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Equality & non-discrimination between the European Court of Justice and the European Court of Human Rights. Challenges and perspectives in the religious discourse

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Equality & non-discrimination between the European Court of Justice and the European Court of Human Rights.

Challenges and perspectives in the religious discourse

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Abstract: Whereas gender, race and ethnicity have been placed at the very center of the rediscovery of European Union anti-discrimination law in the last decades, religion seems to stand in the backyard of the European Union Agenda. Efforts to tackle discrimination based on religious belief have not yet invested all areas of European Union anti-discrimination law, whose preference has been progressively devoted to other factors, even by leaving religion aside from the material scope of the *Race Directive* 43/2000/CE. The Employment Equality Directive, in fact, only prohibits discrimination on grounds of religion and belief in the fields of employment and occupation, vocational training, membership of employer and employee organizations, though refraining from following the *Race Directive* approach as to the width of protection. Freedom of religion within the European Union is then enshrined under Article 10, *Freedom of thought, conscience and religion*, of the European Union Charter of Fundamental Rights together with the general guarantee of non-discrimination under Article 21 and that of cultural religious and linguistic diversity set forth under Article 22. On the Council of Europe side, the European Convention – through Article 9, 14 and, to some extent, 1, Protocol no. 12 – and the European Court of Human Rights (ECtHR) have instead played a prominent role in addressing issues pertaining to freedom of religion, although generally disregarding the discriminatory implications of the scrutinized cases. Reference is made to the ECtHR consistent case-law on: proselytism (see *Kokkinakis v. Greece*); religious communities and their legal recognition (see *Hasan and Chaush v. Bulgaria*, *Metropolitan Church of Bessarabia and Others v. Moldova*); religious holydays (*Francesco Sessa v. Italy*,); religious symbols in the public sphere (see *Leyla Sahin v. Turkey*, *S.a.s. v. France*; *Eweida and others v. the United Kingdom*; *Hamidovic v. Bosnia Herzegovina*); disposal of public services in the interest of religious communities (*Izzetin Dogan v. Turkey*). The European Union Charter of Fundamental Rights, together with the above mentioned Articles of the European Convention of Human Rights, set therefore the framework where to situate the lines of intervention towards discrimination on account on religion in european multicultural and multi-religious society. Moving ahead and beyond the existing legal background on religious anti-discrimination law, the presentation intends to discuss and compare the European Union Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) approaches towards discrimination claims on religious ground, by highlighting weaknesses and challenges faced by the principle of equality and non-discrimination on account of religious belief at the european level. As to the method, the proposed analysis, through selected case studies, will address and disclose achievements and perspectives in the fight against discrimination based on religious belief by looking at the following issues: the notion of religion with specific reference to its overlapping relationship with that of ethnicity; the notions and implications of direct and indirect discrimination; the collective or “group” resonance of discrimination on account of religious belief. The parallel and combined investigation of the EU Court of Justice (see *Achbita v. G4S* and *Bougnaoui v. Micropole*) and the ECtHR case-law will thus offer an insight into the unsolved questions behind the understanding and the legal awareness towards discrimination based on religion. The presentation will eventually bring about: the urge to challenge western countries approach to anti-discrimination strategies by acknowledging the inadequate realization of existing measures and suggesting diverse mechanisms which might embrace a focus on minorities’ rights as an additional tool to overcome discrimination; the adequacy of approaching anti-discrimination claims by interlacing religion and ethnicity; the challenges encountered by anti-discrimination law and Courts’ dependence on the so-called comparator methodology.

SUMMARY: Preliminary Remarks – Part One: Setting the Stage: Theory and Rationale – 1. The Notion of Religion: Where to Situate Manifestations of Religious Beliefs - 2. Direct & Indirect Discrimination under the EU and the ECHR system - 3. Balancing Freedom of Religion: the Proportionality Test in the Light of States’ Margin of Appreciation – Part Two: Highlights Stemming from the ECtHR & the EUCJ Case-Law. – Introduction - 4. Religion: a Sidelined Factor of Discrimination? - 5. Direct or Indirect Discrimination. When the Comparator Makes the Difference - 6. Judiciary Self-Restraint and States’ Discretion in Religion-Based Discrimination Claims - Conclusive Remarks. Beyond the Counter-Majoritarian Dilemma: Religious Minorities in the European Multicultural Era.

Preliminary Remarks

Whereas gender, race and ethnicity have been placed at the very center of the rediscovery of European Union anti-discrimination law in the last decades, religion seems to stand in the backyard of EU Agenda.

Be it for its contentious linkage with the concepts of “choice and immutability”¹, efforts to tackle discrimination based on religious belief have not yet invested all areas of EU anti-discrimination law, whose preference has been progressively devoted to other factors, even by leaving religion aside from the material scope of the *Race Directive* 43/2000/CE.

The *Employment Equality Directive*, in fact, only prohibits discriminations on religious grounds in the fields of employment and occupation, vocational training, membership of employer and employee organizations, though refraining from following the *Race Directive* approach as to the width of protection.

Freedom of religion within the EU is then enshrined under Article 10, *Freedom of thought, conscience and religion*, of the EU Charter of Fundamental Rights together with the general guarantee of non-discrimination (Article 21) and that of cultural religious and linguistic diversity (Article 22).

On the Council of Europe side, the European Convention – through Article 9, 14 and, to some extent, 1, Protocol no. 12 – and the European Court of Human Rights (ECtHR) have instead played a prominent role in addressing issues pertaining to freedom of religion, though generally disregarding the discriminatory implications of the scrutinized cases and giving precedence to the safeguard of States’ demand of neutrality in the public sphere².

Moving ahead and beyond the legal background and given the cross-border resonance of issues pertaining to human rights, the paper intends to discuss and compare the European Union Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) approaches towards discrimination claims on religious ground, by highlighting weaknesses and challenges faced by the principle of equality and non-discrimination on account of religious belief at the European level.

The parallel and combined investigation will thus offer an insight into the unsolved questions behind the understanding and the legal awareness towards religious discrimination.

In following this path, a specific focus will be devoted to the adequacy of approaching anti-discrimination claims by interlacing religion and ethnicity, as to avoid an unequal or “levelling down” treatment among grounds of discrimination, as well as to the challenges surrounding supranational Courts’ dependence on the comparator methodology.

As to its structure, part one presents a theoretical analysis of the existing safeguards towards discrimination on religious ground whereas part two investigates the ECtHR’s and the

¹ On this, arguably, ECJ, *Achbita v. G4S Secure Solutions NV*, AG KOKOTT, § 45 and § 116.

² On this, see J. RINGELHEIM, *Rights, Religion and the Public Sphere: the European Court of Human Rights in Search of a Theory?*, in C. UNGUREANU, L. ZUCCA (eds.), *Law, State and Religion in the New Europe. Debates and Dilemma*, Cambridge University Press, 2012, 283 ss.

ECJ's approaches in examining religious claims by focusing on the comparable and diverse system and mechanisms of anti-discrimination protection.

Ultimately, the paper will pave the way to the ECtHR and ECJ responses to the unavoidable question of "how much difference and diversity an open and pluralistic European society must tolerate within its borders and, conversely, [of] how much assimilation it is permitted to require from certain minorities"³ through the lens of the principle of equality and non-discrimination.

Part One. Setting the Stage: Theory and Rationale

1. The Notion of Religion: Where to Situate Manifestations of Religious Beliefs

Reluctance from defining religion continues to play a role in the case-law of the ECtHR and the ECJ.

Not only do Courts refrain from clarifying the notion of religion, but, even before its increasing impact in shaping societies and individuals' ways of life, the consistent case-law is likely to choose not to interfere with States' preferences as to the relationship between religious faith and national order.

Since EU law reflects the ECtHR's developments in the interpretation of the guarantees set forth under Article 9 of the ECHR⁴, it is worth framing the analysis within the fences of the Conventional system.

Even in the absence of a stark definition and partly because of that, the ECtHR embraces a broad definition of religious belief.

The ECtHR has in fact progressively recognized an open-ended list of religious beliefs and convictions protected under Article 9⁵, following the "loose and ill-defined"⁶ criteria suggested in *Campbell and Cosans v. United Kingdom*, where it spoke of "views that attain a certain level of cogency, seriousness, cohesion and importance"⁷.

Since the *Kokkinakis v. Greece* case and in the light of § 2, the ECtHR has also expanded Article 9's protection to the so-called *forum externum* admitting that, alongside "matter[s] of

³ *Achbita v. G4S Secure Solutions NV*, AG KOKOTT, § 3.

