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17 Freedom of Religion at the Workplace

Background to the Ruling of the Court of Justice of the European Union in the Achbita and Bougnaoui Cases

*János Tamás Czigle**

17.1 Introduction

On 14 March 2017, the Court of Justice of the European Union (hereinafter: CJEU) issued two judgments related to wearing visible political, philosophical and religious signs at the workplace in the *Achbita v G4S* (C-157/15) and *Bougnaoui v Micropole* (C-188/15) cases. Both judgments centered around possible limitations to wearing religious clothing and other signs of beliefs[1] at work. In both cases, the claimants refused to remove their headscarves during work, which resulted in losing their jobs. In *Achbita* the CJEU concluded that it is possible to prohibit certain aspects of religious expressions in order to express an image of neutrality on behalf of a private undertaking, which will not constitute direct discrimination under proper circumstances, whereas in *Bougnaoui* it declared, that the request of a customer to not have services provided by an employee wearing a headscarf cannot be considered a significant and determining occupational requirement that could rule out discrimination.

The cases and the judgment received significant attention becoming the subject of major press coverage in mainstream media, which in light of the socio-political and demographic changes taking place in the European Union is unsurprising. At the same time, they also gave rise to different interpretations amongst legal professionals. This study intends to take a closer look at the cases and the judgment, considering the existing case law, comparing the rulings and discussing possible future developments in this area.

17.2 Freedom of Religion in the Contemporary Legal Context

Although freedom of religion was one of the first human rights to be recognized in Europe it has always been a subject of controversy. Its protection is ensured via numerous international human rights agreements, though the definition of 'religion' itself has not

* János Czigle, PhD researcher at Pázmány Péter Catholic University Faculty of Law and Political Sciences, Budapest.

1 In these cases headscarves or '*ijabs*' to be specific.

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been universally accepted, as such can be interpreted in various ways. Article 9 of the European Convention on Human Rights ('ECHR')[2] and the Charter of Fundamental Rights of the European Union ('Charter') employs a broad definition, referred to by both the European Court of Human Rights ('ECtHR') and the CJEU in cases concerning limitations and restrictions on freedom of religion such as *Achbita* and *Bouganoui*. This approach covers both *forum internum*, the internal religious beliefs and *forum externum*, the freedom of religious expression.

Religious beliefs enjoy absolute protection, religious expression on the other hand may be restricted under certain circumstances as per the law and rulings laid down by both the ECtHR and the CJEU in the past decades. The inviolable right to hold religious beliefs and the putative right to act on those beliefs may sometimes be in conflict with the negative aspect of the freedom of religion; the right not to be associated with any religion at all, adding a further aspect to the issue of rights and religion.[3] One of the main sources for legitimate restrictions is Article 9 (2) of the ECHR:

> "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."

Elements of necessity, proportionate application and appropriate measures stated int the above legitimacy test have been used to fend off claims of discrimination in both public and private spheres. The most visible signs of religious commitment are religious clothing and since religious, as well as ethnical minorities are growing in number owing to demographic changes in Europe of which the recent migration crisis is most topical, similar cases will potentially increase in number. Some jurisdictions have taken issue with clothing covering the entire body, and mainly identified with religious requirements of the Islamic faith. Consequently The majority of these cases stem from European states with a significant Muslim minority like France for example, where public expression of religious conviction tends to provoke the reaffirmation of the Christian French identity by citizens, who are otherwise not accustomed to expressing their religious convictions.[4] In Belgium, there is already a partial *burqa* ban in effect. The most recent conflicts over

2 "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."

3 I. Leigh-A. Hambler: 'Religious Symbols, Conscience, and the Right of Others', 3 (1), Oxford Journal of Law and Religion, (2014): <https://academic.oup.com/ojlr/article/doi/10.1093/ojlr/rwt048/1461694/Religious-Symbols-Conscience-and-the-Rights-of> visited on 04.04.2017.

4 P-H. Prélot: 'French *laïcité* and the terrorist attacks', in Law and Religion UK, <www.lawandreligionuk.com/2017/03/16/french-laicite-and-the-terrorist-attacks/> visited on 16.03.2017.

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religious clothing surfaced in the *Achbita v. G4S* and *Bougnaoui v. Micropole* cases where once again claims of discrimination were made.

17.3 Freedom of Religion in Private and Public Spheres, Legitimate Restrictions

The workplace has always been a special environment, with its own legal rules, and non-legal norms, where employers and employee have a different working *'persona'*, and conflicts are sometimes inevitable. The degree, to which a plural, multi-faith society may require individuals to refrain from potentially controversial religious expressions is an undoubtedly sensitive issue in Europe.[5]

We can see a shift in approach, and measures taken in both the public and private spheres regarding the place of religion in the past decades. Restrictions on the expression of religious conviction first appeared in schools, with respect to both students and teachers. In *Dogru v. France* the ECtHR highlighted the importance of a country's, in this case France's constitutional traditions and sovereignty, and also its right to determine the relationship of Church and State. These considerations justified expelling students on the basis of health and safety concerns who wore headscarves during physical education lessons. According to the guidance in the case-law, France as a secular state had the right as per its constitution in line with its *laïcité* clause, the French doctrine of the public sphere's neutrality, to prohibit the wearing of religious clothing in schools for both students and teachers.[6]

This right was further confirmed by Law 2004-228 on secularity and conspicuous religious symbols in schools, which only allowed the wearing of discreet, inconspicuous religious signs, thereby excluding various headscarves, the Sikh turban, and Jewish kippah as well.[7] Similarly, in *Aktas v. France*, students were expelled, when young girls wore headscarves and young Sikh young men wore keski i.e. casual turban in school[8] The reasoning stated, that the restriction to wear visible signs of religion was in line with the education act, serving the legitimate aim of protecting other students' right to religious freedom and the *'ordre public'* to reflect the state's neutrality.

