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The European Union and the challenge of post-secularism:
An analysis of the jurisprudence of the Court of Justice of the European Union on religious discrimination in the workplace

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Table of Contents

Introduction

In recent decades, Europe has experienced a twofold process of socio-legal transformation that has made the continent a delicate playfield in the interaction of law and religion. On the one hand, European countries have undergone a progressive decline of institutional religion. Since the middle of the twentieth century, an increased majority of the population has ceased participating in traditional religious practice and the number of those who label themselves as "unaffiliated" has grown.[1] On the other hand, religion still plays an influential role in Europe. Even the most casual reader of current news could not help but notice the increasingly prominent role of religion in European politics. In France, Spain and Germany, for instance, debates over Islamic headscarves in public education have been heated.[2] In the last months, controversies arose in response to the proposal for a complete ban on abortion in Poland.[3] Religious extremism has often led to violent incidents in recent years. Just to mention a few, there were the 2004 attacks in Madrid and the 2005 bombing in London. In 2015, the headquarters of the Charlie Hebdo satirical magazine were attacked and, few months later, dozens of people were killed in the Bataclan music venue. More recently, in November 2020, gunmen attacked several locations in central Vienna.

All of these flashpoints have been symptomatic of religion as a basic element of conflict in today's Europe and, undeniably, the majority of them have involved Islam in one way or another. Nevertheless, it would be an erroneous over-simplification to interpret the role of religion in contemporary European political contention as a mere function of Muslim immigration. Surely, in recent years, the number of those affiliated to the Islam faith that

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[1] *See* S. PÉREZ-NIEVAS, G. CORDERO, *Religious Change in Europe (1980-2008)*, presented at the SISP Annual Conference, Venice, 16-18 September 2010.

[2] *See* S. SINCLAIRE, *National Identity and the Politics of the "Headscarf Debate" in Germany*, in *Culture and Religion*, 13, 2012, pp. 19-39; *Spain: Muslim Women Battle Headscarf Discrimination*, in *Anadolu Agency*, 22 September 2016, available at https://www.aa.com.tr/en/europe/spain-muslim-women-battle-headscarf-discrimination/650365 (last accessed on 31 December 2021); *The Muslim Headscarf: France's Republican Dilemma*, *in France24*, 8 November 2019, available at https://www.france24.com/en/france/20191108-the-muslim-headscarf-france-s-republican-dilemma (last accessed on 31 December 2021).

[3] *See Poland's Abortion Ruling Focus of Debate in EU Parliament*, in *ABC News*, 9 February 2021, available at https://abcnews.go.com/International/wireStory/polands-abortion-ruling-focus-debate-eu-parliament-75774155 (last accessed on 31 December 2021).

live in Europe has grown at unprecedented pace,[4] and the challenges associated with such growth have been an element in the above-mentioned conflicts. But Europe is experiencing religious processes that go much deeper than this. Many Europeans still maintain relatively high levels of private individual beliefs, and traditional churches are a powerful element of national collective identity. This challenges the core assumptions of the theory of secularization, which has traditionally interpreted the progressive decline of institutional Christian religion in Europe as a quasi-normative consequence of modernization. In the twentieth century, theorists such as Berger and Martin indeed spoke of the "disenchantment of the world", predicting that an ever-increasing number of social actions would become based on considerations of technical efficiency rather than on motivations of morality or tradition.[5]

However, religion did not simply disappear with the ascendance of secularization in the continent. Berger himself, in the late 1990s, realized that his own predictions were erroneous:

> «*What I and most other sociologists of religion wrote in the 1960s about secularization was a mistake.* Our underlying argument was that secularization and modernity go hand in hand. With more modernization comes more secularization. It wasn't a crazy theory. There was some evidence for it. But I think it's basically wrong. *Most of the world today is certainly not secular. It's very religious*».[6]

Yet, whereas religion did survive secularization, religion is not today what it used to be. The apparent paradox of the advent of a Europe that is simultaneously secular and multi-religious is indeed the outcome of a crucial transformation in European religiosity. Gedicks describes this mutation in the following terms:

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[4] In 2016, the Muslim population living on the EU territory was estimated at almost twenty-six million people, up from twenty million people in 2010. *See Europe's Growing Muslim Population*, Pew Research Center, 29 November 2017, available at https://www.pewforum.org/2017/11/29/europes-growing-muslim-population/ (last accessed on 31 December 2021).