⁴ See ECJ, *Asma Bougnaoui, Association de défense des droits de l'homme (ADDH) v. Micropole SA*, "In accordance with that provision, that 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. As is apparent from the explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17), the right guaranteed in Article 10(1) of the Charter corresponds to the right guaranteed in Article 9 of the ECHR and, in accordance with Article 52(3) of the Charter, has the same meaning and scope. In so far as the ECHR and, subsequently, the Charter use the term 'religion' in a broad sense, in that they include in it the freedom of persons to manifest their religion, the EU legislature must be considered to have intended to take the same approach when adopting Directive 2000/78, and therefore the concept of 'religion' in Article 1 of that directive should be interpreted as covering both the *forum internum*, that is the fact of having a belief, and the *forum externum*, that is the manifestation of religious faith in public", §§ 29, 30.

⁵ See, § 36. On this, see JACOBS, WHITE, OVEY, *The European Convention on Human Rights*, Oxford University Press, 2012. Among others, see ECtHR, *Jakobskey v. Poland* (Buddhism); *Genov v. Bulgaria* (Hinduism); *W. v. United Kingdom* (veganism); *Jehovah's Witnesses of Moscow and Others v. Russia* (The Jehovah's Witnesses); *Izzetlin Dogan v. Turkey* (Alevism); *Francesco Sessa v. Italy* (Judaism); *Leyla Sabih v. Turkey* (Islam);

⁶ JACOBS, WHITE, OVEY, *The European Convention on Human Rights*, Oxford University Press, 2012, 403.

⁷ A more elaborated reflection of what constitutes a religious belief can be found in *Eweida and Others v. UK*, where the ECtHR argued that "[e]ven where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a 'manifestation' of the belief. Thus, for example, acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of Article 9 § 1[...]. In order to count as a 'manifestation' within the meaning of Article 9, the act in question must be intimately linked to the religion or belief", § 82. By contrast, a detailed indication of cases where the ECtHR refused to apply Article 9, § 1, can be found in *Guide on Article 9 of the European Convention on Human Rights*, 2018, 13 ss.

individual conscience”⁸ dealing with the *forum internun* aspect, religious freedom “implies [...] freedom to ‘manifest [one’s] religion’, meaning “freedom to hold or not to hold religious beliefs and to practice or not to practice a religion”⁹ in fields such as employment or education.

The dual dimension of the protection – in terms of its private and public aspect together with its individual and collective resonance¹⁰ – echoes the prominent place of Article 9 within the Convention system as it represents, as the Court suggested, “one of the most vital elements that go to make up the identity of believers and their conception of life [...], a precious asset for atheists, agnostics, sceptics and the unconcerned”¹¹ as well as one of the foundations of a democratic society due to its linkage with pluralism, tolerance and broadmindedness¹².

Whereas freedom of religion (*forum internum*) is an absolute right with no restrictions, freedom to manifest religious beliefs clearly illustrates the challenges faced by multiethnic and multi-religious societies in accommodating religious diversity within national borders or, conversely, in preserving a policy of State neutrality.

It is therefore subjected to the limitations set forth under Article 9, § 2, keeping in mind the principles outlined in the ECtHR’s case law: the preservation of a sentiment of “mutual tolerance between opposing groups”¹³; the safeguard of pluralism¹⁴; the necessity to strike a balance among opposite interests acknowledging the individual and collective dimension of the claims in a non-majoritarian perspective.

Irrespectively on the model of society adopted by the Contracting States, the ECtHR has thus provided some, although poor, guidance to the question of what constitutes manifestation of religion or belief.

Moving beyond the adamant dichotomy between conducts that are “motivated or influenced by a religion or belief”¹⁵ and the relevant conduct required by Article 9 § 1 as being a manifestation of the belief in “practice”¹⁶, in *Jakòbski v. Poland* the Court began to suggest a softer approach qualifying, in that case, as a religious practice a meat-free dietary request. Without so much delving into its qualification as an act motivated by religion or as a pure manifestation of religion, the Court simply argued that “without deciding whether such decisions are taken in every case to fulfil(sic) a religious duty [...] the Court considers that the applicant’s decision to adhere to a vegetarian diet can be regarded as motivated or inspired by a religion and was not unreasonable”¹⁷.

Similarly, overturning *Dahlab v. Switzerland* where it was described as a “powerful external symbol” not protected under Article 9, the consistent ECtHR’s case-law now plainly

⁸ ECtHR, *Kokkinakis v. Greece*, § 31.

⁹ ECtHR, *Leyla Sahin v. Turkey*, § 104.

¹⁰ In Article 9’s perspective, the community element “goes beyond the mere coming together of individuals in the collective enjoyment of their individual freedom and extends to the recognition of an associative life which is to be protected as a necessary expression of that freedom. Within that religious associative life, individuals will be bound by its rules and the primary protection for their right to freedom of thought, conscience and religion lies in their being able to leave and disassociate themselves from the community. The state is to avoid entering into religious or doctrinal questions within that associative life, other than to test them for compatibility with the foundational convention values of democratic governance, pluralism and tolerance. It is not for the Court to comment on the practices of the religious community, although they may of course be limited in accordance with Article 9(2)”, M.D. EVANS, *Manual on the Wearing of Religious Symbols in Public Areas*, Council of Europe Publishing, 2009, 34. In the case-law, see ECtHR, *Metropolitan Church of Bessarabia and Others v. Moldova*, § 118; *Izzetin Dogan and others v. Turkey*; *Moscow Branch of the Salvation Army v. Russia*.

¹¹ ECtHR, *Kokkinakis v. Greece*, § 31.

¹² For an in-depth investigation, see J. RINGELHEIM, *Diversité culturelle et droits de l’homme. La protection des minorités par la Convention européenne des droits de l’homme*, Bruylant, 2006.

¹³ *Inter alia*, ECtHR, *Metropolitan Church of Bessarabia and Others v. Moldova*, § 123.

¹⁴ ECtHR, *Serif v. Greece*, § 53.

¹⁵ ECtHR, *Pretty v. United Kingdom*, § 123.

¹⁶ See on this the strict approach endorsed by the Commission in *Arrowsmith v. United Kingdom*.

¹⁷ ECtHR, *Jakòbski v. Poland*, § 45.

qualifies the Islamic headscarf as a religious protected under Article 9 of the European Convention¹⁸.

Notwithstanding the wider approach reached by the more recent case-law as to enlargement of the notion of religious manifestations, the ECtHR has though not yet provided sufficient guidance as to the definition of religion within the meaning of Article 9 and, mostly, with respect to the admitted restrictions, especially when minorities are concerned.

Despite lack of clarity in defining grounds of discrimination recurs in almost any branch of anti-discrimination law, the presumed non inherent nature of religion, as a chosen rather than intrinsic human trait such as gender, sex or race – so greatly emphasized in the AG opinions in *Achbita* and *Bouagnoui* as it will be further discussed –, seems to trigger the risk of hierarchical approaches to religion-based discrimination claims¹⁹.

As to the *status* of religion confronted with other grounds of discrimination, at least in one case the ECtHR has pooled religion with ethnicity.

From this angle, a point worth mentioning revolves around the relationship between religion and ethnicity due to the relationship entertained by the latter with the notion of race.

Do ethnicity and religion complement each other or do they always consist in two separate grounds of discrimination, entailing separate reviews?

Neither the Strasbourg Court or EU law offer responses, but a suggestion in the direction of a joint consideration of ethnicity and religion was prompted by the ECtHR in *Timishev v. Russia*.

In the attempt to make a distinction between race and ethnicity, the Court held that “[e]thnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin color or facial characteristics, *ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds*”.

However, the established connection between religion and ethnicity, as intertwined factors²⁰, leaves the door open to the treatment reserved to the latter in the ECtHR case-law. Whilst discriminations based on ethnicity require very weighty or compelling reasons to be justified under the Convention²¹, in that echoing the safeguard afforded to race, even after *Vojnity v. Hungary*²² in which for the very first time the ECtHR spoke of religion as a suspected ground, scrutiny on religion-based discriminations continues to rest on the wide margin of appreciation afforded to the Contracting States and on a slightly lenient review²³.

¹⁸ The reference here is specifically made to *S.a.s. v. France*.

¹⁹ The topic will be further discussed in Part Two.

²⁰ See, ECtHR, *Milanovic v. Serbia* (no. 7) § 97.

²¹ For an analysis of the ECtHR’s case-law on racial and ethnic discrimination, see C. NARDOCCI, *Razza e etnia. La discriminazione tra individuo e gruppo nella dimensione costituzionale e sovranazionale*, Editoriale Scientifica, 2016.

