enacted on the domestic level, and the relevant spillover effect against other rights such as access to or retention of employment due to said restrictions.

The European Court of Human Rights (hereinafter referred to as ECtHR), based in Strasbourg, is the guardian of the European Convention on Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention)⁽²⁾. It accepts complaints by individuals alleging a breach of one or more Convention articles by acts or omissions of the authorities of one of the forty-seven Contracting Parties of the Council of Europe, provided that conditions of admissibility are observed⁽³⁾. The Court of Justice of the European Union (hereinafter referred to as CJEU), based in Luxembourg, is the guardian of the EU Charter of Fundamental Rights (hereinafter referred to as Charter)⁽⁴⁾, and reviews whether certain acts or omissions of the EU institutions and/or those of the authorities of one of the twenty-eight Member States of the European Union are in conformity with the guarantees provided in the Charter⁽⁵⁾. In spite of the variance in territorial reach as well as the substantive scope of protection, some cases can and have been filed before

⁽¹⁾Referring to the Hidjab, as distinguished from the entire visage cover Burqa, or the one that covers the face while revealing the eyes Niqab. These forms entail a different dynamic of analysis and somehow diverge from the focus of this discussion. See: *S.A.S. v France* [GC] Appno 43835/11 (ECtHR 1 July 2014); and also, *Belcacemi and Oussar v Belgium* App no 37798/13 (ECtHR 11 July 2017). Available at: <<https://hudoc.echr.coe.int>> accessed 3 January 2018.

⁽²⁾European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols 11 and 14, opened for signature 4 November 1950, entered into force 3 September 1953, ETS no 005. <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005>> accessed 3 January 2018.

⁽³⁾Directorate of the Jurisconsult, 'A Practical Guide on Admissibility Criteria' 3rd edn (2014) <http://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis/admi_guide> accessed 3 January 2018.

⁽⁴⁾Charter of Fundamental Rights of the European Union [2012] OJ C326/391 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12012P/TXT>> accessed 3 January 2018.

⁽⁵⁾Frank Emmert and Chandler Carney, 'The European Union Charter of Fundamental Rights vs. The Council of Europe Convention on Human Rights And Fundamental Freedoms - A Comparison' (2017) 40 *FordhamIntLLJ* 1051.

both supranational courts⁽⁶⁾, and religious attire is one remarkable example of such cases. This could be attributed to the complex relationship between religious liberty and equality, which harbors antagonistic potential for the unequal treatment of others by government, taking the form of differential treatment on the account of a person's exercise of his or her freedoms⁽⁷⁾.

A quick scanning through the provisions of both instruments reveals that both the Convention and the Charter, though differing in wording, entail provisions guaranteeing the status of the right to freedom of religion as a fundamental right, albeit susceptible to qualification⁽⁸⁾. In the same vein, they entail provisions prohibiting discrimination including that on the grounds of religion⁽⁹⁾, thus establishing the enjoyment of these rights as the general rule, whereas curtailing them would be the exception, which had it been carried out, then pursuant to foreseeable criteria under scrutinized judicial supervision. Put differently, the right to freedom of religion, within a prescribed order, is not only guaranteed but also upheld and elevated to the status of a fundamental right, giving rise to individual claims and to some extent to group claims. Whereas discrimination seems prohibited on a wide array of grounds, the Convention as interpreted by the ECtHR, specifically with respect to article 14, does not offer a general prohibition on discrimination, but only with regard to the rights that are otherwise enshrined in the Convention⁽¹⁰⁾. Similarly, the scope of the non discrimination principle as set forth in the EU Charter is applicable to the extent that the issue under review falls within the ambit of EU law. Against such a legal framework, it could be assumed that applying for a job, be it in the private sector or for the state, would not be affected in any way by affiliation to a given religious practice or for choosing to be dressed in a certain manner, especially one dictated by religious belief. Then one encounters the central issue: if the standard of protection to the right to freedom of religion as well as the prohibition of discrimination on grounds of religion are recognized, why then is there an issue in the first place? In other words, can a woman of the Muslim faith who is a fully-fledged

⁽⁶⁾ibid 1052.

⁽⁷⁾Thomas Giegerich, 'Freedom of Religion as a Source of Claims to Equality and Problems for Equality' (2000) 34IsLR 211, 213.

⁽⁸⁾Article 9 of the Convention: '1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others'. Article 10 of the Charter: '1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance. 2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right'. In addition to Article 18 of the ICCPR to which all the member states of both organizations are signatories.

⁽⁹⁾Article 14 of the Convention: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. Article 21 of the Charter: '1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited'.

⁽¹⁰⁾Mark Villiger, 'The Principle of Subsidiarity in The European Convention on Human Rights' in Marcelo Kohen (ed) Promoting Justice and Human Rights through International Law (Brill 2007) 631. This goes without prejudice to Protocol no 12 of the Convention, which expands the grounds of discrimination claims against state authorities, however, and though being in force, it has been only ratified by twenty out of the forty-seven member States of the Council of Europe. <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177>> accessed 3 January 2018.

citizen, as distinguished from an economic immigrant, wear a headscarf to work in Europe? Is she entitled to apply for a job or would she be rejected a priori given her religiously motivated attire? Those being addressed by said questions are not few. State authorities in several European states including those with the least number of Muslim citizen population had and still have to grapple with these questions. While considering the varying legal orders in Europe, evidently the ongoing discourse over the headscarf issue led to total bans in some states, whereas in others the issue did not generate the same contentious resonance. Then follow a few pertinent questions: Why is that piece of cloth so problematic as to warrant restriction or banning? Doesn't such a measure amount to a discrimination of some sort? What about diversity, multiculturalism and pluralism in western democracies? Or does that not cover religion or (all) religions? Wouldn't it be considered a disproportionate intrusion and/or an invasion to that woman's privacy and autonomy? Attempting to answer these interrelated questions was never an easy endeavor. Even though the article does not promise to provide an all encompassing answer to all these questions, it arduously attempts to engage with them, embarking upon a critical analysis of the jurisprudence of both courts as well as that of the relevant domestic legal orders involved.

From an organizational standpoint, the article shall be divided into five main sections. Following the foregoing introduction, the main analytical discussion is laid out in three distinctive sections. The second section reviews the restrictions imposed on wearing the headscarf during school and university stages, which constitute the plausible bases for the ensuing employment stage. The third section concentrates on examples of those attempting to occupy a state-run job while wearing the headscarf and the consequences thereof. The fourth section of the article extends the analyses of wearing the headscarf in situations of private sector employment. Ultimately, the article ends with a conclusion dedicated to summarizing the comparison of the approaches as well as the findings.

B. The Headscarf and Education: Pre-employment stage

This section deals with religion-based claims of discrimination, whereby the applicants were hindered from exercising their fundamental freedoms, which are guaranteed by their national constitutions as well as the Convention and/or the Charter. It entertains the complex relationship between the state interests and individual claims to the right to manifest religion by virtue of wearing the headscarf by deconstructing patterns of governmental interference that are entrenched behind a specific set of arguments. Preservation of state secularism, countering the rejection of national identity, combating the oppression of women, promoting gender equality, and fighting fundamentalism/terrorism were recurring justifications put forth by state authorities. These interferences, as shall be demonstrated below, undertook several legal forms ranging from parliament legislations to administrative regulations, and in some cases, even unwritten norms instructing against the wearing of the Islamic headscarf inside state-run school premises and throughout different stages of education. Discussing this dimension is specifically essential given the nexus between the education stage and that of employment in general and to elucidate the relevant jurisprudence with respect to those individuals who shall and ought to be future employees.