[5] *See* P.L. BERGER, *The Sacred Canopy: Elements of a Sociological Theory of Religion*, Doubleday, 1967; D. MARTIN, *A General Theory of Secularization*, Blackwell, 1978.

[6] P.L. BERGER, *Epistemological Modesty: An Interview with Peter Berger*, in *Christian Century*, 114, 1997, p. 974. [emphasis added]

> «There is the God whose death was widely predicted, and there is the God who today is alive and well, but they're not the same God. The God who dies is the God of Christendom, who bound together Western society with a universal account of the world that did not survive the advent of postmodernism; this God, indeed, is dead. The God who remains alive is the one adapted to postmodernism».[7]

In order to provide a theoretical framework to overcome the supposed antagonism of secular and religious viewpoints, scholars have developed the concept of "post-secularism". In opposition to the quasi-normative positive correlation between modernity and secularity, post-secular societies are those that «adapt to the fact that religious communities continue to exist in a content of ongoing secularization».[8] Post-secularism may be regarded as an attempt to re-conceptualize the boundaries of the public sphere, taking into consideration the ongoing presence of religion and recognizing its social and cultural value. Post-secularism thus calls into question the traditional theory of secularization that takes the disappearance of religion – or, at least, its confinement to the private sphere – as an inescapable consequence of modernization, and implies a critique of secularism.[9] Indeed, whereas one of its main goals is to establish a common place for the protection of citizens' rights and freedoms,[10] secularism may easily turn into ideology when it confuses State neutrality with the *a priori* exclusion of religion from the public arena.[11]

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[7] *See* F.M. GEDICKS, *God of Our Fathers. Gods for Ourselves: Fundamentalism and Post-Modern Belief*, in *William & Mary Bill of Rights Journal*, 18, 2010, p. 902.

[8] J. HABERMAS, *The Future of Human Nature*, Polity Press, 2003, p. 104.

[9] Even though, from a historical perspective, secularism takes a variety of forms, secularism is here understood as a political principle that entails separation between the secular State and religion. *See also* A. STEPAN, *The Multiple Secularisms of Modern Democratic and Non-Democratic Regimes*, in A. STEPAN, C. TAYLOR (eds.), *Boundaries of Toleration*, Columbia University Press, 2011, pp. 114-144.

[10] *See* J. HABERMAS, *The Postnational Constellation: Political Essays*, The MIT Press, 2001, pp. 127-128; J. HABERMAS, *Religious Tolerance – The Pacemaker for Cultural Rights*, in *Philosophy*, 79, 2004, pp. 6-7; J. CASANOVA, *The Secular, Secularizations, Secularisms*, in C. CALHOUN, M. JUERGENSMEYER, J. VAN ANTWERPEN, *Rethinking Secularism*, Oxford University Press, 2011, p. 66.

[11] *See* T. ASAD, *Formations of the Secular: Christianity, Islam, Modernity*, Stanford University Press, 2003, pp. 191-193; K. EDER, *Neither State, nor Church, but Democratic Self-Government*, in *ResetDOC*, 18 September 2007, available at https://www.resetdoc.org/story/neither-state-nor-church-but-democratic-self-government/ (last accessed on 31 December 2021); J. CASANOVA, *The Secular and Secularisms*, in *Social Research*, 76, 2009, p. 1058.

In this perspective, post-secularism also challenges the secular liberal theses of scholars such as Audi and Wolterstorff, who claim that, under liberal democratic arrangements, debates around public policy should be conducted in terms equally accessible to all, so that those which rely on premises that are not universally shared (for instance, religious premises) should either be translated into secular terms or removed from consideration.[12] Such claims embrace the classic liberal interpretation of neutrality, according to which States should provide a neutral framework where the diverse and potentially conflicting ideas of the good life that citizens endorse can be pursued.[13] Governments are then required to disregard all divisive differences between citizens, such as religious affiliation, so as to ensure equality of treatment.[14] Such "exclusive neutrality" is indeed believed to ensure a free society, in which all citizens have the possibility to live according to their own views of that makes a good life.[15] However, exclusive neutrality requires citizens to abandon part of their identity to participate in the public discourse, denying them equal opportunities to fully live according to their own worldviews.[16] It is then argued that governments should adopt an "inclusive neutrality", actively protecting and supporting the autonomy of their citizens – also with regard to the religious dimensions of their life.[17]