²² ECtHR, *Vojnity v. Hungary*, where the Court argued, for the very first time, that “in the light of the importance of the rights enshrined in Article 9 of the Convention in guaranteeing the individual’s self-fulfilment, such a treatment will only be compatible with the Convention if very weighty reasons exist”, § 36. For a more detailed analysis of the *rationale* upheld in the case, see J. GERARDS, *The Margin of Appreciation Doctrine, the Very Weighty Reasons Test and Grounds of Discrimination*, in M. BALBONI (ed), *The principle of discrimination and the European Convention of Human Rights*, Editoriale Scientifica; L. PERONI, “*Very Weighty Reasons*” for Religion: *Vojnity v. Hungary*, in *StrasbourgObserver.com*; K. HENRARD, *Duties of Reasonable Accommodation. In Relation to Religion and The European Court of Human Rights: a Closer Look At The Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality*, in *Erasmus Law Review*, 2012, 59.

²³ On this, see S. FREDMAN, *Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights*, in *Human Rights Law Review*, 2016, 273 ss.; O. ARNARDOTTIR, *Vulnerability under Article 14 of the European Convention on Human Rights Innovation or Business as Usual?*, in *Oslo Law Review*, 150 ss. In the ECtHR case-law, see *Lautsi and Others v. Italy*, and *S.A.S. v. France*.

2. Direct & Indirect Discrimination under the EU and the ECHR system

Another facet warrant a preliminary reflection deals with the direct and indirect forms of discrimination from their theorization to their concrete application.

The European Convention and EU law recognize the multidimensional nature of discrimination, sanctioning conducts that imply differences in treatment based on suspected grounds and practices that, although couched in neutral terms, cause disadvantages on a group.

How these notions of discrimination have been interpreted and applied in the case-law on religious freedom will be further analyzed.

The purpose here is to briefly highlight the ongoing challenges encountered by Courts in verifying the recurrence of either a direct or indirect forms of discrimination in order to better investigate the case-law analysis proposed in Part Two.

To begin with, the first one concerns the identification of the *tertium comparationis*, be it the individual or the group, and its nature, be it concrete or hypothetical.

In the former, dependent on the individual or group based approach is the interpretation of the act at issue as direct or indirect discrimination, which might be contested over trials due to the absolute prohibition of direct discriminations versus the possible reasonable and objective justification underneath a disparate impact or a particular disadvantage suffered by the group.

In the latter, the path from the traditional antidiscrimination model centered on a merely comparative approach to the so-called substantive rights model, endorsed by EU law, has brought about an extension of the antidiscrimination principle in terms of its capability to intercept discriminatory behaviors even when a concrete comparator is lacking.

This is especially true for EU law and for the suggested definition of direct and indirect discrimination, that came with the Race Directive 2000/43 and the Framework Directive 2000/78.

As to indirect discrimination, EU law does not require anymore the proof of a disparate impact supported by a comparative analysis, but merely the hypothetical feasibility of a particular disadvantage that might occur on a disadvantaged social group²⁴.

With respect to direct discrimination, following the *Feryn* case²⁵, on the interpretation of certain provisions of the Race Directive, the ECJ has paved the way to a new approach to direct discrimination, unleashing the causal link between the conduct and the quest for a concrete detrimental effect: in other words “the comparator need not ‘exist’; establishment of the probability of ‘his’ or ‘her’ better treatment will be enough”²⁶.

Before the ECtHR however contours appear blurred.

Article 14’s weakness has largely impacted on the scarce implementation of antidiscrimination cases together with the habit of the ECtHR to neglect investigation over alleged violations of Article 14. This results in few violations of Article 14 and in a less detailed theoretical approach as to the distinction between direct and indirect discrimination - the former is never explicitly mentioned in the case-law as such - and to the role of the comparator methodology.

²⁴ On this, EU law shows to follow the ECJ’s approach explained in the *O’Flynn* case where the ECJ stated that: “unless objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically able to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage. It is not necessary in this respect to find that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect. Further, the reasons why a migrant worker chooses to make use of his freedom of movement within the Community are not to be taken into account in assessing whether a national provision is discriminatory. The possibility of exercising so fundamental a freedom as the freedom of movement of persons cannot be limited by such considerations, which are purely subjective”, § 20.

²⁵ ECJ, *Centrum voor gelijkheid van kansen en voor racismebestrijding contro Firma Feryn NV*.

²⁶ E. HOLZLEITHNER, *Mainstreaming Equality: Dis/Entangling Grounds of Discrimination*, in *Transnat’l L. & Contemp. Probs.*, 2005, 934.

Whereas the consistent interpretation of Article 14 has been developed since the well-known *Belgian Linguistic* case on the criteria revealing discrimination on suspected grounds, the very first case the ECtHR found the recurrence of an indirect discrimination is fairly recent and dates back in 2007 with the *D.H. & Others* case, where the Strasbourg Court held that “a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group”²⁷.

Secondly, another difficulty might arise in the identification of the “correct” or “true” comparator. As it will be further discussed, a wrongful comparison might be sometimes used by Courts in the attempt to dismiss cases or merely to deny the recurrence of a directly discriminatory behavior²⁸.

A third argument that can possibly affect the choice of the comparator regards the establishment of the individual’s membership or affiliation to the targeted group.

To this regard, both systems openly recognize the possibility to sanction discriminatory conducts even without a deep rooted investigation on the victim’s affiliation and merely looking at his or hers presumed or perceived characteristics (the so-called discrimination by association). This is of crucial importance for a claim to be successful in cases covering inherent individual traits such as gender, race, ethnicity and religion as well²⁹, where the lack of definitions and of universally accepted criteria establishing membership may impede Courts’ finding of alleged violations.

Beyond the implications surrounding the identification of the *tertium comparationis*, stands the role of Courts in rooting out discriminatory conducts. The extent to which Courts afford discretion in ascertaining who is the comparator – the individual or the group – and from which perspective – the concrete or the hypothetical one – may in fact very much affect the qualification of a behavior as directly or indirectly discriminatory, the subsequent severity of the scrutiny and eventually the outcome of the case.

Moving on from this line of reasoning, the group concept featuring indirect discriminations impacts on a fourth challenge that involves procedural issues in anti-discrimination law and, more specifically, the gathering evidence process.

As to the evidence, since *D.H. and Others v. Czech Republic*, the ECtHR has firmly established statistics as admitted evidence of indirect discrimination and same is for the ECJ.

Difficulties for both forms of discrimination might though remain in cases of conducts lacking data or whose not reliance on a normative legal basis makes it complex to verify their concrete, and likely discriminatory, realization.

Alongside statistics, another challenge has to do with the rules on the burden of proof that might be sometimes shared between the complainant and the respondent, meaning shifted from the former to the latter, as it has been admittedly held by the ECtHR in hate-crime cases³⁰.

To sum up, the unbinding interlace between substantial and procedural aspects encompasses both systems of anti-discrimination strategy. What may make the difference is the supranational Courts’ tendency to avoid or, conversely, tackle discriminatory behaviors as the jurisprudence on religious discrimination will reveal.

²⁷ See, also, ECtHR, *Biao v. Denmark*, § 107.

²⁸ See, HAVERKORT, 208 and Part Two.

²⁹ See, ECJ, *S. Coleman v. Attridge Law and Steve Law*; ECtHR, *Škorjanec v. Croatia*.

³⁰ See ECtHR, *Nachova and Others v. Bulgaria*.

3. Balancing Freedom of Religion: the Proportionality Test in the Light of States' Margin of Appreciation

How Courts verify the recurrence of a violation of the principle of equality and non-discrimination and the weight attached to the so-called proportionality test also warrants reflection.

Both the ECJ and the ECtHR require that a fair balance among competing interests, that of the individual and that of the community, needs to be struck in order to reject a presumption of discrimination.

A three step analysis where appropriateness, necessity and the so-called “proportionality *strictu sensu*” – in that it has to be established a proportionality between “the aim(s) of the measure and the interest(s) harmed” – or, in the case of the ECtHR, a more loose and sometimes lenient scrutiny of reasonableness, need to be judicially ascertained.

It is beyond the scope of this paper to fully examine the ways in which the ECJ and the ECtHR undertake this test³¹. These mechanisms nevertheless call into question Courts' assessment of proportionality, meaning the intensity of the review and the elements that come into play.

Firstly, the intensity of the proportionality test varies and performs differently on account of the wide or *viceversa* narrow margin of appreciation afforded to national States³². This means that the strictness of the review largely depends on the width of control Courts accept to exercise towards national States.

As it will be outlined below, in religion-based discriminatory claims, the ECJ's and the ECtHR's stance appears that of softening the proportionality test by giving precedence to States' margin of discretion, therefore avoiding a thoroughly investigation on the invoked violation of the non-discrimination principle. Be it for the assumed better placed position enjoyed by national States, where ethics and moral have a say, or for the lacking political representation affecting both Courts, when religious discrimination enters the scene hardly Courts end up with the finding of violations.

Secondly, though there is no explicit hierarchy among factors of discrimination³³, the case-law on religion-based discrimination claims reveals, in the writer's perspective, a marked tendency in making use of the margin of appreciation doctrine in cases involving religious freedom through references to the lacking consensus among the member States.