5 R. McCrea:' Faith at work: the CJEU's headscarf ruling', in EU Law Analysis, <http://eulawanalysis.blogspot.hu/2017/03/faith-at-work-cjeus-headscarf-rulings.html> visited on 11.04.2017.

6 F. Osman: 'Legislative prohibitions on wearing a headscarf: Are they justified?', 17 (4), Potchefstroom Electronic Law Journal. (2014), pp. 1318. <www.saflii.org/za/journals/PER/2014/39.pdf>. visited on 20.03.2017.

7 A. Kouroutakis: 'Islamic terrorism: The legal impact on the freedom of religion in the United States and Europe', 34 Boston University International Law Journal, (2016), pp. 136-137.

8 Notably, the Sikh religion also requires the wearing of *kirpan*, the ceremonial dagger, but it did not automatically led to violent incidents in other countries, such as Canada, where the absolute prohibition could not be justified by the authorities. see in *Multani v. Commission Scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256, [59]–[67].

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France followed the secular education regulation by the rather controversial Law 2010- 1192, which prohibits concealing the face in public spaces, on the basis of security concerns.[9] Many support the legislation to abolish what they consider to be the symbol for the oppression of women, since the headscarf and other body covering clothes are usually considered to be misogynistic, and a sign of male authority. Additional arguments claim that such clothing could cover bruises from domestic violence, and even promote reactionary Islam, while it is also discriminatory against men, since these clothes are required to protect women from the supposed animalistic and carnal nature of men.[10] Similar bans have been introduced around the world. Belgium has banned the wearing of such clothes in public areas. Netherlands has approved a partial ban on the burqa in 2015, followed by Switzerland and Bulgaria in 2016 and Austria and Germany in 2017. The United Kingdom – which is not a secular state – currently doesn't have such ban, since the Human Rights Act of 1998[11] serves as a safeguard against such legislative aspirations.

Following serious attacks of the Islamist terror group Boko Haram Chad has banned full-face veils as well as a sign of religious extremism. Even liberal Canada introduced a ban, prohibiting Muslim women from wearing the *burqa* during citizenship ceremonies. Russia has a regional ban on headscarves at Stavropol in government-run schools, due to the tensions between the ethnic Russians and Muslims. Finally, China follows the same approach in the Xinjiang region where a large Muslim population resides.

The legitimate aim of ensuring public safety and protecting the social interest of respecting a minimum set of values of an open and democratic society is justified, therefore interference with certain rights of religious freedom is considered to be necessary for *'living together'*. This reasoning was followed also by the ECtHR in *S.A.S. v France*, where the applicant claimed that the aforementioned law violated her rights under the ECHR[12] The *'le livre ensemble'* as per the argument made by the Counsil d'Etat and supported by the Court, requires respect for fundamental rights such as human dignity, gender equality and respect for social life's generally accepted aspects, providing legal grounds for the restrictions of one's religious manifestations.[13]

In *Mann Singh v France* public security concerns were once again confirmed based on similar arguments referring to *'ordre public'*. The Strasbourg Court found the restriction to have Mr. Singh's turban removed despite his religious beliefs for the period of taking

9 It could hinder identification, and in light of numerous terror attacks in France during the past couple of years, it could very likely be associated with extremism, hence serving as a potential cause for aggressive behavior against covered people.

10 Y. Alibhai-Brown: 'Why the veil should be repudiated', 25 (1), Nottingham Law Journal. (2016), pp. 113-118.

11 S. Knights: 'Face veils and the law: A critical reflection', 25 (1), Nottingham Law Journal. (2016), pp, 98.

12 Namely Article 3. (cruel and degrading treatment), Article 8. (private life), Article 9. (freedom of religion), Article 10. (freedom of expression), Article 11. (freedom of assembly and association), and non-discrimination in the meaning of Article 14.

13 L. Xiaoping: 'French Muslim Headscarf Ban Under the Context of International Law' 1 (1), PKU Translational Law Review, (2013), pp. 50-56.

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an official picture for his passport to be a legitimate requirement in compliance with the notion of public order.[14] Interestingly, this case was also brought before the UN Human Rights Committee, which arrived in a different conclusion. According to the Committee the restriction to wear the Sikh turban, which he did on a daily basis, violated the individual right of Mr. Singh to manifest his religion.[15] The same case leading to two different decisions may again indicate the complexity and sensitivity of the topic and the importance of national traditions. Some could also claim and criticize the fact that the European Court of Human Rights gives too wide a margin of appreciation to the signatory states. Critics claim that this way, a state could theoretically speaking claim almost every action to be required under its constitutional traditions, or can rather easily find a legitimate reason for introducing indirect or direct forms of discrimination.[16]

In *Sahin v Turkey* the Court repeatedly emphasized the importance of national constitutional and legal traditions strictly separating the Church and State, implementing secularism somewhat similarly to France.[17] The Turkish constitution lays down the foundations of a secular state, providing that the wearing of symbols and signs of religious beliefs, and as such, the freedom of religious expression may be prohibited. Consequently, limitations foreseen regarding the wearing of headscarves as per the inner regulations of Ms. Sahin's university during classes and exams were found to be justified. The reasoning behind the Turkish ban is that many could associate the face veil with radicalism and religious extremism.[18]

The Muslim faith was not the only religion to come before the ECtHR. In *Lautsi v Italy* the placement of the cross in state schools was questioned but ultimately found to be compatible with the ECHR. The Court reasoned that for the dominantly Christian population of Italy the cross is not a mere religious symbol, but also a part of the national identity, and being a passive symbol it would not have a direct converting effect on pupils. The degree to which symbols may be found acceptable in line with a nation's identity and

14 In the United States, a similar request was made, in *Freeman v. State of Florida*, where a Muslim woman claimed that her right laid down in Florida's Religious Freedom Restoration Act of 1998 was violated by having been ordered to retake a driver's license photo, as she wore a veil on the first one. See more: 'A. Kouroutakis: 'Islamic terrorism: The legal impact on the freedom of religion in the United States and Europe', 34 Boston University International Law Journal, (2016).