I. School

The headscarf dilemma in Europe can be traced back to the 1980s when it constituted a challenge for French lawmakers. As a result of the North-African immigration waves, the majority of which were, at least nominally, of Muslim faith, growing numbers of headscarf-wearing students in public schools were at the center of the political discourse as well as the preoccupation of school administrations⁽¹¹⁾. Perceived as a creeping threat to the firmly established principle of *laïcité*, a significant characteristic of the French legal order, tensions culminated by the end of 1989, when the principal of a Parisian suburb middle school suspended three girls for wearing the headscarf in a public school⁽¹²⁾. The minister of education at the time sought an advisory opinion from the Conseil d'État as to whether school administrations were legally entitled to enforce a ban on the headscarf in schools under the pretext of their presumed irreconcilability with the principle of *laïcité*⁽¹³⁾. The Conseil d'État ruled that an indefinite ban on the mere wearing of religious signs, including headscarves, in public schools did not have any legal basis, and asserted that the Constitution of 1958 as well as French obligations under international law necessitate respect for the freedom of conscience of students, including the right to express their beliefs in schools by wearing religious clothing⁽¹⁴⁾. The opinion confirmed the permissibility of wearing religious symbols, including religious garb, provided that 'it was not so ostentatious [ostentatoire] as to constitute an act of intimidation, provocation, proselytizing or propaganda; threaten the dignity and freedom of students or other members of the educational community; or disrupt the school's normal functioning'⁽¹⁵⁾. Whereas the opinion demonstrated support to the headscarf-wearing students by defending their individual rights, it nevertheless conferred the interpretation and implementation of the pronounced criteria to the school principals to be decided on a case-by-case basis⁽¹⁶⁾. A series of cases were brought before the Conseil d'État between 1992 and 1999, whereby it consistently abided by its 1989 opinion, rendering annulment decisions against unsubstantiated school boards' decisions (relying on circulars issued by the ministers of education to enforce the ban) that had sanctioned students wearing headscarves in forty-one of forty-nine cases⁽¹⁷⁾. The Conseil d'État maintained a seemingly well-balanced stance, namely, one based on the rationale that handling the headscarf ban/claims dichotomy should stay within the realm of civil rights and not categorizing it as an issue of public order⁽¹⁸⁾. Thus, it could be argued that the Conseil d'État's approach sought to balance conflicting rights instead of giving in to the government's flat ban request, by undertaking a conciliatory proposition between the protection of a fundamental right (freedom of expression and/or

⁽¹¹⁾ Ali Ulusoy, 'The Islamic Headscarf Problem before Secular Legal Systems: Factual and Legal Developments in Turkish, French and European Human Rights Laws' (2007) 9 *EurJMigL* 419, 424.

⁽¹²⁾ Elisa Beller, 'The Headscarf Affair: The Conseil d'Etat on the Role of Religion and Culture in French Society' (2004) 39 *TexIntlLJ* 581, 582.

⁽¹³⁾ Ulusoy (n 11).

⁽¹⁴⁾ Jeremy Gunn, 'Religious Freedom and Laicite: A Comparison of the United States and France' (2004) 2 *BrighamYoungULRev* 419, 455, citing *Avis du Conseil d'État no 346893* (27 November 1989) as reprinted in Bernard Jeuffroy and François Tricard, *Liberte Religieuse et Regimes des Cultes en Droit Français* (Cerf 1996) 1031-32.

⁽¹⁵⁾ Beller (n 12) 584.

⁽¹⁶⁾ Kathryn Boustead, 'The French Headscarf Law before the European Court of Human Rights' (2007) 16 *JTransnatLawPol* 167, 188.

⁽¹⁷⁾ Beller (n 12) 585. See for example François Bayrou, *Circulaire no 1694 du Septembre 1994* <http://www.assemblee-nationale.fr/12/dossiers/documents-laicite/document-3.pdf> accessed 4 January 2018.

⁽¹⁸⁾ Ulusoy (n 11) 426.

conscience and religion) on the one hand, and the notion of public service and its effective performance in the field of education on the other.⁽¹⁹⁾ Notwithstanding the foregoing, the approach of the Conseil d'État was not warmly received by all stakeholders, specifically following the 9/11 terrorist attacks, where the public mood was fraught with hostile apprehensions toward Muslims at large, creating a platform for political exploitation by the conservative government at the time as well as the far right, giving rise to a resurgence of the headscarf polemic by the spring of 2003⁽²⁰⁾. The French president then reacted to the situation by issuing a decree creating a national commission assigned with the task of analyzing the application of the principle of *laïcité* in the republic, which became known as the Stasi Commission⁽²¹⁾. It issued a report recommending, *inter alia*, the adoption of a legislation with the aim of banning 'clothing or signs manifesting religious or political affiliation' from public schools⁽²²⁾, while excluding private schools and college students from the scope of the ban⁽²³⁾. In contrast to the opinion of the Conseil d'État, the commission argued that the headscarf question is not a civil rights but rather a public order issue, because the highest ranking duty of government is to safeguard public order against unlawful threats or impositions against individuals⁽²⁴⁾. Eventually, a legislation prohibiting the wearing of headscarves in public schools, besides other ostentatious religious signs, was enthusiastically enacted by the French parliament in 2004⁽²⁵⁾, marking the first European legislation in modern times of its kind. It is worth noting that in the first year of enforcing the said legislation, forty-eight school girls were expelled for insisting to wear the headscarf⁽²⁶⁾.

Against such a background, it becomes clear why shedding some light on the French ban was significant and to that effect few observations remain worthy of reflection. First, the entire process that culminated in the headscarf proscription including the judicial decisions, political fervor, and simmering public anxiety, all rendered the French ban a launching point that set a precedent for other European states, which will later on rely upon a similar process to enact their own brands of headscarf bans. Second, by adopting the ban the French government at the time illustrated its tendency to capitalize on events that took place across the Atlantic (instead of addressing its internal post colonial intricacies), stirring away from the majority of recommendations put forward by the Stasi Commission Report⁽²⁷⁾ and meticulously adopting only the elimination of the headscarf scene from public schools. This entailed, arguably, neutralizing judicial protection of a fundamental right for the sake of expedient political gains via overt sidestepping of a consistent

⁽¹⁹⁾ *ibid.*

⁽²⁰⁾ Gunn (n 14) 459.

⁽²¹⁾ Robert O'Brien, *The Stasi Report: The Report of the Committee of Reflection on the Application of the Principle of Secularity in the Republic* (William Hein & CO 2005) 5ff. Provides a penetrating review of the Stasi Report in English language, covering all the aspects that were covered by the report besides the issue of wearing religious signs.

⁽²²⁾ Gunn (n 14) 462

⁽²³⁾ Ulusoy (n 11) 428.

⁽²⁴⁾ *ibid.*

⁽²⁵⁾ Boustead (n 16) 168. Loi n° 2004-228 du 15 Mars 2004 encadrant, en application du principe de *Laïcité*, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics, Journal Officiel (Lois et Décrets) no 65 du 17 Mars 2004, 5190. <JORF n° 0065 du 17 mars 2004 - Légifrance (legifrance.gouv.fr)> accessed 4 January 2018.

