

THE POLITICS OF EUROPEAN HUMAN RIGHTS CULTURE

Petr Agha*

Abstract: *The issue of religious symbols in the public space has given rise to widespread debate on the scope of freedom of religion and of the State's neutrality in various countries around the world. Over the years, it has become a source of vigorous legal and political controversy. In Europe in particular, this question chiefly concerns the wearing of headscarves. Bans (often formulated as either bans on headgear or as general bans on religious symbols or dress) have been introduced by many countries and in many areas of life. Islamic dress tends to be commonly perceived (at least in the west) as being associated with the subordination of young girls and women and the perceived link with what is commonly termed "Islamic fundamentalism". The wearing of religious symbols has been discussed both from a socio-political as well as legal perspective. These developments, particularly attempts to change a cultural reticence to publicly express faith into a legal obligation to refrain from religious expression in certain circumstances, have brought major challenges for European human rights law, most notably in relation to the wearing of religious dress. Although most European legal systems provide protection for religious freedom and to religious minorities, the scope of this protection is affected by many factors, such as history, (constitutional) traditions and social factors. In essence, the term European human rights culture developed in the interplay of jurisprudence between The Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). The text explores the two recent CJEU rulings and juxtaposes it against the recent developments in the ECtHR jurisprudence, focusing on how CJEU departs from the established manner set out by the ECtHR of dealing with cases involving the limitations on fundamental rights. The purpose of this is to present a reflection of the recent state of the European human rights culture, which has, in the past years, become very dynamic.*

Keywords: *Court of Justice of the European Union, European Court of Human Rights, human rights, religious symbols, public space, human rights culture*

INTRODUCTION

The issue of religious symbols in the public space has given rise to widespread debate on the scope of freedom of religion and of the State's neutrality in various countries around the world.¹ Over the years, it has become a source of vigorous legal and political controversy. In Europe in particular, this question chiefly concerns the wearing of clothing linked to the religion of immigrants, most visibly the Islamic headscarf in various places such as schools, workplaces and courtrooms, or on pictures stamped on official documents. Besides the issue of wearing religious symbols, some European countries, like Germany, Italy, Spain, and Switzerland, have also faced litigation challenging the presence of crucifixes in schools, courtrooms, and other public buildings.²

* Mgr. Petr Agha, Ph.D., LL.M. Institute of State and Law of the Czech Academy of Sciences, Prague, Czech Republic. The author would like to acknowledge the financial support of the Czech Science Foundation through a project on 'Human Rights in Inter-Cultural Perspectives' (grant ID: 13-30299S) awarded to the Institute of State and Law of the Academy of Sciences of the Czech Republic, created under subsidies for a long-term conceptual development (RVO: 68378122).

¹ McGOLDRICK, D. *Human Rights and Religion: The Islamic Headscarf Debate in Europe*. Oxford: Hart Publishing, 2006, p. 340.

² MANCINI, S. The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence. *Cardozo Law Review*. 2009, Vol. 30, No. 6, pp. 2629–2668.

Conflict on the issue of public veiling represents an important instance of a broader struggle to define and apply boundaries to religion's role and influence in European societies at a time when established boundaries are being challenged by greater religious diversity. The more muscular religiosity of many members of communities of immigrant origin, particularly those communities with roots in mainly Muslim societies, is raising complex and difficult issues for European states. They are reacting by seeking to define more strictly the boundaries of the settlement between law, society and faith, boundaries which have to date been a matter of cultural convention rather than legal rule in many European states. Thus, as cultural consensus breaks down, the law moves into replace cultural norms with legal rules. Matters are complicated by the fact that this is happening against a background of widespread hostility to migration and severe discrimination against some minority populations. These developments, particularly attempts to change a cultural reticence to publicly express faith into a legal obligation to refrain from religious expression in certain circumstances, have brought major challenges for European human rights law, most notably in relation to the wearing of religious dress.³

When religious symbols are at stake, secularism is one of the most important concepts to explore. Each country has its own understandings of concepts such as secularism, freedom of religion, religious practices, the relationship between church and state. In a pluralistic society, both for majorities as well as for minorities, religion plays a peculiar role in identity related dynamics.⁴ Religion is not just a private issue, but it has its presence in the public arena too and not all the manifestations (expressions) of religion or belief are happily received by States or by fellow citizens. Moreover, there may be a conflict between an individual's religion or belief and the values of a democratic society and the requirement to obey its generally applicable laws. What for some is just a piece of cloth worn as a positive declaration of faith is, for others, a sinister public statement that may even (in certain places) constitute a threat to the very organs of the state.

There are few things more capable of generating controversy in contemporary Europe than the Islamic headscarf. First, Islamic dress has been commonly perceived (at least in the west) as being associated with the subordination of young girls and women. A second reason why Muslim dress often generates controversy is because of a perceived link between certain items of clothing and what is commonly termed "Islamic fundamentalism". Thirdly, Muslim dress is often controversial because it highlights an important difference between the Islamic and secular liberal traditions – the role of faith in public life. Although most European legal systems provide protection for religious freedom and to religious minorities, the scope of this protection is affected by many factors. History, traditions (including constitutional traditions) and social factors play crucial roles in shaping relations

³ For a comparative account of laws in relation to the Islamic headscarf, see McGOLDRICK, D. *Human Rights and Religion: The Islamic Headscarf Debate in Europe*. Oxford: Hart Publishing, 2006. For a qualified criticism of the ban on ostentatious religious symbols in French public schools, see LABORDE, C. *Critical Republicanism*. Oxford/New York: Oxford University Press, 2008. For a defence of this ban, see WEIL, P. Why the French La cité Is Liberal. *Cardozo Law Review*. 2009, Vol. 30, No. 6, pp. 2699–2714.