15 Public security concerns were again voiced in *Phull v. France*, where a Sikh man was obliged to remove his turban at airport security checks, and in *El Morsli v. France*, where a woman was not allowed to enter the French consulate in Marrakesh, since she refused to remove her face covering veil. Both of these cases are related to security checks, which are elements of public safety, therefore the Court could not find any violation of the ECHR. Places such as those are considered to be sensitive security areas, where every citizen is commonly subject to such measures in an indiscriminate manner independent of religion.

16 A. Haleem: 'Covernance: Feminist Theory, the Islamic Veil, and the Strasbourg Court's Jurisprudence on Religious Dress-Appearance Restriction', 5 (1), DePaul journal of Women, Gender and the Law, (2015), pp. 5-6.

17 I. Ward: 'Headscarf Stories', 29 (3), Hastings International and Comparative Law Review, (2006), pp. 316-317.

18 L. Xiaoping: 'French Muslim Headscarf Ban Under the Context of International Law' 1 (1), PKU Translational Law Review, (2013), pp. 50-56.

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traditions, and in contrast, those, which could have a direct proselytizing effect and may thus be prohibited, as seen in *Dogru* and *Dahlab*, remains questionable to say the least, to which there is no clear guidance as of yet.

17.4 Religious Expression at Work

From among the examples of lawful restrictions on religious manifestations in schools, the case *Dahlab v. Switzerland* must be mentioned. Here, the Court declared that prohibiting the teacher, Ms. Dahlab to wear a headscarf during the performance of her professional duties, especially amongst children who may be susceptible to influence, was justified in line with the concept of religious neutrality and secularism laid down in the Swiss Constitution and the Swiss Public Education Act.

The negative aspect of the freedom of religion, i.e. the children's right not to be influenced and the parents' right to decide the education of their children enjoys protection. Since Lucia Dahlab worked in a state school she could be considered a representative of the state, therefore, the neutrality principle also applies to her employment relationship. In light of the principles of a pluralist society, certain restrictions such as the headscarf ban in schools may be justified, if found to be necessary and proportionate. This approach serves the protection of students and their parents. Since the teacher as a public servant was free to choose this profession, as a consequence she must also abide by the possible limitations.

One of the guidelines for assessing claims of religious discrimination was provided in *Eweida and Others v United Kingdom*. In the reasoning it was declared, that based on the relevant circumstances and legal sources of domestic and European law such as the EU Framework Directive for Equal Treatment in Employment and Occupation 2007/78/EC, and Article 9 and 14 of the ECHR (which were decisive legal sources in *Achbita* and *Bougnaou* as well), the UK overestimated the relevance of a company's neutral image, and wearing a 'discreet' cross such as the one Ms. Eweida wore in the course of performing her professional duties should be considered compliant in light of Ms. Eweida's right to express her religious beliefs. Although she was offered a non-customer facing role, she rejected the opportunity, and wished to work in the same position as before.

Here another question arises, namely which signs may be perceived as 'discreet' and how can we decide what is 'clearly visible' and what is acceptable. Cultural and societal differences have resulted in different standards in every country. Amidst such diversity, it is no easy task for the CJEU or the ECtHR to find a common, universally acceptable ground. The workplace is an important sphere for the manifestation of identity, where

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an individual's right may conflict with the corporate 'image', namely the prescribed dress code and hairstyle etc. redrawing the boundaries of public and private spheres of life.[19]

In *Chaplin v United Kingdom* a hospital nurse, Ms. Chaplin was forced to remove the cross she had been wearing for years, due to safety and health regulations laid down by the hospital, whereas other expressions of religious belief, such as headscarves were allowed. Although Ms. Chaplin took her case to the ECHR, the Court found that the contested provisions were not discriminatory. Namely, the rules were enacted to avoid potential health risk for both her and the patients, given the possible scenario that a scared, agitated or disturbed patient could grab her necklace and injure both parties. Here again we are faced with a claim submitted by a public servant; in the specific case, health and safety concerns could justify the prohibition of the expression of religious beliefs. Interestingly, headscarves were not considered to be a potential health or safety risk, though the patients could just as easily grab onto them.[20]

This way, the Court arrived at a rather different conclusion, since "the protection of health and safety on a hospital ward was inherently of a greater magnitude than that which applied in respect of Ms Eweida."[21] The Court also concluded that health and safety concerns require a wide margin of appreciation, which gives considerable weight to the decisions taken by managers.[22] Hence, interference through restrictions on the right of religious manifestation was deemed to be necessary and proportionate. On the other hand, such an approach may result in the exploitation of the 'health and safety card'. In other words, it could easily give '*carte blanche*' to employers to invoke said concern in order to excessively restrict religious manifestations.