Thirdly, the increasing “popularity” of secularism in deciding claims – especially when conceived as implying the neutrality of public spaces – has greatly affected the reasoning underling the proportionality test³⁴. The Strasbourg Court, in particular, has shown a preference to surrender proportionality to secularism by interpreting it as an objective justification of interferences with religious manifestations.

All these three aspects will be jointly considered in the light of the selected case-law in Part two of the paper.

³¹ See, *inter alia*, S. VAN DROOGHENBROECK, *La proportionnalité dans le droit de la Convention européenne des Droits de l'Homme. Prendre l'idée simple au sérieux*, Bruylant, 2001.

³² For an insight into the implication surrounding the margin of appreciation doctrine, see G. LETSAS, *A theory of interpretation of the European Convention of Human rights*, Oxford University Press, 2007; E. BENVENISTI, *Margin of Appreciation, Consensus, and Universal Standards*, in *International Law and Politics*, 843 ss.; E. BREMS, *The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, in *Journal of international law*, 1996, 240 ss.

³³ For the European Union, see EU Commission, Communication, *Non-Discrimination and Equal Opportunities: A Renewed Commitment*, 2008, 420 final, 4.

³⁴ An example of this might be that of *Ebrahimian v. France* with a specific reference to the partially concurring opinion of Judge O'LEARY and to the dissenting opinion of Judge DE GAETANO. See, likewise, *S.a.s. v. France*.

Part Two: Highlights Stemming from the ECtHR & the EUCJ Case-Law

Introduction

The diverse nature of the ECJ and the ECtHR in handling human rights claims results in a quantitative and qualitative diversity of the respective case-law on religion-based discriminations.

Despite the non-extensive ECtHR's jurisprudence on Article 9 taken alone and in conjunction with Article 14 compared to other conventional rights violations, the ECtHR has nevertheless intervened in a variety of sectors from education to employment, from religious minorities' recognition to the status of Churches within the contracting States.

The ECJ has instead only in 2017 delivered its very first two cases on religious manifestations in the private employment sector³⁵, therefore suggesting to confine the here proposed comparative analysis within the narrower borders of religion discrimination in the employment sector. The choice won't nevertheless limit the enrichment of the reasoning through references to the overall ECtHR's case-law on Article 9 and 14 of the European Convention.

In the following section, the purpose is to closely compare ECJ's *Achbita* and *Bougnaoui* cases to the Strasbourg Court's relevant jurisprudence with a specific focus on *Eweida & Others v. UK*³⁶ and *Ebrahimian v. France*³⁷.

In doing so, three points will be addressed: the seemingly deficiency of religion as ground of discrimination juxtaposed to its increasing relevance in the societal debate and to other factors of inequalities; the misleading consequences ensuing the choice of the comparator and Courts' failure to adequately address religious discriminations; Courts' tendency to refrain from assessing religion-based discriminations, disregarding the proportionality test, in the attempt to safeguard States' margin of appreciation and the principle of secularism.

Before delving into these arguments, the facts at issue warrant a preliminary examination.

Both *Achbita* and *Bougnaoui* concern the legal question as to whether a private employer can prohibit the wearing of religious symbols at work in the pursuit of a policy of neutrality within the framework of the Employment Equality Directive.

In the first one, *Achbita*, a receptionist, after years of employment, was notified that the workplace regulation would have no more consented the wearing of any visible signs at work. Her refusal to comply with such regulation was at the core of her dismissal, later on brought before the ECJ. The preliminary question invested Article 2(2)(a) of Directive 2000/78 as the referring Court asked whether the above mentioned provision "must be interpreted as meaning that the prohibition on wearing an Islamic headscarf, which arises from an internal rule of a private undertaking imposing a blanket ban on the visible wearing of any political, philosophical or religious sign in the workplace, constitutes direct discrimination that is prohibited by that directive".

Conversely, in *Bougnaoui*, the ban of wearing the Islamic headscarf was put forward at the very beginning of the recruitment process, having the private undertaking Micropole notified Ms *Bougnaoui* that "the wearing of an Islamic headscarf might pose a problem when

³⁵ Following *Achbita* and *Bougnaoui*, the ECJ decided two other cases on the implementation on the Employment Equality Directive: *Vera Egenberger versus Evangelisches Werk für Diakonie und Entwicklung e.V* on the interpretation of Article 4(2) with regard to the so-called autonomy rights of religious organizations versus the rights of their employees to not be discriminated on the ground of religion (17.4.2018).

³⁶ For a comment, see, *inter alia*, M. PEARSON, *Article 9 at a Crossroads: Interference before and after Eweida* [notes] *Recent Developments*, in *Human Rights Law Review*, 2013, 580 ss.

³⁷ *Inter alia*, see, N. MARCHEI, *Ebrahimian c. Francia: una nuova vittoria per il principio di neutralità dello Stato*, in *Quaderni Costituzionali*, 2016, 143 ss.; L. Vickers, *Freedom of Religion or Belief and Employment Law*, in *Religion & Human Rights: An International Journal*, 2017), 164 ss.

she was in contact with customers of the company”³⁸. Despite Ms *Bougnaoui*’s option of wearing the Islamic headscarf during the internship, Micropole first employed her as a design engineer and later on dismissed her on account of the complaints alleged by some company’s customers’ towards her meeting them veiled. The preliminary question here was different in as much as it concerned the exception to the prohibition of discrimination set forth under Article 4(1)³⁹.

Eweida and Others v. the United Kingdom and *Ebrahimian v. France* hinged instead upon the restrictions placed on the applicants’ wearing religious symbols at work – a British Airways employee, a geriatrics nurse and a hospital social worker – and their compatibility with Article 9 of the European Convention, alone and in conjunction with Article 14.

4. Religion: A Sidelined Factor of Discrimination?

“What is different about religion? Has anti-religious sentiment become so normalized in Europe, that it has become invisible – the new normal?”⁴⁰.

The above comment may be similarly paraphrased questioning what is wrong with religion in the human rights realm.

Although the *status* of religion in international human rights law goes well beyond the scope of the paper, yet the arena where the ECJ and the ECtHR operate may provide some food for thoughts on this point.

In fact, ECJ’s cases on religious discrimination in the workplace sharply brought about the question as to whether religion may need to be placed on an equal footing with other grounds of discrimination. Dismissing *Chacón Navas*’s rationale, as all grounds of discrimination require equal treatment before the law, the interpretation suggested in *Achbita* seems hardly consistent with that precedent.

On the opposite, the ECtHR has only recently overcome, at least theoretically, its dubious approach naming religion as a suspected ground of discrimination subjected to the so-called very weighty reasons test within the meaning of Article 14. Nevertheless, arguably, assessments of Article 14 violations keeps on being a rare outcome, suggesting that religion may not be so suspect as formally stated in *Vojnity v. Hungary*.

The purpose here is to list, in their essence, the arguments that support the rationale of religion as being neglected as a suspected ground in the European jurisprudence and, conversely, to advocate for the equal treatment of religion-based discriminations.

Firstly, when religion is at stake, Courts appear to rely on a “structural” or “ontological” argument, in as much as religion is perceived as being inherently bonded with choice and personal autonomy. The idea is that no one is born with a religious faith – that is something that is believed as nursing across everyone’s life experiences and education –, whereas all human beings may be somewhat classified depending on their sex or race. The former may be gauged and tempered, the latter don’t, affording them with higher protection.

To smooth the approach, Courts have dwelled on the dichotomy *forum internum/forum externum*, suggesting that, when such a difference applies, as long as manifestations of religious

³⁸ ECJ, *Asma Bougnaoui, Association de défense des droits de l’homme (ADDH) v. Micropole S.A.*, § 13.

³⁹ Article 4(1): “Notwithstanding Article 2(1) and (2), 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”.

⁴⁰ E. BREMS, *Analysis: European Court of Justice Allows Bans on Religious Dress in the Workplace*, in *Blog of the LACL*, AIDC 2017, <https://iacl-aidc-blog.org/2017/03/25/analysis-european-court-of-justice-allows-bans-on-religious-dress-in-the-workplace>. Talks about freedom of religion as a human right “under pressure”, H. BIELEFELDT, *Freedom of Religion or Belief. A Human Right under Pressure*, in *Oxford Journal of Law and Religion*, 2012, 15 ss.

freedom is a matter of choice, restrictions may be legitimate when justified under the proportionality test⁴¹.

This line of reasoning has been explicitly advanced by AG Kokott in *Achbita*, where she admitted that “[w]hat constitutes ‘religion’ is an inherently complex matter in which objective factors combine with elements of each individual’s subjective convictions”, arguing that “unlike sex, skin colour, ethnic origin, sexual orientation, age or a person’s disability, the practice of religion is not so much an unalterable fact as an aspect of an individual’s private life, and one, moreover, over which the employees concerned can choose to exert an influence. While an employee cannot ‘leave’ his sex, skin colour, ethnicity, sexual orientation, age or disability ‘at the door’ upon entering his employer’s premises, he may be expected to moderate the exercise of his religion in the workplace”.