Through the adoption of a post-secular approach, which promotes the mutual understanding and practical compromise between religious and non-religious people in the public sphere, it then becomes possible to reflect on the ideological derivations of secularism and put into question the idea that religion constitutes a threat to democratic public sphere. As Eder writes:

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[12] *See* R. AUDI, N. WOLTERSTORFF, *Religion in the Public Square*, Rowman & Littlefield, 1997; M. GAUCHET, *La religion dans la démocratie: parcours de laïcité*, Gallimard, 1998; A. GREELEY, *Religion in Europe at the End of the Second Millennium*, Transaction Publishers, 2003. On the issue, *see also* L. N. LEUSTEAN, J.T.S. MADELEY, *Religion, Politics and Law in the European Union: An Introduction*, in *Religion, State & Society*, 37, 2009, pp. 7-9.
[13] *See* W. KYMLICKA, *Liberal Individualism and Liberal Neutrality*, in *Ethics*, 99, 1989, p. 883.
[14] *See* A.E. GALEOTTI, *Neutrality and Recognition*, in R. BELLAMY, M. HOLLIS (eds.), *Pluralism and Liberal Neutrality*, Cass, 1999, pp. 37-38.
[15] *See* R. PIERIK, W. VAN DER BURG, *What is Neutrality?*, in *Ratio Juris*, 27, 2014, p. 498.
[16] *See* V. BADER, *Secularism or Democracy? Associational Governance of Religious Diversity*, Amsterdam University Press, 2007, pp. 80-88.
[17] *See* R. PIERIK, W. VAN DER BURG, above, pp. 506-508.

> «During secularization, religion did not disappear *tout court*. It simply disappeared from the public sphere. In other words, the voice of religion was no longer audible, having become a private matter. Today religion is returning to the public sphere. *I define this return of religion in the public sphere as "post-secularism"*».[18]

The ongoing presence of religion and the experience of pluralization in contemporary European societies thus fundamentally alters the principles of traditional secularism, necessitating a reflection on the appropriate role and place of religion in the public sphere. According to Zucca, the national level is not anymore the adequate *forum* to reflect on such issues, as the State has proved to be unable to promote reciprocal understanding and establish an adequate framework of co-existence for all social groups in a pluralistic context.[19] It is therefore possible to say that «the struggle for the Soul of Europe has moved from the level of the state to the [supranational] level».[20]

While the early European integration process did not focus on rights and freedoms that fell outside the economic field, the Union brought fundamental rights – including religious freedom - into its core mission in the 1990s and 2000s as part of an effort to enhance its legitimacy.[21] As concerns religion, in its Declaration No. 11, the 1999 Treaty of Amsterdam first established the principle of deference to status enjoyed by churches and other confessional organizations in Member States, that was later transposed into Art. 17(1) of the Treaty on the Functioning of the European Union (TFEU).[22] In 2000, the European legislator then adopted Directive 2000/78/EC, *i.e.* the so-called Employment Equality Directive, enshrining prohibition of discrimination in the workplace on the basis of different grounds, including religion. The interest in the protection of religious freedom and other fundamental rights then brought the Union to issue its own Charter of Fundamental Rights in 2000 (later given binding legal value by the Lisbon Treaty). The

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[18] G. BOSETTI, K. EDER, *Post-Secularism: A Return to the Public Sphere*, in *Eurozine*, 17 August 2006, available at https://www.eurozine.com/post-secularism-a-return-to-the-public-sphere/ (last accessed on 31 December 2021). [emphasis added]
[19] L. ZUCCA, *A Secular Europe: Law and Religion in the European Constitutional Landscape*, Oxford University Press, 2012, p. 30.
[20] *Ibid*.
[21] *See* J.H.H. WEILER, *Deciphering the Political and Legal DNA of European Integration: An Exploratory Essay*, in J. DICKSON, P. ELEFTHERIADIS (eds.), *Philosophical Foundations of European Union Law*, Oxford University Press, 2013, pp. 154-157.
[22] For further detail, *see* Section 1.4.3.