In *Ladele v London Borough of Islington*, the applicant's orthodox Christian view of heterosexual marriage prompted her to deny participating in officiating the same sex union equivalent of marriage. Her refusal to accept a civil partnership as a registrar led to her dismissal from the workplace, since this behavior was considered to be contrary to the policy of equality. The Court in this case reconfirmed the wide margin of appreciation

19 Where can the line be drawn when regulating the clothes, and appearance? In the extreme case of North-Korea, even hairstyles are regulated, since there are 28 state accepted styles. See Sara C Nel on'North Korean hairstyles: Pyongyang salons display menus of state sanctioned trims (pictures)' (The Huffington Post UK, 20 February 2015) <www.huffingtonpost.co.uk/2013/02/21/north-korean-hairstyles-pyongyangsalons-menus-state-sanctioned-crops-pictures-n_2733715.html> visited on 25.04.2017. The question of hairstyle itself was also brought to attention in *Smith v. Safeway*, where the male employee objected to the workplace's rule of men long short hair, while allowing and preferring female employees to have it, in accordance with the traditional image of 'men' and 'women'. See more at: <http://swarb.co.uk/smith-v-safeway-plc-ca-5-mar-1996/> visited on 11/15/2017.

20 J. Marshall: 'Human Rights, Identity, and the Legal Regulation of Dress', 25 (1), Nottingham Law Journal, (2016), pp. 73-75.

21 *Eweida and Others v. United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013).

22 Ian Leigh – Andrew Hambler: 'Religious Symbols, Conscience, and the Right of Others', Oxford Journal of Law and Religion, 2014. 3 (1) 2-24. from here: <https://academic.oup.com/ojlr/article/3/1/2/1461694> visited on 15-05-2017-

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of domestic courts, thereby justifying the legitimate aim laid down in the Article 14 ECHR.

17.5 Case Synopsis for Achbita v G4S and Bougnaoui v Micropole

17.5.1 Achbita *Case – Justifying Indirect Discrimination*

Achbita and *Bougnaoui* are the latest cases – but definitely not the last – in the field of restricting religious manifestation at the workplace. Although some circumstances are similar, since both women lost their jobs, owing to their refusal to remove their religious headscarves during work, there are some subtle differences, which lead to a different reasoning and hence different guidance provided by the Court.[23]

Ms. Achbita started to work for the Belgian company G4S in 2003, where at that time no written policy was in effect against clothes or other manifestations of religious, political or philosophical beliefs, but an unwritten rule applied to the workers. In 2006 she notified her employer, that she wished to wear a religious headscarf at the workplace going forward, but was informed, that wearing such a religious sign is against the position of neutrality G4S adopted to project such corporate image to its customers and which rule she herself had not disputed beforehand. As it is clear from the facts of the case, Ms. Achbita worked there for nearly three years without the intention of expressing her religious beliefs, which changed with the passing of time, an important factor in cases to follow. Nevertheless, Ms. Achbita still intended to wear the headscarf, and shortly afterwards an amendment to the workplace regulations was approved, that explicitly prohibited employees from wearing any visible signs of their political, philosophical or religious beliefs.

Upon breaching the policy requirement and for her insistence to keep wearing the headscarf at work, Ms. Achbita was fired, which decision was challenged by her before the Belgian courts and was finally brought before the *Hof van Cassatie*. The Belgian Court of Cassation referred a question regarding the interpretation of Article 4 (1) (protection against discrimination) of Council Directive 2000/78/EC, the 'Framework Directive' on equal treatment in employment and occupation. The CJEU is the only Court entitled to interpret the law of the European Union via the preliminary ruling procedure, hence the issue was brought before the CJEU. The question referred was whether the prohibition adopted by the company on wearing clothing of religious manifestation, as a general internal rule of a private undertaking enacted applicable to all employees, constitutes

23 R. McCrea:'Faith at work: the CJEU's headscarf ruling', in EU Law Analysis, <http://eulawanalysis.blogspot.hu/2017/03/faith-at-work-cjeus-headscarf-rulings.html> visited on 11.04.2017.

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direct discrimination.[24] To put it simply, could the internal rule of neutrality be considered to be a 'genuine and determining occupational requirement', justifying a directly discriminatory provision?[25]

According to the established case-law of the CJEU, direct discrimination is a result of a less favorable treatment of a person, on the grounds of prohibited criterions, such as racial or ethnic origin, religion or belief, disability, age, sexual orientation or sex than another person, in a comparable situation. Indirect discrimination on the other hand is based on a neutral criterion, measure or practice which puts a person or group of people (exhibiting the protected characteristic) at a particular disadvantage compared to other people, Unless it can be objectively justified with a legitimate aim, implemented proportionately, it shall be unlawful. It must also be stressed however, that in case of indirect discrimination, the individualistic approach to a religion may not always be appropriate in questions regarding group disadvantages.[26]

The scope of the Framework Directive covers both the private and public sphere, and as per its Article 2 paragraph (5) restrictions are possible, based on a national law which promotes the democratic society and is necessary for public security, public order and the health, as well as the protection of the rights of others.[27] This definition resembles the conceptual framework of the abovementioned *'le livre ensemble'* and concerns of public security as described in *S.A.S. v. France*, and the purpose of neutrality presented in *Eweida*

The CJEU defined the principle of equal treatment, which excludes the possibility of direct or indirect discrimination on the grounds of religion. The CJEU repeatedly missed the opportunity to define religion and similarly to earlier cases, the CJEU referred to its

24 Article (2) the principle of equal treatment between women and men was also considered, but only as a secondary legal basis to religious freedom.

25 The exact question being: "Should Article 2(2)(a) of Council Directive 2000/78/EC of 27 November 2000 () be interpreted as meaning that the prohibition on wearing, as a female Muslim, a headscarf at the workplace does not constitute direct discrimination where the employer's rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace?"

26 Article 2 of the Framework Directive states:

a. "direct discrimination 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 any of the grounds referred to in Article 1;
b. indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:
c. that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary…"

27 "This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.' Article 2. (5) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML> visited on 15.11.2017.