⁴ MANCINI, S. The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence. *Cardozo Law Review*. 2009, Vol. 30, No. 6, pp. 2629–2668.

between religious individuals, communities and the State. One should also note that political agendas have some role in these relations. The interplay between these complex factors emerged quite prominently in the recent case of *Lautsi v Italy* (Crucifix case) which involved displaying the crucifix in a public school.⁵

The headscarf controversy has become a major legal battleground in courtrooms around the world. The acceptance of religious symbols in the public sphere greatly varies from State to State. National political cultures and social histories weight heavily on the construction of concepts framing the scope of freedom of religion, such as secularism or public order. In Europe, one traditionally opposes the French situation with the British one. While France has been characterized by a general legislative ban on any conspicuous religious signs in public schools since 2004,⁶ Islamic headscarves and Sikh turbans traditionally have been allowed in British classrooms.⁷ The United Kingdom's famous *Shabina Begum* case, where the House of Lords took a different view than the Court of Appeal of England and Wales, concerned a teenage Muslim schoolgirl who wanted to wear a more extensive covering (jilbab) than was permitted under one of the school uniform alternatives that allowed the Islamic headscarf (hidjab).⁸ Such a debate is unthinkable in France where the Supreme administrative Court has even considered the *keski* (i.e., the under-turban of the Sikhs, "which is like an invisible hair net") to be a conspicuous religious sign per se, because the wearing of the under-turban made the schoolboys immediately recognizable as Sikhs.⁹ The strict attitude of the French authorities is also illustrated by their refusal to enter into the debate on the meaning of the *keski* and the turban, which, according to some, are more cultural symbols rather than religious ones. Between the two emblematic extremes of France and the United Kingdom, there is, however, a full range of national regulations and practices.

European human rights culture

In essence, the term European human rights culture is explained by both a political desire and a judicial self-esteem. Developed in the interplay of jurisprudence between Luxembourg and Strasbourg, a basis for a common European understanding of what human rights should guarantee exists. The human rights jurisprudence has roots in the legal culture of the European Court of Human Rights (ECtHR), and that of the Court of Justice of the European Union (CJEU). The Court of Justice of the European Union (CJEU), is the highest judicial body of the European Union (EU). The other, the European Court of Human Rights (ECtHR), is the high court that handles issues arising under the European Convention on Human Rights, its

⁵ *Lautsi v Italy* (App no 30814/06) ECHR 18 Mar. 2011.

⁶ Law No. 2004-228 of Mar. 15, 2004, regulating, by virtue of the principle of *laïcité*, the wearing of signs or attire manifesting a religious belonging in public schools, *Journal Officiel de la République Française* [J.O.][Official Gazette of France], Mar. 17, 2004, p. 5190.

⁷ *Mandla (Sewa Singh) v. Dowell Lee*, [1983] 2 A.C. 548 (H.L.),

⁸ *R. (On the Application of Begum (By Her Litigation Friend, Rahman)) v. Headteacher, Governors of Denbigh High Sch.*, [2006] UKHL 15, [2007] 1 A.C. 100.

⁹ McGOLDRICK, D. *Human Rights and Religion: The Islamic Headscarf Debate in Europe*. Oxford: Hart Publishing, 2006, p. 94.

membership is much broader; it includes, all of the members of the European Union, but it includes the other signatories as well, whether part of the EU or not; Russia, Norway, and the Baltic countries, for example. For a long time, the activities of the two Courts were somewhat distinct and far apart. The CJEU dealt with EU matters, and these were mostly economic issues, regulatory issues or the specific clauses of EU treaties, while the ECtHR dealt exclusively with human rights; it interpreted the texts of the European Convention. A casual observer might imagine that these two Courts would occupy very divergent cultural spaces. There are, after all, some fairly striking differences between them. The CJEU speaks French. French is its language, and only French and the Court speaks with a single voice. The decisions are always unanimous. The voice of the ECtHR, on the other hand, speaks both in English and in French. The Court allows dissents and concurrences. The style of the judges of the ECtHR is more personal, more individualistic, than the style of the ECJ judges, who tend to write in a rather dry and formalistic way. But the lines between the two Courts have blurred considerably, in recent years. More and more, the CJEU has added a human rights annex to its conventional EU work. It has become, in a real sense, a human rights court on its own. In that respect, it appears clear that the case law of the CJEU and the ECtHR are the most important sources of European human rights law. This interaction, or *mélange*, arguably leads to the formation of a dense European human rights area. This cross-fertilisation may also lead to increasing conflicts of interpretation and jurisdiction between the two European legal orders. Indeed, human rights issues in the EU legal order have been maturing immensely under the impulsion of both the case law of the CJEU and also by the adoption of legislation specifically concerning the protection of human rights, i.e. the creation of the Human Rights Agency in 2007, and the Lisbon Treaty of 2009, providing a legally binding nature to the EU Charter of Fundamental Rights.