Despite the arguable equation – in that exterior manifestations of individual affiliation may similarly take place with respect to cultural or ethnic membership or even with sexual orientation – the statement is debatable. As AG Sharpston in *Boungaoui* pointed out “to someone who is an observant member of a faith, religious identity is an integral part of that person’s very being. Of course, depending on the particular rules of the religion in question and the particular individual’s level of observance, this or that element may be non-compulsory for that individual and therefore negotiable. But it would be entirely wrong to suppose that, whereas one’s sex and skin colour accompany one everywhere, somehow one’s religion does not”.

Thus, in connecting religion with personal identity, the question appears no more that of interpreting religion as an immutable or a chosen factor in itself routinely banned from the proportionality analysis, but rather that of whether religious manifestations may be balanced with other competing interests in the justification test⁴² and, most importantly, through which reasonable accommodation strategies⁴³.

In *Achbita*, the ECJ has steadily followed AG Kokott’s view as its contentious theorization of direct discrimination, that “exists only when a measure targets a single religion or a selection of religions, but not when a measure targets all religions and beliefs”⁴⁴, plainly shows⁴⁵.

To sum up on this first aspect, it emerges from the case-law: a trend to isolate religion in reviewing discrimination claims (1), together with “a failure to engage with the intersection of gender, religion and ethnicity”⁴⁶; subsequently, a likelihood that the protection afforded to it would be insufficient as manifestations of religious freedom are often prevented from being fairly balanced with their competing interests (2).

A further argument that buttresses the thesis of religion as a separate ground arises out from the strictness of the review on alleged Article 14’s breaches with respect to the “very weighty reasons test”⁴⁷.

⁴¹ Examples of this trend, although the ECtHR is not very consistent in undertaking the proportionality analysis, may be found extensively in its case-law: see, *inter alia*, *S.a.s. v. France*; *Leyla Shain v. Turkey*; *Mann Singh v. France*; *Pbull v. France*; *El Morsli v. France*; *Ebrahimian v. France*.

⁴² See, on this, L. VICKERS, *ECJ headscarf series (2): the role of choice; and the margin of appreciation*, in www.strasbourgobserver.it.

⁴³ On this, see K. HENRARD, *Duties of Reasonable Accommodation. In Relation to Religion and The European Court of Human Rights: a Closer Look At The Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality*, cit. With regard to the UK’s developments on this issue following the *Eweida and Others* case, see E. GRIFFITHS, *The ‘reasonable accommodation’ of religion. Is this a better way of advancing equality in cases of religious discrimination?*, in *International Journal of Discrimination and the Law*, 2016, 161 ss.

⁴⁴ E. BREMS, cit.

⁴⁵ On this, see paragraph 5.

⁴⁶ M. BELL, *Leaving Religion at the door? The European Court of Justice and Religious Symbols in the Workplace*, in *Human Rights Law Review*, 2017, 791.

⁴⁷ On this, for further analysis, J. GERARDS, *The Margin of Appreciation Doctrine, the Very Weighty Reasons Test and Grounds of Discrimination*, cit.

Although the ECtHR's case-law is consistent in formally including religion within the suspect grounds list, it nevertheless scarcely draws the consequences from it, as the "very weighty reasons test" rarely applies.

One reason for it may be that the ECtHR highly relies on the margin of appreciation doctrine and on its corollaries of subsidiarity and consensus. Well-known is the key role of the margin of appreciation doctrine towards suspect discrimination grounds, in that the more suspect the ground is, the narrower the margin will be and *viceversa*. Yet, despite the suspectness of religion, the ECtHR has still not often taken a coherent approach when religion was involved.

An explanation to this may be found in the "common ground approach" that calls for a widened margin of discretion when uniform standards across the member States are lacking. The weight attributed to the consensus argument is transparent in the ECtHR's case-law on the display of religious symbols in the public sphere⁴⁸ and, to same extent, even in ECJ's *Achbita*.

With the exceptions of *Eweida v. UK* and *Hamidovic v. Bosnia Erzegovina*⁴⁹, where the ECtHR found a violation of Article 9 taken alone, all other judgements rest in fact on the little common ground argument among the member States to justify the legitimacy of the interference⁵⁰.

Interestingly, *Eweida* and *Hamidovic* contradict the majoritarian approach, since the ECtHR refused to confine Article 9's protection to the *forum internum* limb, admitting that "[f]reedom to manifest one's religion is a fundamental right: not only because a healthy democratic society needs to tolerate and sustain pluralism and diversity, *but also because of the importance to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others*"⁵¹.

Beyond this, another reason for the limited applicability of the "very weighty reasons test" lies in the rationale endorsed in *Vojnity v. Hungary*, where the ECtHR stated that "in the light of the importance of the rights enshrined in Article 9 of the Convention in guaranteeing the individual's self-fulfilment, such a treatment will only be compatible with the Convention if very weighty reasons exist". In connecting religion with the notion of self-fulfilment, the ECtHR has in fact allowed "some room for differentiation, in that the 'suspectness' of the discrimination may depend on the severity of the related interference with the freedom of religion"⁵². On this note, the decision upheld in *Chaplin v. United Kingdom*, where the ECtHR considered legitimate the interference within the applicant's right to wear a Christian cross while working as a nurse at a State hospital juxtaposed to that in *Eweida*, collocates quite coherently within this line of reasoning.

A tempered scrutiny in religious discrimination cases may also be found in the ECJ's jurisprudence when comparing *CHEZ* on indirect ethnic discrimination and *Achbita*. The latter shows in fact a weakness in disclosing indirect discriminations since the ECJ denied to investigate, as it conversely did in the former, "whether the disadvantages caused by the

⁴⁸ With a specific focus on education and religion, see, *inter alia*, E. HOWARD, *Law and the wearing of religious symbols: European bans on the wearing of religious symbols in education*, Routledge, 2013.

⁴⁹ More recently, the ECtHR found another violation of Article 9 taken alone in *Lachiri v. Belgium*, on the prohibition to wear the Islamic headscarf in a courtroom. In the application though there was no reference to an alleged violation of Article 14, read in conjunction with Article 9 of the ECHR, and therefore, despite the agreeable conclusion of the ECtHR, the discriminatory facets of the case at issue again lack the deserved 7attention.

⁵⁰ ECtHR, *S.a.s. v. France* is a landmark case on this point. See §§ 154 ss.

⁵¹ ECtHR, *Eweida and Others v. United Kingdom*, § 94.

⁵² J. GERARDS, *The Margin of Appreciation Doctrine, the Very Weighty Reasons Test and Grounds of Discrimination*, cit., 17. The A. concludes on this that "it seems probable that religion is a 'suspect' ground justifying a very weighty reasons test only in specific cases, namely if the discrimination is directly and essentially based on religious convictions and application of a strict test is sufficiently supported by European opinions".

practice at issue [were] disproportionate to the aims”⁵³, meaning to balance “the needs of the corporate policy with the disadvantages imposed on the individual affected”⁵⁴.

The morals facet that engages with religious freedom also plays a role in broadening the margin of discretion, in that it is usually left to the contracting States, better placed, the qualification of what morals is in a democratic society⁵⁵. This leads us to the third argument that rightly lies in the intersection between religion and morals and on their impact in expanding States’ margin of appreciation.

As religion is conceived as being filled with ethics and morals and the latter often demand for a deference to the member States, the ECtHR is used to following this approach by widening up the margin of appreciation and abdicating to a stricter review on religion-based discriminations.

That was the case, *inter alia*, of *S.a.s. v. France* in that the Court pushed back the question of how to shape society before increasing religious and cultural diversity. Although, it might be a welcome response, due to the subsidiary role of the ECtHR and the democratic principle, nonetheless, the departure from the justification test sheds light over the suspected anti-minoritarian sentiment prevailing within the ECtHR⁵⁶.

Ultimately, in the light of the foregoing – the structural difference of religion as a ground of discrimination; the lenient review; the wide margin of appreciation – the impression is that: a) the presumed heterogeneity of religion *vis-a-vis* to other grounds is not justified in that it constitutes an integral part of a person’s very being; b) the twofold dimension underlying the difference between the *forum internum* and *externum* would envision a similar approach to ethnicity which may likely present exterior facets colliding with the rights of others; c) the resort to a wide margin of appreciation coupled with the consensus argument might entail risks of disregarding minoritarian positions⁵⁷; d) deference to the member States when it boils down to choices involving religion and morals, without a case-by-case scrutiny on the proportionality of the interference, may result in the abdication of the supervisory function of supranational Courts.