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concept in line with the Charter of Fundamental Rights of the European Union ('Charter') and the ECHR.[28] The Court emphasized the importance of the constitutional traditions of the Member States, as such protecting both the *forum internum* (the absolute freedom of having religious beliefs or not having any) and *forum externum* (the right to manifest the religious beliefs), which may be restricted.[29]

According to the CJEU's reasoning an internal rule applied to every employee in the spirit of neutrality as such does not amount to a direct discrimination in treatment based on religion or belief for the purposes of the Framework Directive. At the same time, indirect discrimination may be established by the Belgian courts, if it may be concluded, that the seemingly impartial and neutral rule indeed leads to the result of having a certain religion and its believers put at a particular disadvantage. The national Court is to strike a fair balance between the conflicting interests, based on factual circumstances. It will be interesting to see the conclusions of the judicial proceedings in the instant case.

As seen in the previously mentioned cases (*Aktas v France, Dahlab v Switzerland, S.A.S. v France)* the difference in treatment may be justified with a legitimate aim, if the restriction employed to achieve that aim is necessary, proportionate and appropriate. In the public sphere, legitimate aims covered the neutrality of a state in religious questions as seen in the cases related to education (*Dogru, Dahlab Sahin)* and public employment relationships alike. In addition, security concerns, and the rules of living together, as well as national constitutional and legislative traditions can be perceived as legitimate. Seeing the possible difficulty of interpreting these factors in private relationships is not surprising, the basic reasoning is the same behind them, but the relationship is essentially different, one party being a private organization.

The aim of a private undertaking to emanate and image of neutrality to public and private sector customers – also argued in *Eweida and Others v United Kingdom* – may be considered legitimate with respect to workers who come into contact to the customers. This is justified in light of Article 16 of the Charter, which establishes the freedom to conduct business as a fundamental right. Consequently, the Court found that the rule which prevented Ms. Achbita from wearing her headscarf at work did not amount to direct discrimination, as it 'covers any manifestation of such beliefs without distinction'.[30]

Referring to *Eweida and Others v United Kingdom* an additional question also arises here, whether the company could have offered her a different position, without this being disproportionately disadvantageous for the undertaking. This way, Ms. Achbita would

28 The concept of religion is loosely defined, mainly based on the Article 9 of the ECHR: freedom of thought, conscience and religion, and often vary from country to country, similarly to the relationship between church and state (*Layla Sahin)* as is the case in secular states, and the constitutional-national traditions.

29 See also Article 10 (2) of the Charter: "The right to conscientious objection is recognized, in accordance with the national laws governing the exercise of this right."

30 As per para. 30 of the CJEU ruling, "must (…) be regarded as treating all workers of the undertaking in the same way, by requiring them, in a general and undifferentiated way, inter alia, to dress neutrally, which precludes the wearing of such signs." <https://goo.gl/TczFwz> visited on 15.11.2017.

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not have had to come into visual contact with consumers, thereby avoiding the dismissal of an otherwise capable employee. The alternative of a non-customer facing role was also offered to Ms. Eweida, where the desire to project an image of neutrality was also accepted as a legitimate aim. As regards employees who by the nature of their work may be required to contact customers, in light of the Article 16 of the Charter the 'discreet' expressions of religious beliefs were considered to be acceptable, while clearly visible, conspicuous ones were considered to be grounds for restriction.

The ban may be considered to be appropriate for ensuring the policy of neutrality, if it is properly applied and put into effect, implying extending its application to every religion at the workplace. Although the case does not mention other employees of Muslim or other religion faith, it speaks of clearly visible signs and policies *genuinely pursued in a consistent and systematic manner*. These elements must be assessed by the national court proceeding in the instant case. If the domestic court can establish, that the limitation of religious expression was only in effect with respect to employees coming into contract with customers, the restriction can be considered necessary to achieve the aim pursued. To summarize, the internal rule prohibiting the wearing of an Islamic headscarf cannot be considered a *directly discriminatory rule* – which can be only justified by a *genuine and determining occupational requirement*[31] –, if it is practiced in accordance with the neutrality policy. However, it may be perceived as an *indirectly discriminatory* measure, which may be justified by a legitimate aim and implemented in an appropriate and proportionate manner.[32]

In the *Achbita* case the CJEU followed the reasoning of Advocate General Kokott set forth in her Opinion delivered earlier. This Opinion rejected claims of direct discrimination, but accepted the possibility of indirect discrimination. Prohibiting or banning religious manifestation could be considered a non-discriminatory measure, which aims to achieve neutrality, but that doesn't mean it won't amount to a disadvantage for followers of certain religions. For this to apply, certain factors must be taken into account, such as the size and 'conspicuousness' of the religious symbol, the nature of the employee's activity, the context in which she/he has to perform that activity, and finally, national identity. All of these factors must be investigated by the domestic Belgian Courts, to be able to strike a fair balance between the conflicting interests between individual and collective rights, the negative and positive aspects of freedom of religion.

31 2000/78/EC Directive, (23).

32 Advocate General Sharpton pointed out that, the CJEU should not be satisfied with the protection provided by the ECtHR and ECHR, but should afford a more extended protection for human rights, as laid down in Article 52 (3) of the Charter. But again this would result in the conflict of individual and collective rights, the positive and negative aspect of freedom of religion See more at: <https://eutopialaw.com/2016/07/18/the-cjeus-headscarves-cases-analysis-of-the-contrasting-ag-opinions/> visited on 15.11.2017.