Who is the true promoter of human rights in Europe? At first glance this may be easy to answer since the European Court of Human Rights is the human rights court for Europe. Yet, EU Commission President Barroso has referred to the “European Human Rights Culture”, a political term attributable to the European Union (EU), and we witnessed some spectacular cases that have pushed human rights forward in Europe and that have originated in Luxembourg. Luxembourg has matured its own competences in human rights. Of course, it is true that this Court is not, as such, a ‘human rights court’. As the supreme interpreter of EU law, the Court nevertheless has a permanent responsibility to ensure respect for such rights within the sphere of the Union’s competence. Indeed, in *Bosphorus* the Strasbourg court indicated that the European Court of Justice has an essential role to play in safeguarding rights deriving from the ECHR and its associated protocols as they apply to matters governed by EU law – a function that can only assume greater significance as and when the European Union accedes to the ECHR.

Human rights were originally neither the focus of the CJEU nor the EU. In the beginning, the European treaties contained no clauses on human rights. The CJEU developed its human rights concepts in its jurisprudence gradually.¹⁰ Explicit reference to the Stras-

¹⁰ SCHEECK, L. The Relationship between the European Courts and Integrations through Human Rights. *ZaöRV*. 2005, Vol. 65, p. 871.

bourg system has been made since the 1970s. Having demand for orientation beyond the common constitutional traditions of the member states and in the absence of an EU catalogue of human rights, it was originally Luxembourg that to a greater degree searched for reference in Strasbourg. In the early years there was no natural demand to look at the EU, but Strasbourg was influenced by Luxembourg nonetheless.¹¹ The ECHR and Strasbourg case law provided orientation especially in cases concerning: family life, personal status, fair trial and freedom of expression.¹² An example of a strong push for Strasbourg from Luxembourg is the cases concerning transsexuals. Christine Goodwin is a male to female transsexual who challenged the UK system of national insurance (NI) numbers and practice of Department of Social Security in relation to these numbers. By having to disclose her NI number allowed employers to trace her identity, which led to problems at work. She also challenged that she would receive pension only according to her male age and not her female age and that she was not able to alter her birth certificate. The ECtHR judges unanimously found a violation of the Convention under Article 8 (private life). The ECtHR held that a change of UK legislation on documentation and marriage would be unproportional. What caused this change? Here, the CJEU provides the answer. Luxembourg decided in *P. v. S. and Cornwall*¹³ that discrimination arising from gender reassignment constituted discrimination on grounds of sex and therefore the Directive on equal treatment for men and women in regards to access to employment, training and working conditions applied.¹⁴ The United Kingdom introduced upon the CJEU judgment regulations providing that transsexuals should not be treated less favourable at the workplace because of their transsexuality.¹⁵ Based upon the negative impacts and difficulties that Ms. Goodwin had to endure, the judges found a violation of Ms. Goodwin's right to private life. In addition, the Strasbourg judges found unanimously as well a violation of the right to marry (Article 12). Two years later, this Strasbourg development was reflected upon by Luxembourg. In *K.B.*¹⁶ the issue was the denial of survivor's pension to K.B.'s partner, who had undergone gender reassignment. Because of the gender reassignment the partners were prevented from marrying and in consequence the pension could not be paid. The question posed was whether this constituted discrimination and a violation of EU law. The Luxembourg judges now paid close attention to Christine Goodwin and that the fact that she was as a result of her gender-reassignment unable to marry was deemed to constitute a violation of the ECHR. They held that legislation which breaches the ECHR is incompatible with EU law.¹⁷

¹¹ JACOBS, F. Interaction of Case Law of the European Court of Human Rights and the European Court of Justice: Recent Developments. In European Court of Human Rights. Dialogue between Judges, European Court of Human Rights. In: *Council of Europe* [online]. 2008 [2017-06-01]. Available at: <http://www.echr.coe.int/Documents/Dialogue_2008_ENG.pdf>. See pp. 67–87.

¹² DOUGLASS-SCOTT, S. A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis. *Common Market Law Review*. 2006, Vol. 43, No. 3, p. 647.

¹³ Case C-13/94 *P. v. S. and Cornwall County Council* [1996] ECR I-2143.

¹⁴ *Goodwin v The United Kingdom* [2002] ECHR (Case No 28957/1995), para. 43. 26 *Ibid.*, para. 45.

¹⁵ *Ibid.*, para. 45.

¹⁶ Case C-117/01 *K.B. v. NHS* [2004] ECR I-541.

¹⁷ *Ibid.*, para. 34.

This exchange shows how Luxembourg influenced Strasbourg's case law. Luxembourg's rulings provided the impetus for Strasbourg to go further in its human rights standards. Upon this Strasbourg judgment, Luxembourg then integrated the new ruling into its case law and affirmed its standards. This cross-fertilisation between the two Courts that we have witnessed and the incentives for developing human rights standards at the ECtHR that originated in Luxembourg speak for a trend that will also continue in the future. Aside from the complaints of some non-EU state judges, the systematic use of the EU Charter in the future, in a non-compulsory way, like the CJEU's use of the ECtHR case law, is likely.

In contrast, the CJEU case law on equality aims to set standards to eradicate inequality, rather than reflect different national traditions. Of course, the margin of appreciation will not directly apply in the context of the Directive, but the process of reciprocal interpretation as between the CJEU and the ECtHR could mean that a similar concept could be used. The opinions in *Achbita* and *Bouagnaoui* both take different approaches to the question of whether the national context should be taken into account in assessing the proportionality of any restrictions on religious practice. In *Achbita*, AG Kokott concludes that some discretion is needed for States when applying the Equality Directive, stating that one of the factors to which the court should have regard in assessing proportionality is '*the national identities of Member States inherent in their fundamental structures*'. This reasoning is entirely consistent with the approach of the ECtHR as it has consistently respected the individual States' national identities in allowing restrictions on religious symbols at work in cases such as *Sahin v Turkey*, and *Ebrahimian v France*.