⁽²⁶⁾ *ibid* 189.

⁽²⁷⁾ O'Brien (n21) 7ff, including but not limited to the improvement of the living standards of some economically disenfranchised communities, banning of wearing political insignia, advocating improved education about religion and *laïcité*, adopting Jewish *Yom Kippur* and Islamic *Eid-EL-Kebir* religious holidays as school holidays and even the desirability of establishing an institute of Islamic studies.

flow of decisions delivered by their own national judiciary and irrespective of France's constitutional and international law obligations. At this point, it might be useful to mirror the British reaction, for example, following the 2005 London bombings, when a comparable heated debate over the headscarf in the UK ignited yet it did not turn into a flat ban legislation on headscarves in schools⁽²⁸⁾. Most notably, the House of Lords asserted in the Begum case the differing stance adopted by the UK legal order, whereby parliament conferred discretion to schools as to whether to impose restrictions on school uniforms, in the absence of a flat ban legislation⁽²⁹⁾. Indeed, so many differences exist between the UK and French legal orders, however, the situations were comparable with respect to issue, aggrieved group of citizens and political climate. The third reason can be attributed to the inconsistent arguments provided by the Stasi Commission Report. As a general premise, it is difficult to overlook how the report employed effusive rhetoric praising neutrality, equality, *laïcité* and freedom of conscience, yet ironically, it paid no regard whatsoever to define the substantive scope of religious rights including those involving religious attire⁽³⁰⁾. In the same vein, the specific anti-religious signs argument, for example, did not extend the ban to private schools, which seems at best contradictory⁽³¹⁾, as if students in private schools are somehow entitled to some leeway from strict laicism dictated in public schools, while at the same time excluding them from the preservation of public order argument. The same inconsistency applies to the claim that the ban is absolutely necessary to liberate women from family pressure, thus in a way the state arrogated the authority to emancipate the so-called oppressed women. While ceding to the fact that in several instances family pressure plays a vital role in wearing the headscarf, the report nevertheless did not provide any solid statistical proof that the majority of headscarf wearing French were coerced, but instead, it reiterated stereotypical impressions about Muslim women while eschewing their personal autonomy, which again seems inconsistent with the very principles of *laïcité* as put forth in the report⁽³²⁾. Eventually, with the ban in force, the remaining options for these girls were either that they will be moved to private schools (for the well-to-do families) where the ban is not enforceable, or suffer from a zero-sum game by ending up being deprived from access to education in essence by means of family pressure induced by political alienation. A final recourse could be made to the ECtHR. However, as shall be demonstrated in the following juncture, bringing an individual claim involving interference with the right to freedom of religion before the ECtHR could fall within the ambit of the qualification provision (Article 9.2 ECHR), if it were to be established that the interference was prescribed by law and pursuing a legitimate aim, i.e.; protecting public order.

II. University

Building on the former analysis, the public order argument was central to the ECtHR's reasoning of various decisions with respect to Article 9 claims. The article was drafted in two paragraphs; the first

⁽²⁸⁾Jill Marshall, 'Conditions for Freedom? European Human Rights Law and Islamic Headscarf Debate' (2008) 30 HumRtsQ 631, 634.

⁽²⁹⁾R (Begum) v Headteacher and Governors of Denbigh High school [2006] UKHL 15 [62].

Shabina Begum, UK school girl of Bengali origin, was prevented from wearing the 'Jilbab', a cloak-like dress, to school despite the availability of other accommodating options of attire as laid down by the school regulations, and claimed violation of her right to freedom of religion as per the UK Human Rights Act 1998 which codified the Convention.

⁽³⁰⁾Gunn (n 14) 479

⁽³¹⁾Ulusoy (n 11) 428.

⁽³²⁾ibid.

providing the right to freedom of religion in almost an absolute form, whereas the second section qualifies the first, listing conditions in which state interference can be tolerated by applying the tripartite test. As has been established in the *Handyside* case⁽³³⁾, in the exercise of its supervisory role, the ECtHR checks whether the restrictive measure was having clear legal basis in the national legal order, pursuing a legitimate aim, providing some evidence to support the intervention claiming to safeguard interests (such as public order and the rights of others)⁽³⁴⁾, and if such measure was necessary, evaluated in reference to standards adopted in a democratic society⁽³⁵⁾. In spite of the test, several Article 9 decisions were characterized by a consistent deference and without due scrutiny to governmental interferences based, amongst other arguments, in mandates of public order, reciprocated by a wide margin of appreciation from the ECtHR's side. With respect to education, the headscarf polemic managed to make its way to the ECtHR by virtue of the landmark case of *Leyla Şahin v Turkey*, where the ECtHR found no violation of the applicant's right to freedom of religion⁽³⁶⁾. This case is of highest significance, since it was the first decision by the Grand Chamber on the issue of religious attire⁽³⁷⁾. The decision was formulated within the rims of particular constructs, namely, the margin of appreciation doctrine, applying the proportionality test and preconceived political fear⁽³⁸⁾, each meriting a closer consideration.

1. Margin of appreciation

If the basic standards of the Convention can be met in several manners, the ECtHR does not require a specific set of measures to be followed uniformly⁽³⁹⁾. Nevertheless, it reviews whether 'a general interest, such as public order, secularism or equality, justifies in principle the usurping of an individual freedom'⁽⁴⁰⁾. Hence, in *Leyla Şahin*, without giving much weight to the facts of the case, the court established its legal analysis on the premise that given the historical experience of Turkey, upholding secularism is in fact a prevalent matter of public order which validates this type of infringement of individual rights. Some attribute that mode of disconnection between the legal principles pertinent to the issue and the facts surrounding the employment of these principles to the ECtHR being true to its civil law roots, i.e.; leaning

⁽³³⁾ *Handyside v UK* App no 5493/72 (ECtHR, 7 December 1976), paras 49-50.

⁽³⁴⁾ *ibid.*

⁽³⁵⁾ Phillip Leach, *Taking a Case to the European Court of Human Rights* (Blackstone Press Limited 2001) 148.

⁽³⁶⁾ *Leyla Şahin v Turkey* [GC] App no 44774/98 (ECtHR, 10 November 2005). It involved a fifth-year medical student, after spending four years at Bursa University while wearing the headscarf, then moving to Istanbul University, whereby a circular was issued by the Vice-Chancellor, instructing lecturers to deny access to lectures, tutorials and examinations to students with a beard or who wore the headscarf. Consequently, she was denied admission to written examinations as well as enrollment to different subjects. She brought her case through all stages of litigation before the Turkish administrative courts without any success, and then she brought her case to the Court.

⁽³⁷⁾ *Karaduman v Turkey* App no 16278/90 (ECtHR, 3 May 1993). In which a former brief consideration to questions of religious attire have been invoked. Even though it involved a university student, it was a question pertaining to a regulatory requisite for processing an identity photo for graduation and not to be prevented access to exams or lectures for the purpose of wearing the headscarf as in *Leyla Şahin*.