5. Direct or Indirect Discrimination? When the Comparator Makes the Difference

The concerns noted above regarding the isolation of religion may very well be interfered in the ECJ’s and ECtHR’s jurisprudence when examining the poor inquiry into alleged violations of the principle of equality and non-discrimination on religious ground.

Notwithstanding both Courts elaborated on the distinction between direct and indirect discrimination, poor signs of such theorization can be traced in the case-law.

It is noteworthy that the ECtHR is consistent in disregarding the notion of indirect discrimination on religious ground, deeming not necessary to investigate invoked non-compliance with Article 14.

⁵³ ECJ, *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*, § 123.

⁵⁴ M. BELL, cit., 794.

⁵⁵ ECtHR, *Handyside v. United Kingdom*, § 48.

⁵⁶ This point will further addressed in paragraph 6.

⁵⁷ See, *inter alia*, E. BENVENISTI, *Margin of Appreciation, Consensus, and Universal Standards*, in *International Law and Politics*, who observes that “while resort to the margins doctrine may be justified in certain matters that affect the general population in a given society,¹⁷ the doctrine is inappropriate when conflicts between majorities and minorities are examined. In such conflicts, which typically result in restrictions exclusively or predominantly on the rights of the minorities, no deference to national institutions is called for”.

Despite the novelty endorsed in *Thlimmenos v. Greece*⁵⁸, in that it was stated that “[t]he right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different”⁵⁹, the ECtHR has nevertheless ever since denied any recurrence of indirect discriminations, opting for a soft “hands-off” approach⁶⁰.

Following this trend, several applications, especially those involving the display of religious symbols in the public sphere, have been declared inadmissible by merely upholding the legitimacy of the aim pursued, usually that of neutrality, and without delving into the proportionality of the scrutinized balance.

In *Mann Singh v. France*, the ECtHR did not condemn France for requiring the applicant, a practicing Sikh, to compare bareheaded in identity photographs for use on driving licences by stating that the rule responded to the aim of ensuring public safety within the meaning of Article 9 § 2, and therefore it fell within the State’s margin of appreciation.

Other cases have followed the same path. In *Phull v. France*, it has been recognized as falling within the State’s margin of appreciation the choice of whether or not considering mandatory the removal of turbans during airport security checks for public safety reasons; in *El Morsli v. France*, the rationale was very similar, in that the ECtHR interpreted as legitimate the request to have the applicant’s Islamic headscarf removed during a security check at a Consular held by male personnel.

Besides the absence of any investigation on the proportionality of the measures at stake in the light of Article 9, what warrant reflection is the ECtHR’s indifference towards the discriminatory facet of the claims. In *Mann Singh*, the ECtHR simply stated that it “did not find *any appearance* of a violation of the provision relied on”; in *El Morsli*, it went further even dismissing the applicant’s request of having her veil removed only in the presence of a woman.

Certainly, not every difference of treatment amounts to an illegitimate discrimination. Nonetheless a deeper evaluation in the light of the notion of indirect discrimination, taking into account the principle of reasonable accommodation, when specifically invoked as it was in *El Morsli*, might very well increase the ECtHR’s capability to eradicate discriminatory behaviors.

It was noted above that the comparator also performs a crucial role in acknowledging direct or indirect discriminations. Whereas the recurrence of a discrimination can be easier to reveal when a concrete comparator exists, by contrast, obstacles might occur before potential or hypothetical comparators. Therefore, as much as the comparator is concrete, the likelihood discriminatory claims will succeed increases.

Such a conclusion has proved to be of some consistency. In *Izzetin Dogan and Others v. Turkey*, concerning the status of the Alevi community as being treated less favorably than the Sunni branch of Islam, the ECtHR found a violation of Article 9, taken in conjunction with Article 14, arguing that “the applicants have received less favorable treatment than the beneficiaries of the religious public service despite being in a comparable situation”. This was a classic direct discrimination by comparison case where the finding of a concrete comparison group would not be that difficult. Moreover, not only was the comparator of simple identification (the “other” Islamic group benefiting higher standard benefits), but what’s more it was concrete.

⁵⁸ The case was about a Jehovah’s witness complaining about a Greek law excluding persons convicted of a serious crime from appointment to a chartered accountant’s post without distinguishing between persons convicted because of their religious beliefs and those convicted on other grounds.

⁵⁹ ECtHR, *Thlimmenos v. Grecia*, § 43.

⁶⁰ On this, *inter alia*, S. BARTOLE, P. DE SENA, V. ZAGREBELSKY (eds.), *Commentario breve alla Convenzione europea dei diritti dell’uomo*, CEDAM, 395.

Far from it, stand cases where the comparator demand becomes a barrier. This usually happens with indirect discrimination cases, as those mentioned above, where the disparate impact or the particular disadvantage suffered by the alleged outgroup requires statistics, but even more when the distinction between direct and indirect discrimination slightly fades.

Unfortunately, the first hypothesis did not prove to be problematic in that, as noted, the ECtHR refrains from engaging in the proportionality test in indirect discrimination cases by merely acknowledging the legitimacy of the interference⁶¹ as it did, among others, in *S.a.s. v. France* holding that, “while it may be considered that the ban imposed by the Law of 11 October 2010 has specific negative effects on the situation of Muslim women who, for religious reasons, wish to wear the full-face veil in public, this measure has an objective and reasonable justification”⁶², meaning the “living together” idea.

The second, instead, takes place when it may be disputable whether the interference is prescribed by the law, as long as the lack of a source of law impacts on the data available on the applicability the policy at stake.

In *Hamidovic v. Bosnia and Herzegovina*, following an internal regulation, a witness in a criminal trial was expelled from a courtroom, convicted and fined for refusing to remove his skullcap. The ECtHR, surprisingly⁶³, found a breach of Article 9, because the interference was disproportionate, but at the same time argued that there was no need to examine the application under the perspective of Article 14.

This long-standing approach is questionable as it prevented the ECtHR from a careful review on the alleged religion-based discrimination suffered by the applicant. In this case, though, not only was a comparator hard to find, but, even sooner, it was unclear whether the judge’s conduct might be interpreted as directly or indirectly discriminatory. To be interpreted as direct discrimination, the ECtHR would have had to delve into the judge’s routinary approach in order to verify whether the applicant’s religious affiliation was the sole justification behind the order to remove the skullcap, through the identification of a comparator. By contrast, the qualification of the judge’s conduct as indirectly discriminatory without any statistics to rely on would have resulted in a highly problematic search for data based on a non-existing rule of law signaling the particular disadvantage suffered by muslims in comparison with another group in a similar or comparable position. This ambivalence, enhanced by the absence of a clear legal basis underlying the contested obligation, was therefore, from the perspective here endorsed, decisive for the unsuccessful outcome of the discrimination claim.

Moreover, noteworthy is that this case shows how anti-discrimination strategies may be deficient when the difference in treatment is motivated by irrational stereotyping against religious minorities. A trend the ECtHR has slightly begun to nuance with respect to race⁶⁴ and gender⁶⁵, but not when religion is at the core, therefore boosting the thesis that depicts it as an isolated ground.

Difficulties in addressing the difference between direct and indirect discrimination with respect to the quest for the comparator seem to even better feature the ECJ’s case-law on religious freedom.

While *Bouagnaoui* is in line with the previous ECJ’s case-law in that it considered that “the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be

⁶¹ The so-called restrictions-based approach as underlined by AG SHARPSTON in *Bouagnaoui*.

⁶² ECtHR, *S.a.s. v. France*, § 161.

⁶³ This was the second case, after *Ahmet Arslan and Others v. Turkey*, where a claim put forward by an applicant of muslim faith was successful. For a comment, see E. BREMS, *Skullcap in the Courtroom: A rare case of mandatory accommodation of Islamic religious practice*, in www.strasbourgobserver.com.

⁶⁴ See with a specific reference to ethnic minorities, ECtHR, *Chapman v. United Kingdom*; *Connors v. United Kingdom*; *Yordanova and Others v. Bulgaria*; *Winterstein and Others v. France*.

⁶⁵ See, for an example on this, ECtHR, *Talpis v. Italy*; *Opuz v. Turkey*.

considered a genuine and determining occupational requirement within the meaning of that provision”, *Achbita* offers some hints for reflection on at least two aspects.

The first observation deals with the rationale supporting the finding of the non-existence of a direct discrimination, in that the internal rule, banning all visible wearing of any political, philosophical or religious signs in the workplace, “applies to all visible religious symbols without distinction” therefore avoiding any discrimination between religions⁶⁶.

Besides the fact that it is “astonishing that, in the eyes of the European Court, direct discrimination on grounds of religion or belief exists only when a measure targets a single religion or a selection of religions, but not when a measure targets all religions and beliefs”⁶⁷, AG Kokott’s argument, endorsed by the ECJ, may be criticized as much as it relies on a wrong comparison⁶⁸.