The EU anti-discrimination law framework

Whereas the Council of Europe has gathered countries of the continent since its enlargement to the East in the 1990s, the European Union covers a smaller territory and reaches less far East. Implementing the principle of equal treatment between persons irrespective of religion or belief is a very recent concern in EU law. In other respects, anti-discrimination has, however, been a key element of European integration.¹⁸ The first EEC Treaty included a number of provisions prohibiting discrimination against EU nationals living or working in another member State.¹⁹ The result of years of civil society campaigning was the inclusion of Article 13 in the EC Treaty, following the entry into force of the 1997 Amsterdam Treaty. This provision is the cornerstone of potentially wide-ranging European anti-discrimination laws, as it empowers the Community "*to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.*"²⁰ Two Directives were, however, adopted in 2000, the year following the entry into force of the Amsterdam Treaty: Directive 2000/43/EC, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the Racial Equality Directive), and Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation with respect to religion or

¹⁸ See, e.g., BELL, M. *Anti-Discrimination Law and the European Union*. Oxford: Oxford University Press, 2012.

¹⁹ See EEC Treaty pt. I, art. 7 (now EC Treaty art. 12).

²⁰ EC Treaty art. 13.

belief, disability, age and sexual orientation (the Employment Equality Directive). The EU legislation prohibits direct and indirect discrimination on grounds of religion in the context of employment²¹ and the Court of Justice has recognised non-discrimination as a general principle of law which all the EU and national law in the sphere of competence EU must respect.²² Article 14 of the ECHR also prohibits discrimination in relation to the rights protected by its other articles while Protocol No 12 of the same Convention prohibits discrimination more generally.

The public order defined by these two pan-European institutions contains a range of rights that may be affected by a ban on the veil. Both the ECHR and the EU law contain explicit commitments to freedom of religion.²³ The Convention and the EU Charter also protect the right to privacy (including a right to define one's own identity) and the right to freedom of expression, both of which may be restricted by a prohibition of the wearing of the veil. Restricting the wearing of a symbol worn only by female Muslims involves significant scope for claims of discrimination. The legal order of the EU is explicitly committed to promoting gender equality and to enabling Member States to protect their national cultural traditions,²⁴ thus leaving some scope for Member States to take action to promote the interaction of men and women on equal terms as well as to protect cultural norms in relation to interactions in public spaces. The ECHR has been held by the Strasbourg Court to accommodate what has been termed 'militant democracy'.²⁵ This is a doctrine that permits Member States to take illiberal measures such as suppression of political parties committed to overthrowing democracy, in order to protect liberal democracy. The Court of Human Rights controversially held in the *Refah Partisi* case²⁶ that this right of states to defend liberal democracy encompasses measures to protect the secularity of the state and the separation of religion and politics.

In relation to the EU anti-discrimination law framework, the concept of indirect discrimination is particularly meaningful as restrictions to wear religious symbols often occur in the form of dress code requirements. Independent of any discriminatory intent, an indirect discrimination occurs where "an apparently neutral provision, criterion or practice" would put persons of a particular religion or belief at a particular disadvantage, unless it can be "objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."²⁷ A company dress code could amount to indirect discrimination based on religion when it is incompatible with the wearing of the headscarf, the

²¹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

²² See Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*.

²³ Article 9 ECHR; and Article 10 Charter of Fundamental Rights of the European Union. EU Directive 2000/78/EC on discrimination in employment, which, by prohibiting indirect religious discrimination in the labour market, indirectly protects the principle of religious freedom.

²⁴ For gender equality, see Article 23 Charter of Fundamental Rights of the European Union; and Articles 2 and 3 Treaty on European Union. For cultural autonomy, see Articles 3.3 and 4.2 Treaty on European Union.

²⁵ See BOYLE, K. *Human Rights, Religion and Democracy: The Refah Party Case*. *Essex Human Rights Review*. 2004, Vol. 1, No. 1, pp. 1–16.

²⁶ *Refah Partisi and Others v Turkey* 2003-II; 37 EHRR 1

²⁷ Council Directive 2000/78/EC, art. 2(2)(b).

kippa, or the turban without proper justification, i.e., safety for jobs requiring the wearing of a helmet, public health for jobs in the food industry, etc. Against this background, the question is nowadays whether an indirect discrimination could be justified in cases where reasonable accommodation is conceivable. Take the example of a chemistry laboratory whose safety regulation requires the workers to wear a proper white coat and a hair net, to knot any long hair and not to wear any scarf or hat. This regulation, neutral on its face, discriminates against Muslim women, but undoubtedly pursues a legitimate aim (safety of the workers). Would it pass the proportionality test if a Muslim worker offers to wear a suitably designed fire-proof headscarf? Then again, the place of religious symbols in the public space remains a very sensitive issue in EU law and the material scope of the Employment Equality Directive is somehow limited as it is confined to employment and occupation, as well as vocational training.²⁸ Opinions may reasonably differ in a democratic society, when questions concerning the relationship between State and religions are at stake, when the place of religions in the public space is discussed. A uniform solution throughout Europe might neither be achievable nor desirable. What is coming out of the current case law of the European Court of Human Rights, however, is a significant tension between the principles put forward and the way they are applied. So far, referring to the national margin of appreciation is the only answer that the European Court of Human Rights has been giving when the issue of banning religious symbols from the public space is at stake.