⁽³⁸⁾ Christopher Belelieu, 'The Headscarf as a Symbolic Enemy of the European Court of Human Rights' *Democratic Jurisprudence: Viewing Islam through a European Legal Prism in the Light of the Sahin Judgment* (2006) 12 *ColumJeurL* 573, 608.

⁽³⁹⁾ Thomas O'Donnelle, 'The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights' (1982) 4 *HumRtsQ* 474, 483.

⁽⁴⁰⁾ Belelieu (n 38) 613.

toward textual exegesis apart from the facts⁽⁴¹⁾. The foregoing disconnection led some to describe that mode of examining cases as if the ECtHR's is setting first definitions followed by an attempt to force facts to fit into them⁽⁴²⁾. One has to wonder whether the result would have been any different had the starting point for the margin of appreciation inquiry been the individual right in question and not the justification of the restriction⁽⁴³⁾.

2. Proportionality

The test was about establishing the reasonable relationship of proportionality between the means employed and the legitimate objectives pursued by the interference⁽⁴⁴⁾. Nonetheless, the test itself is viewed under the lens of identifying whether the state's measures were 'necessary' in a democratic society⁽⁴⁵⁾. Interestingly though, in *Leyla Şahin*, the ECtHR did not apply the tripartite test, as to what constitutes 'necessary in a democratic society'; whether the interference in question corresponds to a 'pressing social need'; whether it was proportionate to the aim pursued; and whether the justifications given by the state were 'relevant and sufficient' in order to justify the interference⁽⁴⁶⁾. Instead, the ECtHR indulged in regarding the principle of secularism, finding it a priority per se to uphold, indispensable for maintaining the democratic system in Turkey⁽⁴⁷⁾. The ECtHR failed to introduce any evidence or tangible data to prove that wearing the headscarf at the university posed a threat to public order or transgressed the rights of others, or that it exerted pressure on other Muslim colleagues who chose not to wear it⁽⁴⁸⁾. That leads one to conclude the absence of a 'reasonable relationship' of proportionality between the measures employed and aims pursued⁽⁴⁹⁾. To the same end came the only dissenting opinion in the case, issued by Judge Tulkens, whereby she referred to 'a review which must be made in concreto', namely, the tripartite test, while adding further scrutiny with respect to the chosen measure and whether it was the least restrictive of the right or freedom concerned⁽⁵⁰⁾. In other words, even if the measure was proportionate, still there was another step on the checklist that the ECtHR skipped without any reasoning apart from defending secularism argument. The former point alone cast doubts about the ECtHR's rationale from a legal standpoint, for it contradicts its very jurisprudence. However, it does not leave much space for doubting its political motivation.

3. Politicizing the headscarf

The ECtHR failed to provide any evidence or facts to support its recurrent equating of the headscarf as being solely an aspect of political Islam or religious fundamentalism when citing the *Refah Partisi*⁽⁵¹⁾ case. In the least sense, this type of generalization can be characterized as misplaced if not forced in this particular

⁽⁴¹⁾ *ibid* 615.

⁽⁴²⁾ Clovis Morisson, *The Developing European Law of Human Rights* (Sijthoff 1967) 170.

⁽⁴³⁾ *Belelieu* (n 38) 616.

⁽⁴⁴⁾ *Leyla Şahin* (n 36), para 117ff.

⁽⁴⁵⁾ *ibid*.

⁽⁴⁶⁾ *Gündüz v Turkey* App no 35071/97 (ECtHR, 4 December 2003), para 38ff.

⁽⁴⁷⁾ *Leyla Şahin* (n 36), paras 112-116.

⁽⁴⁸⁾ *ibid*.

⁽⁴⁹⁾ *Belelieu* (n 38) 612.

⁽⁵⁰⁾ *Leyla Şahin* (n 36), Dissenting Opinion of Judge Tulkens, para 2.

⁽⁵¹⁾ *Refah Partisi and others v Turkey* [GC] App nos 41340/98, 41342/98, 41343/98, 41344/98 (ECtHR, 13 February 2003).

instance, not to mention being oblivious of the distinction between the aims of a political organization on the one hand and the mere external manifestation of an individual for what she holds as being her religious belief on the other. The ECtHR attempted to develop a premise of consensus about the headscarf issue in Europe by referencing the French ban, yet again overlooking that it was directed at school students and not university students⁽⁵²⁾. Then it stretches a bit further by listing other European states and their relevant legal positions toward the headscarf issue⁽⁵³⁾. Nevertheless, the consensus argument grew thinner, because with the exception of Turkey, Azerbaijan and Albania, who have some regulation on wearing the headscarf in universities, the rest of the members of the Council of Europe, as a matter of fact, do not have any legislation to that effect. Hence, it could be argued that where the ECtHR sought to establish a consensus across the Member States presuming that a legal restriction on wearing the headscarf was a regular practice and by extension would count as part of the existing European public order fortifying the justifications of banning the headscarf, somehow it backfired. Reaching such a conclusion leaves one with the impression that it was fear of the political Islam project that was guiding the ECtHR's reasoning, at least to some extent, regardless of its inferences about secularism, pluralism, or public order, rather than legal principles including its own jurisprudence⁽⁵⁴⁾.

In conclusion of this section, one can rationalize, at least on a theoretical level, that the particular historical experiences of a state like France explain its *laïcité* mode of secularism and stance toward religion in general. Perhaps in the French case the headscarf debate masks entangled and deeper problems of immigration and integration⁽⁵⁵⁾, which are beyond the scope of this article. What is quite perplexing though is the stance of the ECtHR as highlighted in *Leyla Sahin* in a state with a majority of Muslims. It could be argued that the ECtHR missed a ripe opportunity to harmonize a sensitive matter, such as religious manifestation, and contain it under its ambit while claiming the credit, instead of indulging in an antagonistic disclosure of fear from religious fundamentalism. The ECtHR could have applied the least degree of scrutiny by reviewing the extent of state intervention in a fundamental freedom and then examine whether there was a less burdening option apart from a complete ban, but unfortunately, it was not the case. The ECtHR did not even run a broad brush examination for the sake of the ideals the Convention stands for, specifically, the prevention of discrimination and enjoyment of rights as enshrined in the Convention. Apart from the opinion of Judge Tulkens, the decision in *Leyla Şahin* dealt a knock-out statement in defense of secularism under the pretext of public order and protection of the rights of others, while ignoring women's choice and autonomy, while being void of factual evidence or due analysis. Perhaps the ECtHR's decision carried a far reaching message that this issue should have not been brought under its review. Evidently, the decision could be perceived as pragmatic and political, whereby secularism stands as the underpinning thickest redline the ECtHR is unwilling to compromise or moderate for the sake of other rights, especially one that has to do with religion. In 2018, it is no longer a secret that such fears expressed in cases such as *Leyla Sahin* and

⁽⁵²⁾ *Leyla Şahin* (n 36), para 56.

⁽⁵³⁾ *ibid* paras 58-65.

⁽⁵⁴⁾ *Belelieu* (n 38) 617.

⁽⁵⁵⁾ Mahmood Monshipouri, 'A Review of Dominic McGoldrick's Human Rights and Religion: The Islamic Headscarf Debate in Europe' (2007) 4 *MWJ Hum Rts*, 309, 312.