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17.5.2 *Bougnaoui and ADDH, Does the Customer Come First?*

At a first glance, the circumstances of the *Bougnaoui* case seem similar, the main issue being, again, the wearing of headscarf at the workplace. Nevertheless, the small differences in decisive circumstances – such as general background of the legal systems and the internal policies – led to a different judgment. Ms. Bougnaoui was informed about issues *possibly* emerging from wearing headscarf at the company before actually starting to work at *Micropole*, during a business fair. By this time, as mentioned beforehand, France had already enacted a ban on religious clothes in the public sphere, which affected private relationships, such as working at an international undertaking as well (in accordance with the interpretation provided by the ECtHR). Ms. Bougnaoui took up work wearing a bandana, subsequently a headscarf in 2008 without any objections raised by the firm. Performance issues were not noted either, until an affronted customer emphasized her/his wish, to have services provided by someone else, who did not wear hijab. As a consequence, the undertaking informed her that she should avoid the headscarf in the future when meeting with customers. Since this request was rejected by Ms. Bougnaoui, she was subsequently discharged from her position, without having been offered a non-customer facing role, not unlike the case of Ms. Achbita.

The claim was brought before the Labour Court of Paris, and later on with the help of ADDH[33] before the French Court of Cassation, following an unsuccessful claim filed at the Court of Appeal of Paris. The Court of Cassation then referred the question to the CJEU, whether the wish of a customer to not to have services provided by someone wearing a headscarf, in this case Ms. Bougnaoui, can be interpreted as a 'genuine and determining occupational requirement'[34] in accordance with Article 4 (1) of the Framework Directive.[35] Similarly to the *Achbita* case, the first impression here is that the domestic court tried to get confirmation from the CJEU, whether the circumstances point to direct discrimination, or should be judged by the rules of indirect discrimination.

The concept of determining occupational requirements was implemented also in the French Labour Code (L. 1131-1). These, according to the Opinion of Advocate General Sharpston delivered in 2016, cannot be interpreted broadly based on the CJEU's case law. In fact, restrictions on protected characteristics, such as gender, religion etc. must be

33 Association de defense des droits del'homme.

34 "Must Article 4(1) of [Directive 2000/78] be interpreted as meaning that the wish of a customer of an information technology consulting company no longer to have the information technology services of that company provided by an employee, a design engineer, wearing an Islamic headscarf, is a genuine and determining occupational requirement, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out?"

35 "Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate… ."

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interpreted narrowly,[36] Sharpton thus used a different reasoning than the one seen in *Achbita* and concluded that a rule which prohibits an employee of a private undertaking from wearing religious signs or apparel when in contact with customers should be regarded as an instance of direct discrimination.[37]

National constitutional traditions, such as the French *laïcité* and the legislative fervor around the world to regulate the wearing of headscarves, played an important role, the concept being widely accepted in the private sphere as well. *Laïcité* itself is often described as an intolerant tool towards religions, incapable of guaranteeing religious freedom in the public sphere.[38] National identity plays a pivotal role in French self-identity and must also be taken into consideration. According to its Constitution, France is a homogeneous state of French people, without any national, ethnical of religious minorities, be they autochthon or immigrant minorities, in the country. The only territory, which has a special status and enjoys certain levels of autonomy, is the Island of Corsica, but not on the basis of its ethnic diversity or uniqueness, but owing to practical administrational considerations.

The apparent financial impact and loss on the side of the employer cannot be considered to be legitimate grounds for justifying restrictions of religious expressions. This has already been established in *Eweida and Others v. United Kingdom* earlier where domestic courts according to the ECtHR had given undue importance to the employer's commercial interest. Again, this consideration draws attention to proportionality as a key factor.[39] One must also consider, that even though such bans seemingly do not make any distinction between the different religious signs, believers and active followers of certain religions which require the expression via clothes are at an obvious disadvantage. Similarly, if only one person is affected by such a regulation it is hard not to discern an obvious intention behind the seemingly neutral policy.[40] The question of the employee's safety was not raised either, i.e. whether an agitated customer could have used the

36 Láncos Petra Lea:' A hidzsáb az Európai Bíróság elott', Ars Boni: <http://arsboni.hu/a-hidzsab-az-europai-birosag-elott/> visited on 10.04.2017.

37 Para. 108. of the Opinion states "A rule laid down in the workplace regulations of an undertaking which prohibits employees of the undertaking from wearing religious signs or apparel when in contact with customers of the business *involves direct discrimination on grounds of religion or belief*, to which neither Article 4(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation nor any of the other derogations from the prohibition of direct discrimination on grounds of religion or belief which that directive lays down applies. That is *fortiori* the case when the rule in question applies to the wearing of the Islamic headscarf alone." From here: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CC0188> visited on 15.11.2017.

38 P-H. Prélot: 'French laïcité and the terrorist attacks', in Law and Religion UK, <www.lawandreligionuk.com/2017/03/16/french-laicite-and-the-terrorist-attacks/> visited on 16.03.2017.

39 I. Leigh-A. Hambler:'Religious Symbols, Conscience, and the Right of Others', 3 (1), Oxford Journal of Law and Religion, (2014): <https://academic.oup.com/ojlr/article/doi/10.1093/ojlr/rwt048/1461694/Religious-Symbols-Conscience-and-the-Rights-of> visited on 04.04.2017.

40 "…apparently neutral obligation it encompasses results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage", according to the CJEU <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-03/cp170030en.pdf> visited on 15.11.2017.

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hijab to grab and twist, this way causing potential harm, and the case where religious jewelry was considered to be a security concern (*Chaplin v United Kingdom*) was not invoked either in the reasoning.

Unlike in *Achbita v Micropole* there was no written internal rule or well defined policy at G4S to promote religious neutrality. Consequently, the CJEU focused on the definition of *genuine and determining occupational requirements*, which are objectively derived from the nature of the work and occupational activities involved.