Case study: the manifestation of beliefs in the private workplace

Some answers could also come from the European Union through anti-discrimination law. For the last decade EU law has certainly been the driving force toward a more effective implementation of the principle of equal treatment in Europe.²⁹ On 14 March 2017, the European Court of Justice issued two judgments, in the cases of *Achbita* and *Boungaoui* concerning the manifestation of beliefs in the private workplace. The two cases concern the issue of whether the prohibition of discrimination based on religion under the Employment Equality Directive 2000/78 makes it unlawful for a private-sector undertaking to dismiss a Muslim employee because she refuses to remove her veil at work.

Both cases concern Muslim women employees who work(ed) in private companies. In the first case, Ms. Achbita worked already for three years for the Belgian branch of G4S before she decided to wear an Islamic headscarf, as a consequence of which she was dismissed. G4S argued that this was not in accordance with their company neutrality policy, which they introduced only after Ms. Achbita made clear that she wanted to wear a headscarf. In the second case, Ms. Boungaoui was already wearing a headscarf at the time she was hired as an engineer by the French company “Micropole”. After complaints of cus-

²⁸ MCCOLGAN, A. et al. National protection beyond the two EU Anti-discrimination Directives Justice The grounds of religion and belief, disability, age and sexual orientation beyond employment. In: *European Commission* [online]. 2013 [2017-06-01]. Available at: <http://ec.europa.eu/justice/discrimination/files/final_beyond_employment_en.pdf>.

²⁹ In this respect it is striking to note that the European Court of Human Rights explicitly referred to EU anti-discrimination law in the leading case *D.H. v. Czech Republic*, App. No. 57325/00.

tomers, however, she was asked to remove her headscarf which she refused and as a consequence faced dismissal as well. In the case of Ms. Bougnaoui, the European Court of Justice finds a direct discrimination on the ground of religion, since the employer's decision was not based on a general neutrality policy of the company. The customers' wish not "*to have the services of that employer provided by a worker wearing an Islamic headscarf*" could not be considered as a 'genuine and determining occupational requirement'.³⁰ In the case of Ms. Achbita, however, the Court finds no discrimination. It considers it legitimate to dismiss an employee when a company has a policy of political, religious and philosophical neutrality in relation with both public and private sector customers.

The core of the problems with which the Advocate Generals struggled, as have many courts before them and surely as will many judicial institutions after them as well, is the need to balance the competing rights at stake, which in the concrete constellation are, most importantly, the right to freedom of religion and the economic freedom of the corporate entities concerned. Advocate General Sharpston makes the point³¹ that it is of importance whether this general problem is framed as a problem of fundamental liberal rights or as a question of discrimination law. To her, discrimination law seems to formulate more exacting demands for the justification of unequal treatment. This question is of some practical importance because some jurisdictions construct these cases on the basis of the right to the free exercise of religion, rather than as an issue of discrimination law.

At the deepest level, questions concerning the meaning of human autonomy and its importance in comparison to other important fundamental rights positions are at stake here. What weight does human religious self-determination have in comparison with the economic freedoms of others, which are both entirely legitimate concerns? The Court of Justice of the European Union is now invited to answer this question in a decision that may have the potential to determine the crucial contours of religious freedom and equality for years to come. Belgium and France have a sizeable and growing Muslim community that demands respect for its religious practices. Yet both States take an approach to the religious diversity often labelled "religious neutrality" or "secularism". In these cases we have however, two *private companies*, who invoke their own "neutrality policy" in an attempt to justify the dismissal of employees on the ground that they insist on wearing the Islamic headscarf at work. The question of whether the pursuit of religious neutrality is an acceptable aim for public and private organisations alike, on the basis of which they may prohibit their employees from wearing religious signs or apparel whilst at work, is an important but complex one. It should therefore not surprise that the Advocates General seem to arrive at opposite conclusions on this point or, to put it perhaps more accurately in the case of AG Sharpston, prefer to remain silent on the subject. The discreetness of the symbol concerned seems of some, but not necessarily of decisive importance. Small symbols may have powerful effects, and as Advocate General Sharpston rightly points out, in some cases there is just no discreet form of a certain religious symbol, especially in the case of certain forms of apparel.

³⁰ C-188/15 - Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v. Micropole SA, para. 41.

³¹ *Ibid.*, paras. 58 et seq.

The two Opinions of Advocate General Kokott in the case of *Achbita* and of Advocate General Sharpston in the case of *Bouagnaoui* come to opposing results though dealing with cases that are, in many respects, very similar. Whereas Advocate General Kokott regards a company rule that prohibits the wearing of any religious symbol or a symbol associated with some form of belief as a genuine determining occupational requirement that serves a legitimate aim and is proportionate, Advocate General Sharpston argues that there is no such justification. But not only the results of the two Opinions delivered by the Advocate Generals are different; their interpretation of central legal concepts differs as well. This is even true for the concept of discrimination.³² Another major difference concerns the relevance of the possibility of discreet religious apparel, which, for Advocate General Kokott, is an important consideration regarding the proportionality of any measure. Advocate General Sharpston accepts this position in principle, but argues that some symbols are of a nature that leaves no discreet choice for the respective believer, for example the turbans worn by Sikhs or Islamic headscarves. Another important difference concerns the question of whether religion and, more precisely, the manifestation of religion is different to other characteristics in that one can decide not to manifest a certain religious belief, whereas one cannot do anything of that sort in the case of other characteristics, such as sex or assumed race, which are directly related to a human beings' personality. Advocate General Sharpston disagrees with that point, arguing that a religious manifestation is intrinsically related to the beliefs that a person holds.