Refah Partisi did not prevent the secular redline in Turkey to remain untouched as the ECtHR hoped or intended. However, they were utilized as an element of the victimization fuel, which brought about the very dreaded fear to govern and rule. More importantly, undermining access to education as Giegerich has put it so straightforwardly, 'If a state prohibits all women from wearing headscarves in schools and universities it will effectively exclude female Muslim believers from institutions of learning'⁽⁵⁶⁾, Strikingly that did not seem to bother the ECtHR.

C. Employment by the State

In this section, the headscarf issue is viewed through the lens of employment by state institutions. It traces the limits which come along the mandates of being a public servant, in particular, such limits which are inscribed to fundamental freedoms as laid down by constitutions and International obligations. How far can the external manifestation of religious belief be accommodated or tolerated in public service is yet to be shown in the ensuing analysis.

A remarkable pertinent example of restricting individual freedoms in tandem with public office is evident in the case of *Dahlab v Switzerland*⁽⁵⁷⁾, in which the contours of the ECtHR's decision rested upon three main premises: wearing the headscarf constitutes a proselytizing effect; it is incompatible with gender equality and it is incompatible with tolerance and respect for others. As for the issue of proselytism, the facts clearly indicated that the applicant was alert and very sensitive not to be viewed as proselytizing, to the extent that when students asked her about her attire, she said that she wore it to warm up her ears and not even identifying herself as a Muslim⁽⁵⁸⁾, thus, vindicating her from a direct proselytism accusation. Even a case of indirect proselytism did not stand on firm grounds considering the extended period of time which the applicant had spent teaching while wearing the headscarf, taken in conjunction with admitting to the difficulties associated with finding an empirical evidence to support claims of potential harm⁽⁵⁹⁾. Nevertheless, the ECtHR relied entirely on the assertions of the government, granting a wide margin of appreciation, accepting the governmental claims without any scrutiny. Put differently, it is quite striking how the applicant who had addressed the ECtHR as the aggrieved party ended up somehow through the ECtHR's analysis being viewed as the culprit. Even if, hypothetically, allegations of proselytism were to be established, they would still require indisputable evidence arising from concrete facts and actual law breaking instead of unsubstantiated claims, unless the ECtHR accepted the government's interpretation that the very wearing of the headscarf in itself was an outlawed act proselytism⁽⁶⁰⁾. Otherwise, the endorsement

⁽⁵⁶⁾Giegerich (n 7) 230.

⁽⁵⁷⁾*Dahlab v Switzerland* Appno 42393/98 (ECtHR, 15 February 2001). It should be noted that the available official English translation is a condensed version without standard paragraph numbering. It involved the case of a Swiss primary school teacher who converted to Islam. She wore the headscarf for four years (including the maternity leave period) without any complaints neither from her colleagues nor from students or their parents. The Director General of Public Education in the Canton of Geneva issued a decree that she must cease to wear the headscarf at school. She refused, challenged the decision through the ranks of Swiss courts, where she lost repeatedly. The ECtHR ruled the case manifestly ill-founded, thus did not reach the merits phase.

⁽⁵⁸⁾*ibid*, para 4 (cc).

⁽⁵⁹⁾Carolyn Evans, 'The Islamic Scarf in the European Court of Human Rights' (2006) 7 *MelbJIntL* 52, 63.

⁽⁶⁰⁾Such as explaining to students what is Islam, or showing them how to pray or any other ritual, which was not proven to have existed in her case.

of governmental claims puts the ECtHR's decision at odds with its former jurisprudence as established in *Kokkinakis*⁽⁶¹⁾, in which it did not prohibit proselytism per se, notwithstanding the particular nature of the Greek legal order in that regard⁽⁶²⁾. In the same vein, it goes against what the ECtHR will decide later in the *Lautsi v Italy* decision⁽⁶³⁾. Therefore, it is quite relevant to question the type of message being sent to the 'curious little children', as phrased by the decision, and what kind of an answer is to be given when they ask why their teacher is gone and whether she has done something wrong⁽⁶⁴⁾.

As for the gender inequality premise, the ECtHR's decision used the term 'imposed' with respect to the precept of wearing the headscarf as laid in the Qur'an⁽⁶⁵⁾. The use of such term could be described in many ways but neutral is certainly not one of them. If pursuant to Article 9.1 of the Convention the freedom of conscience dimension is absolute, then why does the decision seem as if implying a judgment over the applicant's forum-internum? When taken in conjunction with another reference at the onset of the decision⁽⁶⁶⁾, one is left with the impression that the ECtHR took an adversarial stance, declaring its own interpretation of what the Qur'anic verse stood for. In other words, it made an obviously negative characterization stemming from assessing the religion of the 'other' that is non-European. Thus, it was not clear, according to the ECtHR's description, why wearing the headscarf under such a precept is any different from obeying the Ten Commandments imposed on Jews and Christians for example, otherwise, would the ECtHR then describe such obedience as being 'imposed' in that sense?⁽⁶⁷⁾ Here it is difficult to overlook what seems to be a case of cultural bias that the ECtHR did not shy away from.

With respect to the third premise, once again, the decision did not show any evidence to justify banning the headscarf on the basis of its alleged incompatibility with a tolerant and secular society. It has been proven neither that the applicant belittled the beliefs of anyone nor that she promoted superiority of her own belief or attempted to force her views on others⁽⁶⁸⁾. As if the ECtHR is implying that anyone being serious about the fact of being Muslim is considered by definition intolerant⁽⁶⁹⁾. What makes this case troubling, especially when viewed in conjunction with the rationale in *Leyla Sahin*, is the paradoxical promise of liberation and equality⁽⁷⁰⁾. Whereby, the ECtHR goes on stereotyping Muslim women; either that they are victims of oppression requiring emancipation attainable only via a secular demarcation of their religious manifestations, similar to the rationale behind the French ban on the one hand, or portraying those women as dangerous and aggressive missionaries promoting gender inequality who should be restrained on the other. Viewed from a broader perspective the ECtHR's stance certainly portrays an alienating formula for Muslim European women, for the *Dahlab* decision rendered a teacher with a flawless record humiliated,

⁽⁶¹⁾ *Kokkinakis v Greece* App no 14307/88, (ECtHR, 25 May 1993), paras 40-1.

⁽⁶²⁾ Alastair Mowbray, *Cases, Materials and Commentary on the European Convention on Human Rights* (OUP 2011) 604.

⁽⁶³⁾ *Lautsi and others v Italy* [GC] App no 30814/06 (ECtHR, 18 March 2011), paras 67-72. The Grand Chamber ruled that a display of crucifix in State schools did not constitute a form of indoctrination because it did not involve coercion.

⁽⁶⁴⁾ Evans (n 62) 64.

⁽⁶⁵⁾ *Dahlab* (n 60), *The Law*, para 1.

⁽⁶⁶⁾ *Ibid*, para A: 'abandoned the Catholic faith and converted to Islam'.

⁽⁶⁷⁾ Evans (n 62) 65.

⁽⁶⁸⁾ *ibid* 69.

⁽⁶⁹⁾ *ibid*.

⁽⁷⁰⁾ Peter Danchin, 'The Tangled Law and Politics of Religious Freedom' (2012) 10 *Santa Clara J Int'l L* 73, 81.

probably unemployed and certainly discriminated against⁽⁷¹⁾.