By contrast, it has been argued, “a policy barring the headscarf, turban, and kippah is not ‘neutral’ between religions. To the contrary [sic], such a policy disfavors persons whose religious beliefs require an outward manifestation of those beliefs”; in this sense, the true comparator is not to be found in who professes other religious beliefs, but rather in the employee who doesn’t manifest any belief.

What’s more, the circumstance that a rule equally applies to convictions other than religious does not in itself alter the fact that it targets religion in a discriminatory manner, even if jointly considered with other possible grounds of discrimination, such as personal convictions. On the opposite, the impact of a rule as such might very well be that of causing intersectional or multiple discriminatory effects⁶⁹.

Secondly and with respect to the indirect discrimination claim, regretful is the fact that the ECJ renounced to assess the proportionality of the ban, considering that “[a]n employer’s wish to project an image of neutrality towards customers [...] is in principle, legitimate, notably where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer’s customers” and when “that policy is genuinely pursued in a consistent and systematic manner”⁷⁰.

In the ECJ’s view, the question therefore shifts from that of verifying whether the rule, although couched in neutral terms, imposes a particular disadvantage on a group, to that of “whether the prohibition on the visible wearing of any sign or clothing capable of being associated with a religious faith or a political or philosophical belief covers only G4S workers who interact with customers”⁷¹; as long as this was the case and since the applicant had been offered a back office position prior to the dismissal, the prohibition must be considered strictly necessary⁷².

⁶⁶ See, AG KOKOTT, § 49: “the ban at issue applies to all visible religious symbols without distinction. There is therefore no discrimination between religions. In particular, all of the information available to the Court indicates that the measure in question is not one directed specifically against employees of Muslim faith, let alone specifically against female employees of that religion. After all, a company rule such as that operated by G4S could just as easily affect a male employee of Jewish faith who comes to work wearing a kippah, or a Sikh who wishes to perform his duties in a Dastar (turban), or male or female employees of a Christian faith who wish to wear a clearly visible crucifix or a t-shirt bearing the slogan ‘Jesus is great’ to work”.

⁶⁷ E. BREMS, *Analysis: European Court of Justice Allows Bans on Religious Dress in the Workplace*, cit.

⁶⁸ S. OUALD-CHAIB, V. DAVID, *European Court of Justice keeps the door to religious discrimination in the private workplace opened. The European Court of Human Rights could close it*, in www.strasbourgobserver.com.

⁶⁹ E. SPAVENTA, *What is the point of minimum harmonization of fundamental rights? Some further reflections on the Achbita case*, in <http://eulawanalysis.blogspot.com>.

⁷⁰ ECJ, *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, § 38.

⁷¹ *Ibid.*, § 42.

⁷² On the risks of neglecting diversity by hiding religious visible minorities, see Y. KENJI, *Covering: The hidden assault on our civil rights*, Random House Trade Paperbacks, 2007 and S. OUALD-CHAIB, V. DAVID, *European Court of Justice keeps the door to religious discrimination in the private workplace opened. The European Court of Human Rights could close it*, cit.

Nonetheless, this approach overlooks the harm placed on the side of the applicant, as long as it fails to engage in “any balancing of the needs of the corporate policy with the disadvantages imposed on the individuals affected”⁷³.

In refraining from an inquiry into the proportionality of the ban, *Achbita* clashes with the ECtHR’s finding in *Eweida* where the ECtHR, even acknowledging that the Commission had dismissed cases on account that changing job might be considered “enough” to exclude the interference, recognized that “[g]iven the importance in a democratic society of freedom of religion [...] where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate”⁷⁴ and this, regrettably, was precisely what was missing in *Achbita*.

Besides the noted incoherence between the judgements and to summarize on this point, the two jurisdictions appear rather consistent in avoiding in-depth investigations into religion-based directly and indirectly discriminatory behaviors.

With regard to direct discrimination, the non-unanimous suspectness of religion together with the wide margin of appreciation afforded to national States has until now greatly affected the ECtHR’s “very weighty reasons test”, as well as the restrictive and rather insensitive ECJ’s approach, whose unfortunate reliance on the ECtHR’s trend has been extensively confirmed by *Bougnaoui* and *Achbita*.

As to indirect discrimination, while the ECtHR does not even commit into any examination limiting its scope to a non-interferences-based approach, the ECJ has made its first (disappointing) attempt to delve into an invoked indirect discrimination on religious ground.

From the standpoint of *Bougnaoui* and *Achbita*, it may therefore conclusively be interfered that the major challenge in the scrutiny relied in the identification of the true comparator which, in *Achbita* in particular, proves to be fairly confusing. Beyond its deliberate or “naïve” origin, it is unclear whether “the other” to be compared with, had to be found in the group of those who possess different religious belief (a), those who wish to manifest a belief other than religious (b) or, conversely, all the employees who do not share the need to display any individual affiliation (c). In that it constitutes the prior logic to the following analysis, the troubling identification of the comparator had been crucial in undermining the successful assessment of the proportionality test.

6. Judiciary Self-Restraint and States’ Discretion in Religion-Based Discrimination Claims

The third and last challenge featuring religion-based discriminations covers the leading role played by the margin of appreciation combined with Courts’ tendency to excuse States’ prohibitionist approaches through a blanket reference to the principle of secularism⁷⁵.

What seems to emerge from the ECtHR’s case-law in particular is, on the one hand, a preference to let States deal individually with religious manifestations as a way to effectively

⁷³ M. BELL, *Leaving Religion at the door? The European Court of Justice and Religious Symbols in the Workplace*, in *Human Rights Law Review*, cit., 794.

⁷⁴ ECtHR, *Eweida and Others v. United Kingdom*, § 83.

⁷⁵ On this and within the Italian literature, see L. VANONI, *Pluralismo religioso e Stato (post) Secolare. Una sfida per la modernità*, Giappichelli, 2016; *Ibid.*, *La laicità e libertà di educazione. Il crocifisso nelle aule scolastiche in Italia e in Europa*, Giuffrè, 2013. For an insight beyond the legal question surrounding the display of religious symbols in the public sphere, see, also, L. VIOLINI, *Bioetica e laicità*, in *Problemi pratici della laicità agli inizi del secolo XXI (Atti del XXII Convegno nazionale dell’Associazione Italiana dei Costituzionalisti, Napoli, 26-27 ottobre 2007)*, Cedam, 2008; *Ibid.* (ed.), *Temi e problemi di diritto pubblico comparato*, Maggiolini, 2014.

guarantee specific situations on a national basis; on the other, a blanket use of the principle of secularism which, deprived of its multifaceted dimensions, is proposed or imposed to any Contracting States without the least investigation into its peculiar implications within each State⁷⁶.

The two detailed trends should serve each other in as much as the principle of secularism is conceived as being filled with the specificities of each State, acting as the *rationale* of the margin of appreciation doctrine. However, the ECtHR has contained its open interpretation, opting for the endorsement of a strict form of secularism, as Judge Costa positively brought forward in the early 2000⁷⁷, though elsewhere referred to as “intolerant”⁷⁸, and as Judge Tulkens envisioned in her dissenting opinion in *Leyla Sahin v. Turkey*⁷⁹.

Whereas the ECtHR has never specified the principle’s contents in the light of the Convention⁸⁰, it has nevertheless suggested that not only should it be included within the legitimate aims justifying an interference within manifestations of religious beliefs, but, what’s more, it has often interpreted it through the lens of the French *laïcité*.

In taking this path, the principle has therefore been progressively colored by neutrality, in that the case-law on religious symbols proves to have generally interlaced secularism with States’ demand of avoiding religious intrusions in the public domain.

References to such a construction of secularism may be found in *Leyla Sahin v. Turkey*⁸¹, where the ECtHR argued that “it is the principle of secularism, [...] which is the paramount consideration underlying the ban on the wearing of religious symbols in universities. In such a context, [...] it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn”⁸².

Not differently, in *Lautsi v. Italy*⁸³, the Grand Chamber took the view that secularism might be included within the legitimate aim of the “protection of the rights and freedoms of others”, within the meaning of Article 9 § 2, and same conclusion was drawn in *Hamidovic v. Bosnia Herzegovina* with no further indications, despite the embraceable remarks highlighted by Judge De Gaetano in its concurring opinion.

The combined effect of these two elements – the wide margin of appreciation and the preference accorded to a strict form of secularism – have eventually greatly affected religious minorities in their attempt to claim for a sensitive approach towards religious diversity. The resort to a wide margin of appreciation and the application of the neutrality principle have in fact largely contributed to the neglect of the discriminatory facets of the claims, in that:

⁷⁶ On this, see, *inter alia*, I. RORIVE, *Religious symbols in the public space: in search of a European answer*, in *Cardozo Law Review*, 2009, 2669 ss.;

⁷⁷ The reference is to the statement by Judge COSTA at the time of France’s debate on the Stasi Commission when he admitted that “in the event that such statute was reviewed by our Court, it would be considered as complying with the French model of secularism and, consequently not in breach of the European Convention”.