Even though Advocate General Kokott allows considerably wider discretion to corporate entities determining the content of the rules that apply to their employees, she nevertheless sets crucial limits to this discretion. Most importantly perhaps, the wishes of customers are regarded as entirely irrelevant for the permissibility of such restrictions.³³ A restriction on wearing religious symbols thus cannot be based on the real or perhaps even just assumed wishes of customers of the respective company. She emphasizes, in addition, the importance of intersectional effects. In other words, she notes that discrimination may adversely affect particular groups that are a traditional target of certain discriminatory measures. If so, she finds, unequal treatment is not proportionate.³⁴ The fact that both Advocate Generals assert the importance of the prohibition of religious discrimination by relying on many convincing arguments, though coming to different conclusions in the concrete case, is thus to be welcomed. In the future, much will depend on a culture of religious broadmindedness buttressed by sufficiently robust prohibitions of religious discrimination.

³² Advocate General Kokott writes (para. 53) that, *in the present case, therefore, this leaves only a difference of treatment between employees who wish to give active expression to a particular belief — be it religious, political or philosophical — and their colleagues who do not feel the same compulsion. However, this does not constitute 'less favorable treatment' that is directly and specifically linked to religion.* Advocate General Sharpston, in contrast, argues (para. 88) *that an employee who had not chosen to manifest his or her religious belief by wearing particular apparel would not have been dismissed. This leads her to the conclusion that the dismissal amounted to direct discrimination against the employee.*

³³ C-157/15 Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV, para. 91.

³⁴ *Ibid.*, para. 121.

The ECJ judgments allow private companies to impose bans on the wearing of religious signs in the workplace, in particular for employees with contact jobs. The ECJ's also references *Eweida and Others v. The United Kingdom*. Now, let's take a closer look at *Eweida*. In this case, a woman employed by a private company in a face-to-face customer service was suspended on account of wearing a cross. The Court found a violation of the applicant's religious freedom. And in doing so, it left little room to private companies' restrictions on the religious freedom of their staff for the sake of the company's corporate image. The judgment provided at least three important grounds. These are: (1) the difference between a human right and a business interest; (2) the seriousness of the restriction for the applicant; and (3) the lack of evidence on the harm inflicted to the company. While the Court in *Eweida* accepted as legitimate the private companies' wish to project a certain corporative image, it made it clear that this does not stand on a same footing with the right to manifest one's religion. Freedom of religion, like the prohibition of discrimination, is a human right protected by the ECHR (Article 9); the private companies' interest to project an image is not. The Court thus concluded in *Eweida* that too much weight was accorded to this interest: "*the value [of religious manifestation] to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others*".³⁵ Moreover, in its necessity test, the Court also considered the socio-economic harm faced by Ms. Eweida and by other applicant manifesting religion in a private workplace, when it weighed "*the possibility of changing job*" and the "*seriousness of losing one's job*"³⁶ as well as it compared the damage experienced by the company with upholding the claimed rights. But the Court didn't find "*any negative impact on British Airways' brand or image*." There was "*no evidence of any real encroachment on the interests of others*".³⁷

The ECJ framed this issue differently: "*it must be determined whether the prohibition is limited to what is strictly necessary*." That is "*whether the prohibition [...] covers only GAS workers who interact with customers*".³⁸ So, an employer could very well ask his employees to dress smartly, or casually, when meeting with customers, because that style contributes to the particular corporate image he wants to communicate. But is it also permissible for a private undertaking to choose a *religiously neutral* look, and to require its personnel to dress accordingly? As noted by the Advocates General in *Achbita*³⁹ and *Bougnaoui*⁴⁰, that freedom can reasonably be interpreted as implying the liberty to project a certain corporate image and to determine a corresponding dress code for staff.⁴¹ AG Kokott readily accepts that such a look is "absolutely crucial" for a company that offers surveillance, security and receptions services. She cites two reasons for this proposition: the variety of the company's customers, and the constant face-to-face contact between its employees and other persons.

³⁵ *Eweida and Ors v United Kingdom* [2013] ECHR 37, para 94.

³⁶ *Ibid.*, paras 83 and 109.

³⁷ *Ibid.*, paras 94-95.

³⁸ *Achbita* para 42.

³⁹ *Ibid.*, paras 81-82.

⁴⁰ *Bougnaoui* paras 115-116.

⁴¹ See also *Eweida* para 94.

In the Advocate's General view, the enforcement of a corporate policy of religious and ideological neutrality is a legitimate aim, which may justify a general company rule prohibiting visible political, philosophical and religious symbols in the workplace. The Advocate General does accept that the company's dress code, while applying without distinction to all signs reflecting the employee's convictions, religious and ideological alike, may nonetheless put female Muslim employees at a particular disadvantage compared with other employees. However, she considers the disparate impact of the facially neutral dress code justified on the basis of the employer's fundamental freedom to conduct a business, which implies the freedom to determine and pursue a corporate identity or image, including an image of neutrality. AG Sharpston reaches a radically different conclusion than does her colleague in *Achbita*. At issue in *Bougnaoui* is a rule adopted by a business consultancy firm which prohibits employees from wearing religious signs or apparel when in contact with customers. AG Sharpston classifies the company's dress code as directly discriminatory on grounds of religion. Yet the Advocate General also considers the hypothesis that the Court disagrees on this point, subjecting the dress code to an additional review through the lens of indirect discrimination. Like AG Kokott, AG Sharpston recognises that the business interests of the employer, in particular his interest in communicating a certain image of the company, constitute a legitimate aim that may justify the adoption of a corresponding dress code.⁴² However, unlike her colleague in *Achbita*, AG Sharpston does not explicitly accept that an image of (*religious*) *neutrality* is amongst the images a company such as that in issue may legitimately wish to project to its customers. Moreover, she indicates that, in her view, the prohibition on wearing religious attire that was imposed on Ms. Bougnaoui is not proportionate to its objective.