German Impressions

By this point, it would not be surprising for the repercussions of the French ban to ripple through neighboring Germany with its considerable Muslim population. The German Federal Constitutional Court (hereinafter referred to as FCC) landed in its the landmark Ludin⁽⁷²⁾ decision that was long anticipated, then once delivered, was followed by an intense debate ranging between appraisals and sharp criticism across the entire political spectrum. The gist of the matter in this decision, notwithstanding the dissenting opinions, was the view that access to public service is decided according to qualification and aptitude irrespective of religion and freedom of religion⁽⁷³⁾. Some of the strongest merits that could be accounted to the decision is the defense of the fundamental rights of civil servants, in contrast to the view adopted by the German Federal Administrative Court, whereby civil servants, in the course of their duty represent state authority, thus, are subject to limitations by default in order to project state's neutrality⁽⁷⁴⁾. The second positive attribute of the decision was that the FCC considered the obligation to wear the headscarf as plausible to enjoy the protection of Article 4 of the German Basic Law, which guarantees rights of religious freedoms unconditionally, without engaging in a debate as to whether Islam generally requires women to wear the headscarf, as expounded by the ECtHR in the Dahlab or Leyla Sahin cases⁽⁷⁵⁾. Moreover, FCC exhibited a willingness to review empirical evidence for the consequences of wearing the headscarf, thus refuting the (abstract) claim for the negative rights of children and their parents not to be taught by headscarf-wearing teachers⁽⁷⁶⁾. The decision considered the necessity of acquiring a factual base to find out how far this issue has an actual impact on the children, something the ECtHR did not even consider in the Dahlab decision more relevantly or in Leyla Sahin to some extent⁽⁷⁷⁾. One of the strong merits of the decision as well was how the Court did not use the constitutional provision⁽⁷⁸⁾ guaranteeing equality between men and women as basis to ban the headscarf as was the case in the French ban for example. Thus, the decision concluded that the headscarf per se would not prevent the teacher from performing her duties under the German constitutional framework⁽⁷⁹⁾. Another meritorious finding by the FCC was the differentiation between religious symbols installed by the state on the one hand and personal attributes of the civil servant on

⁽⁷¹⁾ *ibid* 73.

⁽⁷²⁾ BVerfG, Urteil des Zweiten Senats vom 24. September 2003, 2 BvR 1436/02, 108, 282-340. For the English translation of the decision, see the official website of the German Federal Constitutional Court: http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2003/09/rs20030924_2bvr143602en.html accessed 5 January 2018. The case involved the case of a German citizen of Afghani origin, who went through her teacher's training and then sought employment at the Baden-Württemberg region. She was regarded as unqualified for the appointment as a civil servant for wearing the headscarf. She challenged the decision through the ranking of administrative courts. After failing before the Federal Administrative Court, she brought her case before the Federal Constitutional Court claiming the infringement of her right to freedom of religion as per the German Basic Law.

⁽⁷³⁾ Articles 4.1 and 4.2 of the German Basic Law.

⁽⁷⁴⁾ Matthias Mahlmann, 'Religious Tolerance, Pluralist Society and Neutrality of the State: The Federal Constitutional Court's Decision in the Headscarf Case' (2003) 4 German LJ 1009, 1109.

⁽⁷⁵⁾ Axel Von Campenhausen, 'The German Headscarf Debate' (2004) 2 Brigham Young UL Rev 665, 677-678.

⁽⁷⁶⁾ Mahlmann (n 74) 1110.

⁽⁷⁷⁾ *ibid*.

⁽⁷⁸⁾ Article 3.2 of the German Basic Law.

⁽⁷⁹⁾ Mahlmann (n 74) 1111.

the other. Thus, asserting that if the state enables the existence of various religious symbols in public service, it does not equate an endorsement of any of these symbols⁽⁸⁰⁾. In spite of receiving the biggest share of criticism, the FCC then opted to confer on the legislatures the authority to regulate, namely, each of Germany's sixteen federal regions can democratically decide what they want to do about this issue and how, pursuant to their political and demographic needs, instead of a super-imposed judicial decision⁽⁸¹⁾.

Following the decision, eight of Germany's federal regions opted to pass neutrality laws banning the wearing of the headscarf in civil service⁽⁸²⁾. Remarkably, the region encompassing the capital Berlin, adopted in 2006 a law prohibiting civil servants from wearing religious symbols, including teachers in vocational schools and tertiary education, as well as nursery school teachers in state administered day-care facilities (if expressly desired by parents), while excluding symbols worn as items of jewelry⁽⁸³⁾. The net value resulting from such criteria ends up leaving mainly the adherents of a particular religion hit by the ban, thus, qualifying the ban as a form of indirect discrimination⁽⁸⁴⁾. In other words, another round of indirect discrimination is legalized under the guise of state neutrality, even while considering that the ban was enacted against a contention which had not existed in the first place (unlike in the French ban), such as one between teachers and parents for example, yet again, a vivid example of political exploitation⁽⁸⁵⁾. In this case, even multiple levels of discrimination have taken place, as the ban disproportionately influenced adherents of a particular religion, which is a combination of both individual and group disadvantage⁽⁸⁶⁾. Moreover, the ban on religious attire simultaneously and practically disadvantages one gender, i.e.; women, since men would be barely affected by such a restriction as in the case of beards for example⁽⁸⁷⁾. Eventually, such ban could be viewed as slipping toward the same formulations that were developed in the French example. Until the Ludin decision, Germany has been hailed as a model country in the field of religious freedoms and tolerance when compared to other European states, whereby its own mode of separating state and church is employed to further the citizens' interests in matters where the intersection between the responsibilities of both institutions is inevitable⁽⁸⁸⁾. A prohibition on teachers wearing headscarves in state schools indicates a worldview of neutrality of the state⁽⁸⁹⁾. There is a fundamental difference between the legal situations of Germany and France, where in the latter laicism continues to pose a challenge as an exclusionary principle which curtails religious freedom⁽⁹⁰⁾. However, the reactions of the German regions opting for the headscarf prohibition legislations post the Ludin decision reflect some sort of a sway in mood. Evidently, it is hard to ignore the subtle yet gradual shifting in the German impressions, with respect to

⁽⁸⁰⁾ *ibid.*

⁽⁸¹⁾ *ibid.* 1112.

⁽⁸²⁾ Joyce Marie Mushaben, 'Women between a Rock and a Hard Place: State Neutrality vs. EU Anti-Discrimination Mandates in the German Headscarf Debate' (2013) 14 GLJ 1757, 1760. See also Julia Von Blumenthal, *Das Kopftuch in Der Landesgesetzgebung: Governance im Bundesstaat zwischen Unitarisierung und Föderalisierung* (Nomos 2009)

⁽⁸³⁾ *ibid.* 1766-67.

⁽⁸⁴⁾ *ibid.*

⁽⁸⁵⁾ *ibid.* 1769.

⁽⁸⁶⁾ *ibid.* 1776.

⁽⁸⁷⁾ *ibid.* 1777.

⁽⁸⁸⁾ Von Campenhausen (n 75) 698.

⁽⁸⁹⁾ *ibid.*

⁽⁹⁰⁾ *ibid.* 697.

religious freedom, away from the formerly established model, and slowly leaning into the French rationale. By all means, it should not go that far in Germany⁽⁹¹⁾.