The CJEU did not stop at dismissing claims of direct discrimination in *Bougnaoui*, but asked the national court entrusted with deciding on factual matters to once again approach the case through the lens of possible indirect discrimination.[41] As emphasized earlier, cases like these in a multi-faith society always raise sensitive issues, such as integration and its possible failure, public security regulations, etc. According to the CJEU, it is the French courts' responsibility to determine whether the dismissal was based on non-compliance with the internal rule of the undertaking governing expressions of political, philosophical and religious beliefs. If the latter is the case, the court also needs to evaluate whether there is a reasonable ground for justification for such restriction, which is legitimate, necessary and proportionate.

17.6 Comparing the Decisions: Are They Contradictory?

There seems to be a tension between the two rulings regarding the respect for customer preferences, even though originally both the French and Belgian Courts of Cassation asked similar questions, namely whether the measure introduced by the companies can be considered direct discrimination. In both cases, the CJEU noted that religion should be perceived in accordance with Article 9 of ECHR, and the constitutional traditions of the Member States as defined in Article 10 of the Charter, which both include the right to religious manifestation in *public*. In *Achbita*, the rule of neutrality was laid down in a written company regulation, although we are unaware whether anyone had raised a claim beforehand regarding the appearance of G4S' employees. As such it appears to be a *pre-emptive* measure, designed to exclude even the possibility of an issue such as Ms. Bouganoui faced from even emerging. Neutrality as a goal was considered to be legitimate, and since no religion was explicitly targeted by the restriction, it was proportionate and necessary in order to project neutrality towards religion, political and philosophical beliefs. This also justified indirectly discriminatory measures in line with the Directive.

Apart from the existence of a written general rule of neutrality in Achbita, another major difference between the cases is that in *Bougnaoui*, a client itself already felt uncomfortable in the presence of the claimant wearing the veil, requesting not to have services provided by someone wearing the same outfit next time. As such, the rule itself

41 Similarly to the earlier reasoning of Advocate General Kokott.

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seems to be a *reactionary* measure. The CJEU itself declared, that taking into account the wish of a customer cannot be considered to be a 'genuine and determining occupational requirement'. Therefore, unlike *indirect discrimination*, it cannot be invoked to justify *direct discrimination*. The circumstances, under which such occupational requirements correspond with a client's request are very limited, and must be justified by reason of the nature of the particular occupational activities concerned or the context in which they are carried out. In *Bougnaoui*, this was clearly not the case. The importance of these cases are marked by the fact that both were brought before the Grand Chamber for consideration, a composition used only exceptionally.

The CJEU did not stop at dismissing claims of direct discrimination, but also provided guidance to national courts on how to approach the cases through the lenses of indirect discrimination. This way, domestic courts may very likely conclude, that the measures resulted in putting persons adhering to a particular religion or belief at a particular disadvantage, notwithstanding the fact that regulation on its face seemed neutral. Again, it is the national courts' responsibility to decide whether the underlying neutrality policies were pursued in a consistent and systematic manner. The CJEU also referred it to national courts to decide whether non-customer facing roles could have been offered without posing an unreasonably great disadvantage for the employer, similarly to what was laid down in *Eweida and Others v United Kingdom*.

The possible conflict between the CJEU's two lines of reasoning may be derived from a simple oversight and misunderstanding of the slightly different circumstances. In *Achbita* the CJEU mainly focused on the justification of an indirectly discriminatory rule. In compliance with the Framework Directive, it once again confirmed the important role of *neutrality* declared in *Eweida*. Meanwhile, in *Bouganoui* the justification of a measure directly discriminating against a particular religion (and not all religions in general) was put to the test – and failed. Justifying direct discrimination has more stringent requirements: while the preference of a customer for neutrality can be used to justify indirect discrimination, it shall fail in case of direct discrimination. Against this backdrop, the reasons underlying the apparent conflict between the two rulings become clearer.

In both cases, the claimants were in a customer facing role, which puts them in an even more sensitive position, since additional requirements may be posed by their employers. Dress code has been established to be an essential part of corporate image, customer facing employees may be required to further this image by complying with business policy. While this factor must be taken into consideration, the question arises, whether these restrictions would also apply to non-customer facing employees as well, and if not, would it have been possible to offer such position to the claimants.

Unlike *Chaplin v United Kingdom*, neither of the cases mentioned possible health or security concerns related to the wearing of the headscarf. If the companies wished to emanate an image of neutrality, especially in the *Bouganoui* case where a customer was offended by the headscarf, one could presume, that the undertaking would consider the

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possible problem of an agitated customer initiating physical confrontation at the sight of the headscarf, which, owing to its design, makes it easier to grab on, posing a threat to the employee.

Arguably, the cautious ruling provided by the CJEU in these cases is attributable to the deep political and social, economic implications and the surrounding disputes related to the recent refugee and migration crises. The CJEU seems to adhere to the religion concept of the Charter and the Article, whereas Member States follow different definitions and approaches. Consequently, the same facts could well lead to a different outcome in the UK and France for example.

17.7 Conclusion – What Next?

Though religion itself is based on private and individual belief, the *forum internum* enjoys absolute protection and is a primary and individual right. Expressing religious beliefs and the right to religious manifestation constituting the *forum externum* undeniably affects also public relationships. It is a part of a person's identity, and can also be perceived as a set of beliefs- like a political opinion. As such, it is a value which needs protection, but this value and fundamental right may clash with other rights, and can be seen in a different light from time to time, due to different and changing political, national, social circumstances. As a consequence, legal approaches shall vary from time to time, country to country.