The question of whether religion is a chosen characteristic often arises when considering the proper scope of religious equality provisions. Those who argue that it is chosen usually use this to suggest that religion should either not be protected at all (because religious individuals chose their religion and so can choose not to be disadvantaged by their religion too), or that religion should receive less protection than other, immutable, characteristics such as sex, race or sexual orientation. This debate becomes relevant when assessing whether the different equality grounds should be treated in the same way in law. For example, should it be as difficult to justify religious discrimination as it is to justify race or gender discrimination? If religion is not chosen, it should, presumably, be treated the same as other grounds; if it is chosen, this may justify affording it lesser protection.

In *Achbita* AG Kokott's decision that the wearing of a headscarf by an employee could lawfully be restricted by the employer was based in part on her approach to the question of choice. In her view, "*religion is different to other characteristics because 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... an employee may be expected to moderate the exercise of his religion in the workplace...*"⁴³

⁴² Bougnaoui paras 115–116.

⁴³ Achbita para 116.

Although religious observances can involve an element of choice in practice, nonetheless, the question of whether religion is a chosen characteristic can be contested. First, some aspects of religious identity are clearly not chosen. Unfavourable treatment on grounds of religion can be based on others' perceptions of religion, such as because of a religiously-associated name, or because of assumptions made by the discriminator, linked to ethnicity, matters which are not chosen by the 'victim' of the discrimination. In such cases it would be unfair to restrict protection on the basis that religion is not immutable. Even in cases of religious observance such as the wearing of religious symbols that was in issue in these cases, the choice argument can also be questioned. For example, few adherents experience their religion as chosen; and even where this is the case, the cost to the individual of renouncing key aspects of identity and culture is high. Moreover, the assumption that religion is different because it is chosen suggests that other grounds of equality are not chosen. Yet such a claim is perhaps not so simple: at times, other characteristics can involve an element of choice, such as some cases of pregnancy. In these cases, choice is not accepted as a reason to deny protection, because any such choice is a 'fundamental choice', and closely related to an individual's concept of identity and self-respect. It would seem that the same should apply to religion.⁴⁴ AG Sharpston confirms that the protection for religion and belief should be based on notions of equality and autonomy, and not limited by the question of choice or immutability following the reasoning of AG Maduro in *Coleman* who firmly bases the protection for equality on all grounds, including religion and belief, on autonomy and self-fulfilment.

In contrast, AG Sharpston in *Bougnaoui* is clear that different standards of protection should not be applied to different equality grounds. By implication then, if national identity would not be allowed to justify gender discrimination, nor should it justify religious discrimination. Moreover, her strong words at [133] regarding the danger of businesses relying on customer prejudice to justify discrimination, suggests that arguments based on established practice should not be accepted as justifying a refusal to accommodate religious manifestations at work. Instead, her assumption is that in the vast majority of cases it will be possible for employers and employees to reach an accommodation allowing the employer's business needs to be met while providing for the manifestation of religion. The fact that the need to make a profit can prevail over an individual employee's right to manifest religion only 'in the last resort', leads to the assumption that in most cases there will be no valid business reasons to restrict the wearing of religious symbols at work, particularly where these are based on general issues such as national identity. Nonetheless, in my view the approach of AG Sharpston is to be preferred, because it confirms the centrality of the principle of equality to EU law: indeed she asserts that non-discrimination on grounds of religion or belief is a general principle of EU Law. Such an approach still allows some area of judgment to the Court, but if all equalities are to be treated equally, the focus will return to a question of proportionality as the decider of the issue of when religion and

⁴⁴ "to someone who is an observant member of a faith, religious identity is an integral part of that person's very being... it would be entirely wrong to suppose that, whereas one's sex and skin colour accompany one everywhere, somehow one's religion does not." in *Bougnaoui* para 118.

belief can be restricted at work. Such an approach allows for fact sensitive decision making, focussed on the interests of employer and employee, rather than more general, theoretical and at times paradoxical matters related to historical national context and the role of choice in religion.

It is noteworthy that AG Sharpston does not suggest that religion is necessarily immutable, merely that it is an integral part of identity. This allows space for the view that religion is in some senses chosen. This is important, because despite the criticism above, a recognition of the element of choice in religious practice may be needed if we are to explain why religion is a protected characteristic in the first place. One of the strongest reasons for the protection of religion in human rights law is that of autonomy and the freedom to choose one's own conception of the good life. If religion is understood as unrelated to choice, then some of the underlying reasons for its protection are weakened.