D. Working for the Private Sector While being Religious

Unlike the former sections of the article in which the state was a key player, this section entertains the complex interplay between private parties disputing the scope of freedom of religion in the realm of private employment, the restrictions that may occur thereof and whether such restrictions amount to discrimination under the laws of the European Union. Once again, the headscarf becomes a reason for an intense legal debate as to whether outward religious manifestation has a place in the private business medium. Nonetheless, the central question repeats itself; if a woman is wearing the headscarf for a religious reason, would she be entitled to employment in a private sector job? Or rather, is there a reason why she should not be considered beforehand? What will her rights be under EU law if the business policy does not accommodate religious apparel? The answers to these questions shall be the main concern of this section.

The Grand Chamber of the CJEU rendered its first decisions on the issue in two cases on the same day. The decisions abstractly invoked the question whether the prohibition on wearing the headscarves at the workplace constituted discrimination on the grounds of religion or belief pursuant to EU Directive 2000/78⁽⁹²⁾.

Both cases involved women who wore the headscarf at work; Samira Achbita⁽⁹³⁾, and Asma Bougnaoui⁽⁹⁴⁾. The decisions are of the highest significance, since they have been anticipated for quite some time given the controversial nature of the topic, but more importantly, even though the two cases have had the same set of facts, the views of Advocate General Kokott in Achbita and Sharpston in Bougnaoui ended up being diametrically opposite.

⁽⁹¹⁾ *ibid.*

⁽⁹²⁾ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16. According to Article 2(2)(a) of the Directive, direct discrimination on the ground of religion or belief shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation, on the grounds of religion or belief. According to Article 2(2)(b), indirect discrimination on grounds of religion shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are proportionate and necessary.

⁽⁹³⁾ Case C-157/15 *Samira Achbita and Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v G4S Secure Solutions NV* [2017] OJ C151/205. Where a Muslim woman worked as a receptionist who was told that she could not wear the headscarf at work, because that was against the employer's (unwritten) strict neutrality policy. When she refused to take off her headscarf, she was dismissed. After challenging the decision before the Belgian Courts that her dismissal amounted to a discrimination on the grounds of religion contrary to the 2000/78 Directive, the Belgian Court of Cassation asked for a preliminary ruling on the question: whether Article 2(2)(a) of Council Directive 2000/78 should be interpreted as meaning that the prohibition on wearing a headscarf does not constitute direct discrimination if the employer's rules prohibit all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace.

⁽⁹⁴⁾ Case C-188/15 *Asma Bougnaoui, Association de Defense des Droits de l'Homme (ADDH) v Mircopole Univers SA* [2017] OJ C151/221. Who worked as a designer engineer, was told by her employer to remove her headscarf when visiting clients, after receiving a complaint by a client. When she refused, she was dismissed. After challenging the decision before the French Courts that her dismissal amounted to a discrimination on the grounds of religion contrary to the 2000/78 Directive, the French Court of Cassation requested a preliminary ruling on the question: Must Article 4(1) of Directive 2000/78 be interpreted to mean that the wish of a customer to no longer have the services of that company provided by an employee wearing the headscarf as a genuine and determining occupational requirement.

As for the claims of direct discrimination, AG Kokott concluded that, since the (unwritten) rule of the company explicitly prohibited visible political and philosophical signs, the rule applied without distinction and was neutral from the perspective of religion and ideology⁽⁹⁵⁾. Even though that unwritten company rule did not amount to a prima facie direct discrimination, it nevertheless constituted indirect discrimination⁽⁹⁶⁾. Conversely, AG Sharpston concluded that the dismissal of Ms. Bougnaoui amounted to direct discrimination because she had been treated less favorably on the grounds of her religion than another who would have been treated more favorably (without a headscarf) in a comparable situation⁽⁹⁷⁾. She opined further, 'where the customer's attitude may itself be indicative of prejudice based on one of the prohibited factors, such as religion, it seems to me particularly dangerous to excuse the employer from compliance with an equal treatment requirement in order to pander to that prejudice'⁽⁹⁸⁾. Nevertheless, the CJEU adopted the opinion of AG Kokott in holding that there was no direct discrimination in *Achbita*⁽⁹⁹⁾.

One of the main criticisms that fell against the two decisions is that the CJEU ruled that it was up to the referring courts to decide whether there was direct or indirect discrimination, thus not providing sufficient guidance to the national courts as to the specific criteria to apply⁽¹⁰⁰⁾. Except for in *Achbita*, the CJEU provided some guidance on the test to be applied on the case of indirect discrimination, which could have been set in either a scrutinized or a flexible manner⁽¹⁰¹⁾. Eventually, the CJEU settled for the latter option, ruling without much discussion that religious neutrality must be considered legitimate because it is connected to the freedom to conduct business as enshrined in Article 16 of the Charter⁽¹⁰²⁾, and that such notion was supported by the ECtHR in the *Eweida and Others v UK*⁽¹⁰³⁾ decision, whereby a restriction on the right to freedom of religion was upheld in favor of neutrality. The CJEU has been sharply criticized for focusing on the right to conduct business as per Article 16 of the Charter while completely ignoring Article 31(1) of the Charter, whereby every worker has the right to working conditions which respect his/her dignity⁽¹⁰⁴⁾. That should be read in the light of Article 10 of the Charter as well, in which the preservation of religious neutrality is not included, especially when read in conjunction with Article 52 of the Charter or Article 9 of the Convention⁽¹⁰⁵⁾. The loose justification test came in contrary to former jurisprudence of the CJEU, where it adopted a much more stringent approach with respect to other forms of discrimination such as sex, age or disability.

⁽⁹⁵⁾ Erica Howard, 'Islamic Headscarves and the CJEU: *Achbita* and *Bougnaoui*' (2017) 24 *Maastricht Eur&CompL* 348, 353.

⁽⁹⁶⁾ *Achbita* (n 93), Opinion of AG Kokott, paras 49-57.

⁽⁹⁷⁾ *Bougnaoui* (n 94), Opinion of AG Sharpston, para 88.

⁽⁹⁸⁾ *ibid*, para 133.

⁽⁹⁹⁾ Howard (n 95) 358.

⁽¹⁰⁰⁾ *Achbita* (n 93), para 34; *Bougnaoui* (n 94), para 32.

⁽¹⁰¹⁾ Howard (n 95) 358.

⁽¹⁰²⁾ *Achbita* (n 93), paras 37-38.

⁽¹⁰³⁾ *Eweida and Others v the United Kingdom* App no 48420/10, 59842/10, 51671/10, 36516/10, 15 (ECtHR, January 2013), para 94.

⁽¹⁰⁴⁾ Monique Steijns, 'Raising more Questions than Answers' (Eutopia Law 18 March 2017) <<https://eutopialaw.com/2017/03/18/achbita-and-bougnaoui-raising-more-questions-than-answers/>> accessed 5 January 2018.

⁽¹⁰⁵⁾ Solon Solomon, 'The Right to Religious Freedom and the Threat to the Established Order as a Restriction Ground: Some Thoughts on Account of the *Achbita* Case' (European Journal of International Law-Talk 23 March 2017) <<https://www.ejiltalk.org/the-right-to-religious-freedom-and-the-threat-to-the-established-order-as-a-restriction-ground-some-thoughts-on-account-of-the-achbita-case/>> accessed 5 January 2018.