The workplace itself is a special environment with its own set of rules and regulations, where people of different political, religious and other beliefs may be required to work together, and to restrict expressing such beliefs. The degree to which multi-faith and -religion societies may require individuals to refrain from expressing their possibly controversial beliefs in the shared space such as the workplace was never an easy question. The fundamental question remains: where is the boundary between enforcing the right of an individual and respecting the right of others, what degree of tolerance can be expected?

Restrictions may fall under the definition of direct discrimination, which can only be justified by a specific and determined occupational requirement. In case the prohibition seemingly treats every religion and expression the same way, but in effect results in only restricting certain religions and their expressions, we are faced with an instance of indirect discrimination. This again may be justified with a legitimate aim, and implemented in a proportionate manner. These rules must be applied in a balanced, systematic and fair manner, criteria which are not easily proven. With its decision the CJEU 17 years after the adoption of the Framework Directive entered an extremely fraught political territory. By some Member States this may be perceived to be an excessive move.

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In addition to the political dimension, it also touches on such highly disputed like migration, gender theory, notions of sexuality, national identity and national security. The concept of neutrality is itself culturally embedded, what may seem fair and proportionate in one case, could be seen as unjust and excessive in another, and it is still not possible for the EU to provide for a generally acceptable rule on religious expression at the workplace.

There is no consensus in the Union on the best approach to the role of religion in public life and about its manifestation. There are examples for countries which allow manifestations of religion in a wide range of contexts, such as the United Kingdom. Others are gradually introducing or are in the process of adopting specific provision against certain religious expressions as discussed above. Regulating religion, which is both a matter of identity and belief has never been easy, leading to variant regulations, and depending on scenarios different approaches may be taken even at the workplace.

In *Achbita and Bouganoui* the CJEU emphasized the attributes of a ban on religious manifestation which is compatible with the Framework Directive at the workplace. Yet it also went further to avoid any abuse of the approach or rules enacted in bad faith to target specific religious groups such as believers of Islam, it rejected giving excess control to employers over employees' appearance. It seem to be a recurring symptom of Union's legislation to appear more reactionary to possible security threats coming from minority religions, and not from the culturally-entrenched forms of Christianity. Which as a common root, has long formed certain degree of cohesion between the Member States, even the degree or manifestations of religiousness are quite different.

An alternative could be to introduce religious neutrality of the state as a common European standard, derived from the ECHR itself. Unfortunately, the concept of religious neutrality has been interpreted in inconsistently in ECtHR case law and as such it wouldn't be a suitable example to be followed by the CJEU either.[42] Consequently, the ECtHR's failure to follow a consistent in approach in cases related to the place of religion in public institutions results in the same ambiguity in the private sphere. In 2000 the Court declared in *Hasan and Chaush v Bulgaria*[43] that based on the Article 9 of the ECHR states are obliged to be neutral in religious matters. Although this guidance may seem rather straightforward and self-explanatory, it can lead to different interpretations, since e.g. state-religion arrangements are rather diverse across Europe, and unlike most of the constitutions of Member States, the ECHR does not specify a specific regime for state-religion neither. In the EU we see examples of official church systems, such as in the UK, Greece, a system of mild separation, e.g. Germany and Belgium, and strict separation in

42 J. Ringelheim: 'State Religious Neutrality as a Common European Standard? Reappraising the European Court of Human Rights Approach', 6 (1), Oxford Journal of Law and Religion, (2017). pp. 25-27. <https://academic.oup.com/ojlr/article/6/1/24/2894388/State-Religious-Neutrality-as-a-Common-European> visited on 10.04.2017.

43 *Hasan and Chaush v. Bulgaria*, Appl. No. 30985/96 (ECtHR Grand Chamber, 26 October 2000), ECHR 2000-XI.

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the name of secularism (France). Religion and its relationship with the state is an extremely sensitive political issue, religion itself plays a significant role in national identity, especially in case of religious (and sometimes also ethnic minorities) as well.[44]

The neutrality principle itself may have three main interpretations, first of all it can be interpreted as the absence of coercion, this being a minimal conception, meaning, that no state shall impose a religion or belief to people in the public sphere, as seen in *Dogru*. This does not mean, that a state cannot embrace certain religions in a privileged position, which usually forms a cohesive part of national identity. Neutrality can also be perceived as an absence of preference, meaning that not even indirect or subtle forms of pressure exerted on individuals are allowed. Finally, it can be understood as an exclusion of religion from the entire public sphere, excluding the possibility of any visibility of religion in public institutions. In practice, we are also witnessing a decline in the religious practice among the European population, paralleled with a growing fear of religious radicalization attributed to the increasing number of minorities owing immigration. This again, leads to controversies in both the public and private spheres.

Ensuring that general bans such as those in *Achbita* or *Bouganoui* are followed in a genuinely systematic and generally applicable manner with respect to all kind or religious, philosophical or political beliefs is a way to justify such restrictions, and not to target certain minorities selectively. The problem here is that this way the employer can exercise even greater control over how employee's look, while the desire to express neutrality also depends on the context and the national traditions, since there is no universally accepted concept in this respect. National courts may refer questions regarding the interpretation of European law to the CJEU, but upon receiving the ruling, they themselves will be required to investigate and decide on factual questions.

The topic of wearing clothes expressing the religious beliefs at work has become ever so sensitive in the past years. It is getting bound up with complex political, economic and social issues such as the recent migration crisis, integration of minorities and the Islamist terrorism affecting European countries and raising additional security concerns. While it should be noted, that Islam is not the only religion under focus, the increasing attention however is understandable, even if not justifiable, in times of increasing tension, tolerance stretching to its limits, where the value of national and ethnical pluralism is under incremental pressure.

44 For example the status of the Turkish minorities in Greece, who are considered to be a *religious* minority, not an *ethnic* one in Greek constitutional traditions.