Charter provides *inter alia* for religious freedom and the right not to be discriminated against, under Articles 10 and 21, respectively.[23] In spite of these normative instruments, religious freedom and religious discrimination concerns have been virtually absent from the case-law of the Court of Justice of the European Union until 2017.[24]

Since then, however, the European judges have issued numerous rulings on the matter, concerning religious non-discrimination,[25] the relationship between religion and State aid,[26] ritual slaughtering and animal welfare,[27] the enforceability of a religious divorce,[28] religious data protection[29] and the international protection schemes for religious persecution.[30] The majority of these rulings concerned religious discrimination in the private workplace. In particular, three judgments - *i.e. G4S Secure Solutions*, *Bougnaoui and ADDH* and *WABE and Müller* - addressed the question of whether private employers could lawfully prohibit employees from wearing religious apparel during working hours, while three other – *i.e. Egenberger*, *IR* and *Cresco Investigation* – concerned the degree

[23] For further detail, *see* section 1.4.1.1.

[24] In the 1970s, two judgments were issued tangentially discussing religious freedom within the EU. *See* Court of Justice of the European Communities, judgment of 4 December 1974, Case C-41/74, *Van Duyn v. Home Hoffice*, EU:C:1974:133; Court of Justice of the European Communities, judgment of 27 October 1976, Case C-130/75, *Prais v. Council*, EU:C:1976:142. Since then, CJEU's case-law has hardly mentioned the religious angle. *See also* R.MCCREA, *Singing from the Same Hymn Sheet? What the Differences between the Strasbourg and Luxembourg Courts Tell Us about Religious Freedom, Non-Discrimination, and the Secular State*, in *Oxford Journal of Law and Religion*, 5, 2015, p. 185.

[25] *See* Court of Justice of the European Union, judgment of 14 March 2017, Case C-157/15, *G4S Secure Solutions*, EU:C:2017:203; Court of Justice of the European Union, judgment of 14 March 2017, Case C-188/15, *Bougnaoui and ADDH*, EU:C:2017:204; Court of Justice of the European Union, judgment of 17 April 2018, Case C-414/16, *Egenberger*, EU:C:2018:257; Court of Justice of the European Union, judgment of 11 September 2018, Case C-68/17, *IR*, EU:C:2018:696; Court of Justice of the European Union, judgment of 22 January 2019, Case C-193/17, *Cresco Investigation*, EU:C:2019:43; Court of Justice of the European Union, judgment of 15 July 2021, Cases C-804/18 and C-341/19, *WABE and MH Müller Handel*, EU:C:2021:594.

[26] *See* Court of Justice of the European Union, judgment of 27 June 2017, Case C-74/16, *Congregaciòn de Escuelas Pìas Provincia Betania*, EU:C:2017:496.

[27] *See* Court of Justice of the European Union, judgment of 29 May 2018, Case C-426/16, *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others*, EU:C:2018:335; Court of Justice of the European Union, judgment of 26 February 2019, Case C-497/17, *Oeuvre d'assistance aux bêtes d'abattoirs*, EU:C:2019:137; Court of Justice of the European Union, judgment of 17 December 2020, Case C-336/19, *Centraal Israëlitisch Consistorie van België and Others*, EU:C:2020:1031.

[28] *See* Court of Justice of the European Union, judgment of 20 December 2017, Case C-372/16, *Sahyouni*, EU:C:2017:998.

[29] *See* Court of Justice of the European Union, judgment of 10 July 2018, Case C-25/17, *Jehovan todistajat*, EU:C:2018:551.

[30] *See* Court of Justice of the European Union, judgment of 4 October 2018, Case C-56/17, *Fathi*, EU:C:2018:803.

of autonomy left to Member States in organizing their relations with churches and religious organizations in the occupational field. It then emerges that, among the numerous religious issues recently addressed by the CJEU, «the prohibition of discrimination on religious grounds in the field of employment ha[ve] had the biggest judicial impact so far».[31] Issuing these judgments, the CJEU has indeed had the opportunity to rule for the first time on the concrete interpretation of both Article 17(1) TFEU and Directive 2000/78. The importance of these cases should not be underestimated. Not only CJEU has a monopoly on the interpretation of EU law, but its case-law also trumps domestic laws when there is conflict. Consequently, «the more the CJEU spells out its jurisprudence, the more likely the EU will slowly integrate – if not unify – its treatment of religious freedom».[32]

This is of particular significance, especially in light of the existence of a wide variety in Europe of both constitutional models of State-church relationships and national legislations regulating the wearing of religious apparel at work. On the one hand, jurists often distinguish between three main State-church relation models:[33] "State Church Systems", characterized by the existence of close ties between the State and a certain religious community, such as those between Greece and the Greek Orthodox Church or Denmark and the Evangelical Lutheran Church; "Separation Systems", characterized by a strict separation of State and Church, such as in France or Netherlands; and "Hybrid Systems", characterized by a simple separation of State and Church coupled with the recognition of numerous common tasks which link State and Church activity, such as in Italy or Belgium. On the other hand, the legislation and case-law of the Member States relating to the exhibition of religious symbols and clothing in the employment context is