As for the claims of indirect discrimination, some academics expressed the view that a ‘rule expressed neutrally on workplace attire or apparel is more likely to constitute indirect discrimination, unless there is evidence of particular stereotyping, prejudice or intent behind the rule which could lead it to be discrimination’⁽¹⁰⁶⁾. Accordingly, it becomes relevant to review the test as laid down by Article 4(1) of Directive 2000/78. The CJEU indicated the following factors as important: that a rule against all visible political, philosophical and religious symbols is genuinely pursued in a consistent and systematic manner and thus that it does not distinguish between different religions or different beliefs; that the rule is limited to customer-facing employees; and, that the employer considers whether the employee can be moved to a job without contact with customers⁽¹⁰⁷⁾. Hence, it becomes evident to conclude that the CJEU should have used a stricter justification test for indirect discrimination than it actually did⁽¹⁰⁸⁾. Ironically, the CJEU applied a strict test but for the purpose of ascertaining whether there was a genuine and determining requirement under Article 4(1) of Directive 2000/78⁽¹⁰⁹⁾.

In *Achbita*, the CJEU did not even mention the genuine and determining occupational requirement in principal, whereas it was briefly considered in the case of *Bougnaoui*⁽¹¹⁰⁾. In that regard, AG Sharpston stated that ‘the exception for occupational requirements cannot be used to justify a blanket exception for all the activities that a given employee may potentially engage in’⁽¹¹¹⁾. Therefore, derogation from Article 4(1) of Directive 2000/78 could not be justified by the pursuit of commercial interests of the business in its relations with its customers⁽¹¹²⁾. She stressed further that accepting the view adopted by the employer risk normalizing the derogation, namely, the discriminatory treatment, which cannot be the rule, as it is intended that the derogation should apply only in the most limited of circumstances⁽¹¹³⁾. Eventually, the CJEU adopted the view of the AG Sharpston, and concluded that the wish of a customer not to be served by a customer wearing a headscarf was not a genuine and determining occupational requirement, which is consistent with former jurisprudence of the CJEU, whereby derogations from the principle of equality are subject to a strict test⁽¹¹⁴⁾.

E. CONCLUSION

It is submitted that the two poles of European legal order adopted stances characterized by a great deal of similarity while handling the headscarf question, a fact that comes as no surprise. Given the supra national basis of operation, whereby subsidiarity on the one hand and conferral of powers on the other play a vital role in determining the scope of freedoms, it is understandable why they ended having similar approaches. Both Courts, when investigating the issue, gave what can be labeled as the widest possible stretch for the

⁽¹⁰⁶⁾Schona Jolly, ‘Islamic Headscarves and the Workplace reach the CJEU: The Battle for Substantive Equality’ (2016) 6 EHRLR672, 675.

⁽¹⁰⁷⁾Howard (n 95) 362.

⁽¹⁰⁸⁾ibid 367.

⁽¹⁰⁹⁾ibid.

⁽¹¹⁰⁾ibid 368.

⁽¹¹¹⁾AG Sharpston (n 97), para 95.

⁽¹¹²⁾ibid, para 100.

⁽¹¹³⁾ibid, para 101.

⁽¹¹⁴⁾Howard (n 95) 370.

national authorities to regulate such individual and sensitive matters, each according to their social and legal order needs. A positive point without doubt and consistent with the subsidiarity principle. With respect to the discrimination questions, one can mark the existence of a common pattern. When conducting the balance of interests test, the starting point of analysis was either admitting a loose justification from the state regarding its intervention with a fundamental right under the pretext of upholding a higher ideal such as state laicism, or carrying out the analysis almost in the absence of any test, siding with the precepts of neutrality while completely eviscerating the right to freedom of religion from its fundamental status in spite of being enshrined in the Convention and the Charter, as has been the case in *Dahlab*, *Achbita* and *Bougnaoui* respectively.

Moreover, it is remarkable how the issue of the headscarf led to the adoption of contradictory, or at least inconsistent, jurisprudence of both Courts, whether directly concerning religious manifestation questions, or other comparable freedoms. For instance, in *Vanjaicase*⁽¹¹⁵⁾, the ECtHR did not find much threat to the neutrality principle in the wearing of a sign, which may be perceived by a considerable portion of (the Hungarian) society as a symbol of communism, and ruled that it should be viewed as a symbol that stood for many other things, in spite of the particular historical experience of Hungary with communist dictatorship and its attributes.

In the *Bilka Kaufhaus*⁽¹¹⁶⁾ case, the CJEU applied a strict tripartite test for the justification of indirect discrimination on grounds of sex, whereas in the cases of discrimination on grounds of religion, it opted for some wide criteria. Hence, applying varying levels of protection for different grounds, which ultimately leads to irregular application of EU law. In the *Omega Spielhallen* case⁽¹¹⁷⁾, human dignity was upheld to outweigh the right to pursue a commercial activity. Ironically, in *Achbita* and *Bougnaoui*, the CJEU stood quite to the opposite of the *Omega Spielhallen* landmark principle.

That is not to conclude that the esteemed supra national Courts of Europe are systematically upholding the restriction of the manifestation of religion, but rather, maintain the underpinning post WWII status-quo, upon which the stability and prosperity of Europe had been resting. A secular order with strong political mechanisms of checks and balances, whereby the role of religion in the public sphere is controlled and vigilantly observed. Consequently, if religion were to exist in said order, then it is only reasonable to expect accommodation mainly for the pre-existing religious background, namely, the Judeo-Christian tradition, rather than any other religion outside of that sphere. But why has the process of having a job become so complicated for a woman? Why isn't it just about her aptitude and skills rather than what she believes in or even wears over her head? Complication heightens whenever the religion of Islam can be associated with political ambitions as expressed in other states, hence, the double edge formula of fear and even rejection, which both Courts were fully aware of. That is precisely why one is overwhelmed with the impression that they did not wish to rule on such delicate issue in the first place, and when the issue arrived before them, they deferred to the state in question to decide.

⁽¹¹⁵⁾ *Vajnai v Hungary* App no 33629/06 (ECtHR, 8 July 2008), para 58 ff.

⁽¹¹⁶⁾ Case 170/84 *Bilka Kaufhaus v Karin Weber von Harz* [1986] ECR I 607, para 36.

⁽¹¹⁷⁾ Case C-36/02 *Omega Spielhallen v Germany* [2004] OJ C300/109, para 32.

From the foregoing analysis, it is safe to state that the issue of the headscarf leaves one with more questions than answers. So, what about harmonization? Both Courts function under a mechanism of direct effects, whereby their decisions end up being incorporated in the national legal orders. How would a decision coming from the top of the pyramid, which only fits France or Belgium for example, be fitting to Norway or Germany or Turkey? More pertinently, how would the EU, which presents itself to the world as more than just a common market, a union of values, including preserving the rights of minorities, as enshrined in Articles 2 and 49 of the Treaty on the European Union reconcile the headscarf question in the future? As Giegerich remarked, the EU has an ambitious mission to become a role model and a moral compass for the wider world, yet again he projected doubts given the setbacks resulting from failing, at least sometimes, to uphold the high standards enshrined in the Treaties.

The fate of wearing the headscarf in Europe is concealed behind thick clouds of uncertainty, underdeveloped conditions of minorities and an overwhelming critical fear of religious resurgence in a predominantly secular continent.