⁷⁸ This view is widespread in literature, See, *inter alia*, Z.R. CALO, *Note, Pluralism, Secularism and the European Court of Human Rights*, in *J.L. & Religion*, 2010, 272; A.B. KOLENC, *Religion Lessons from Europe: Intolerant Secularism, Pluralistic Neutrality, and the U.S. Supreme Court*, in *Pace International Law Review*, 2017, 43 ss. In the ECtHR’s case-law, this trend may be found in *Dablab v. Switzerland*, but also in *S.a.s. v. France*.

⁷⁹ See, § 7.

⁸⁰ With the exception of *Lautsi v. Italy* where the ECtHR included secularism within the meaning of “personal convictions”, see § 58.

⁸¹ On this, see S. LANGLAUDE, *Indoctrination, Secularism, Religious Liberty, and the ECHR*, in *The International and Comparative Law Quarterly*, 2006, 929 ss.

⁸² ECtHR, *Leyla Sahin v. Turkey*, § 116.

⁸³ ECtHR, *Lautsi v. Italy*. On this, see L. VANONI, *Laicità e libertà di educazione. Il crocifisso nelle aule scolastiche in Italia e in Europa*, Giuffrè, Milano, 2013; S. MANCINI, *La sentenza della Grande Camera sul crocifisso: è corretta solo l’opinione dissenziente*, in *Quaderni costituzionali*, 2011, 425 ss.; On the Italian case and before the Grand Chamber’s judgement, see the analysis offered in R. BIN, G. BRUNELLI, A. PUGIOTTO, P. VERONESI (eds.) *La laicità crocifissa? Il nodo costituzionale dei simboli religiosi nei luoghi pubblici. Atti del Seminario*. Ferrara, 28 maggio 2004, Giappichelli, 2004.

first, by stating that the interference is legitimate in the light of an abstract interpretation of secularism, the ECtHR escapes the further analysis as to whether the interference is “necessary in a democratic society”; second, and though Article 14 might be violated even when no other conventional rights does, dismissing the claim under Article 9 means no room for verifying the compliance with Article 14. In so doing, the ECtHR gave way to a “smooth over approach” towards religion across Europe, shrinking its chances to adequately protect the rights of religious minorities⁸⁴, and, more generally, neglecting room for protection of the *forum externum*. In this sense, it has been emphasized that “neutrality becomes invisibility and even exclusion”⁸⁵.

On a last note, it is moreover disputable the argument that lies at the core of the wide margin of appreciation in cases concerning religious symbols, meaning the presumed lack of *consensus* among the member States. On the opposite, this is a far-reaching conclusion when in fact only few countries (Belgium and France) fully regulate on the display of religious symbols in the public space⁸⁶.

Turning briefly to EU law, it is worth mentioning that discussions on the potential application of the margin of appreciation doctrine have been prompted also within the context of the Employment Equality Directive with contrasting suggestions by AG Kokott in *Achbita* and AG Sharpston in *Bouagnaoui*.

It is unclear whether the ECJ will take one side or the other, tying up its case-law to the ECtHR’s or, conversely, releasing it. The hope is that the ECJ will fully recognize the “centrality of the principle of equality”⁸⁷, rejecting reasonings on abstract principles, nurtured by references to States’ margin of appreciation, and favoring a more balanced and concrete approach through the proportionality analysis⁸⁸.

Conclusive Remarks. Beyond the Counter-Majoritarian Dilemma: Religious Minorities in the European Multicultural Era

Religion appears to badly reacts with anti-discrimination principles at least in the European scenario.

Although reluctance in taking religion seriously likewise resounds in the lacking protection afforded to religious minorities under international human rights law⁸⁹, same deference to national States and misconception of direct and indirect discriminations is nowhere to be found.

Despite the problematic coordination between ECJ’s *Achbita* and ECtHR’s *Eweida*, whose relevance has though been downsized by the following *Ebrahimian v. France* case, both

⁸⁴ See, on this, the dissenting opinion of Judges TULKENS in *Leyla Shain v. Turkey*.

⁸⁵ M. BELL, *Leaving Religion at the door? The European Court of Justice and Religious Symbols in the Workplace*, 796.

⁸⁶ See, the jointly dissenting opinion of Judges NUSSBERGER and JÄDERBLOM in *S.a.s. v. France*: “it is difficult to understand why the majority are not prepared to accept the existence of a European consensus on the question of banning the full-face veil (see paragraph 156 of the judgment). In the Court’s jurisprudence, three factors are relevant in order to determine the existence of a European consensus: international treaty law, comparative law and international soft law [...]. The fact that forty-five out of forty-seven member States of the Council of Europe, and thus an overwhelming majority, have not deemed it necessary to legislate in this area is a very strong indicator for a European consensus [...]. Even if there might be reform discussions in some of the member States, while in others the practice of wearing full-face veils is non-existent, the status quo is undeniably clear”.

⁸⁷ L. VICKERS, *ECJ headscarf series (2): the role of choice; and the margin of appreciation*, cit.

⁸⁸ *Ibid.* See, also, the dissenting opinion of Judge TULKENS in *Leyla Shain v. Turkey*, § 2, “the Court’s review must be conducted in concreto, in principle by reference to three criteria: firstly, whether the interference, which must be capable of protecting the legitimate interest that has been put at risk, was appropriate; secondly, whether the measure that has been chosen is the measure that is the least restrictive of the right or freedom concerned; and, lastly, whether the measure was proportionate, a question which entails a balancing of the competing interests”.

⁸⁹ See N. GHANEA, *Are Religious Minorities Really Minorities?*, in *Oxford Journal of Law and Religion*, 2012, 57 ss.

Courts show a poor insight into the notion of direct and indirect discrimination when coupled with manifestations of religious belief. The dichotomy *forum internum/forum externum* has therefore been counterproductive in the safeguard of non-discrimination and religious freedom, in that Courts refrain from examining the reasons justifying interferences, allowing States to get away with a wide margin of discretion and no proportionality assessment.

Nevertheless, and hopefully, this is not a one and only approach.

By contrast, the UN Human Rights Committee has developed a more sensitive approach in religious discrimination cases. In *Mann Singh v. France* and *Ranjit Singh v. France*, the Committee overturned ECtHR' findings, welcoming the application of the reasonable accommodation principle in religious discrimination and a concrete proportionality assessment⁹⁰. Moreover, not only did the HRC probe whether the interference was proportionate, but went on neglecting that secularism might justify it in the first place, narrowing States' margin of appreciation.

Whether the ECtHR and the ECJ will side with the HRC in future cases is hard to say⁹¹.

As for now, in religion-based discrimination cases, the ECtHR – and, to some extent, the ECJ – seems to be puzzling over the counter-majoritarian dilemma, limiting its supervisory role to an endorsement of States' (majoritarian) preferences through a massive resort to the margin of appreciation doctrine.

What, conversely, might be advocated here is a case-by-case evaluation of the interferences in those human rights, like religious freedom, which, intrinsically counter-majoritarian, ask, at the very least, for an assessment of their necessity in a democratic and – I would add – multicultural and multi-religious society⁹².

⁹⁰ See, § 8.4, “the State party has not explained why the wearing of a Sikh turban covering the top of the head and a portion of the forehead but leaving the rest of the face clearly visible would make it more difficult to identify the author than if he were to appear bareheaded, since he wears his turban at all times. Nor has the State party explained how, specifically, identity photographs in which people appear bareheaded help to avert the risk of fraud or falsification of residence permits”. On this, see S. BERRY, *A 'good faith' interpretation of the right to manifest religion? The diverging approaches of the European Court of Human Rights and the UN Human Rights Committee*, in *Legal Studies*, 2017, 672 ss.

⁹¹ An interesting one is ECtHR *Lachiri v. Belgium*. On this, see E. BREMS, C. HERI, S. OUALD CHAIB, L. VERDONCK, *Head-Covering Bans in Belgian Courtrooms and Beyond: Headscarf Persecution and the Complicity of Supranational Courts*, in *Human Rights Quarterly*, 2017.

⁹² On the need to undergo a case-by-case analysis when conflicting rights are at stake, see M. D'AMICO, *I diritti contesi. Problematiche attuali del costituzionalismo*, FrancoAngeli, 2016 and, *Ib.*, *Laicità costituzionale e fondamentalismi tra Italia ed Europa: considerazioni a partire da alcune decisioni giurisprudenziali*, in *Rivista AIC*, 2015.