CONCLUSION

Recognition that religion is integral to identity does not lead inevitably to religion prevailing over other interests; the proportionality assessment may still result in religion being restricted. However, recognition that religion is not simply a chosen behaviour does allow more appropriate weight to be given to religious interests in any proportionality balancing exercise. We do not create ourselves ex nihilo, as self-defining adults, but emerge, through education and inculcation, as members of particular families and communities.⁴⁵ We are influenced by others – family, religious community, societal cultures etc. The role of choice in the protection of religion is thus somewhat paradoxical in that religion acquires its value from the notion of autonomy which is based on choice; but equally for many individuals religion is not experienced as freely chosen. Indeed perhaps this paradox explains such different approaches to the role of choice and immutability in the opinions of the AG's in the two cases. As Margalit and Raz argue, individuals flourish through culture and culture is maintained by groups: the prosperity of cultural groups is therefore necessary to the wellbeing of their members and self-determination is necessary for the protection of groups.⁴⁶ Kymlicka has observed that: *People make choices about the societal practices around them, based on their beliefs about the value of these practices (beliefs which, I have noted, may be wrong). And to have a belief about the value of a practice is, in the first instance, a matter of understanding the meanings attached to it by our culture.*⁴⁷ This argument rests on the theory that a government treats its citizens as equals by allowing each of them to define what is of value to them, not by applying a single conception of the good life to everyone.⁴⁸ A secular understanding of the public is justified by virtue of liberal neutrality because it secures a neutral public sphere in which citizens, stripped of their reli-

⁴⁵ SCHARFFS, B. G. The Autonomy of Church and State. *Brigham Young University Law Review*. 2004, No. 4, pp. 1217–1348.

⁴⁶ MARGALIT, A., RAZ, J. National Self-determination. *Journal of Philosophy*. 1990, Vol. 87, No. 9, pp. 439–461.

⁴⁷ KYMLICKA, W. *Multicultural Citizenship: A Liberal Theory of Minority Rights*. Oxford: Clarendon Press, 1995.

⁴⁸ RAZ, J. *The Morality of Freedom*. Oxford: Oxford University Press, 1988.

gious differences, can encounter each other as commons.⁴⁹ This justification, as we have seen above, of the secular public sphere on grounds of liberal neutrality, while superficially attractive, is not conclusive because the distinction between the public sphere and the private sphere that is constitutive of liberal neutrality cannot be constituted by way of a neutral distinction between the (secular) public and the (religious) private. The preceding discussion indicates that justification of the public / private divide rests on two distinct claims that are often lumped together: first, that the distinction between a ‘public sphere’ and a ‘private sphere’ is a meaningful way to cognize and structure modern pluralistic societies; and secondly, that there is a meaningful way to distinguish what is or ought to be ‘public’ from what is or ought to be ‘private.’ In this vein, critics of the liberal public-private divide have contested the distinction between the public sphere and the private sphere because it rests on a partisan understanding of public and private.⁵⁰ Europe’s (legal) treatment of its Muslim populations is a case in point.

Religious pluralism is one of the essential principles of constitutional democracies. Yet the ways in which Western democracies deal with Islamic practices raise a variety of issues that appear to erode religious pluralism. In recent years, there have been major public debates in several European countries about the acceptability of Islamic practices; specifically, the wearing of a headscarf, or hijab, by women and girls. In the midst of a resurgence of religion, the challenge to accommodate Muslim practices seems greater and more urgent than ever before. It pervades virtually every aspect of modern life, from culture to civil society, from politics to identity, from security to conflict and discrimination. Upholding freedom of religion or belief involves the complex task of protecting religion and its impact on public and private life, while establishing certain restrictions to avoid religion’s potential for negative impact. Such balancing necessarily bridges the public and the private, and explores the relationship between secularism and religiosity. Any adequate implementation of the freedom of religion or belief needs to consider these polarities.

The veil is a religious symbol. Moreover, it is a symbol that speaks to very fundamental elements of the social order: relations between the genders, religious beliefs and how those beliefs and practices relate to our duties to each other and one’s broader duties as a member of society. Although each individual who wears the veil will have a specific set of reasons for doing so that are particular to herself, justifications for banning the veil rest to a very significant degree on the attribution to the wearing of the veil of certain meanings. As McGoldrick points out, context has an important role in the attribution of meanings to religious and political symbols.⁵¹ It is a known phenomenon that religion is prone to manipulation in the political sphere, leading to widespread stereotyping of certain reli-

⁴⁹ As Walzer notes, the distinction between the public-as-secular and the religious-as-private is but one manifestation of the liberal art of separation alongside, for example, the distinction between public politics and private economic activity, see WALZER M. *The Communitarian Critique of Liberalism*. *Political Theory*. 1990, Vol. 18, No. 1., pp. 6–23.

⁵⁰ See HABERMAS, J. Religion in the Public Sphere. *European Journal of Philosophy*. 2006, Vol. 14, pp. 1–25.

⁵¹ MCGOLDRICK, D. *Human Rights and Religion: The Islamic Headscarf Debate in Europe*. Oxford: Hart Publishing, 2006, p. 316.

giously observant groups. There are a wide range of policy outcomes and various degrees of tolerance toward and/or discrimination against Muslim women because of disparate domestic political settings, cultural differences, and diverse constitutional orders. We need to articulate these differences and similarities among countries when discussing freedom of religion in relation to the integrity of a constitutional order. To protect the rights at stake, it is important to diagnose the problems accurately and act effectively before tensions on both sides produce a chronic disorder that can produce profound societal tension. Therefore, secularism should not be used as an excuse to punish expressions of religious belief and observance, especially if these manifestations of religiosity are the basis for the denial of further human rights to individuals. On the contrary, secularism should be implemented and interpreted as a principle that supports the exercise of religious freedom in order to protect other, related human rights, such as the rights to education and gender equality. Such spaces are seen as cultural space that allows for the negotiation of new meanings, as traditional forms of cultural authority are relativized.