[31] A. PIN, J. WITTE, *Meet the New Boss of Religious Freedom: The New Cases of the Court of Justice of the European Union*, in *Texas International Law Journal*, 55, 2020, p. 238.
[32] *Ibid*., p. 266.
[33] *See* R. SANDBERG, N. DOE, *Church-State Relations in Europe*, in *Religion Compass*, 1, 2007, pp. 561-578; S. RIEDEL, *Models of Church-State Relations in European Democracies*, in *Journal of Religion in Europe*, 1, 2008, pp. 251-272; S. FERRARI, *Models of State-Religion Relations in Western Europe*, in A.D. HETZKE (ed.), *The Future of Religious Freedom: Global Challenges*, Oxford University Press, 2012, pp. 202-214; G. ROBBERS, *State and Church in the European Union*, in G. ROBBERS (ed.), *State and Church in the European Union*, Nomos, 2019, pp. 677-688.

extremely diverse.[34] By way of example, at one end of the spectrum, States such as France and Belgium have adopted legislations banning certain types of apparel in public *tout court*.[35] At the other, in the Netherlands it has been found that a rule expressly prohibiting the exhibition of a religious symbols constitutes direct discrimination.[36]

The aim of the present work is thus to analyse the approach that the institutions of the European Union have developed so far with regards to the management of religion, evaluating whether the concrete application of EU regulatory instruments in matters of religious discrimination in the workplace can be considered adequate to a post-secular and pluralistic context. In order to answer such question, after having discussed the emergence of post-secularism and having conducted a preliminary assessment of whether or not the EU normative instruments concerning religion can be considered appropriate to the contemporary post-secular context (Chapter 1), the present work analyses and makes considerations on the CJEU judgments concerning both the exhibition of religious apparel in the workplace (Chapter 2, Section 2) and the degree of autonomy left to Member States in organizing their relations with religious organizations in the occupational field (Chapter 3, Section 2). In addition, a thorough examination of the jurisprudence developed by the European Court of Human Rights (ECtHR) on the use of religious symbols and apparel (Chapter 2, Section 1) and on religious organizations' autonomy (Chapter 3, Section 1) will be conducted.

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[34] See E. BRIBOSIA, I. RORIVE, *Le voile à l'école: une Europe divisée*, in *Revue Trimestrelle des Droits de l'Homme*, 60, 2004, pp. 951-984 ; F. DIENER, A. FERRARI, V. PACILLO (eds.), *Symbolon/Diabolon. Simboli, religioni, diritti nell'Europa multiculturale*, Il Mulino, 2005; J.H.H. WEILER, *State and Nation; Church, Mosque and Synagogue – On Religious Freedom and Religious Symbols in Public Places*, in M.A. GLENDONI, H. ZACHER (eds.), *Universal Rights in a World of Diversity: The Case of Religious Freedom*, The Pontifical Academy of Social Sciences, 2012, pp. 578-588; T. SQUATRITO, *Domestic Legislatures and International Human Rights Law: Legislating on Religious Symbols in Europe*, in *Journal of Human Rights*, 15, 2016, pp. 550-570 ; E. HOWARD, *Law and the Wearing of Religious Symbols in Europe*, Routledge, 2021.

[35] *See* French Law No. 2010-1192 of 11 October 2010, prohibiting concealment of the face in public places and Belgian Law of 1 June 2011, prohibiting the exhibition of all apparel concealing the face. While those laws are not expressly aimed at prohibiting a religious symbol, it is clear that they disproportionately affect Muslim women that wish to wear the *niqab* or the *burqa*. Similarly, although not specifically targeted at the employment sector, those laws inevitably limit the possibility of certain people to enter into the employment market.

[36] *See* College voor de Rechten van de Mens (Institute for Human Rights), decision of 18 December 2015.

The reason behind this choice lies in the fact that, through the years - despite having different mandates, powers and jurisdictions – the Luxembourg and Strasbourg Courts have developed a fruitful relation as regards the protection and promotion of fundamental rights in Europe. Notably, the European Convention on Human Rights (ECHR), together with the common constitutional traditions of Member States, represents one of the main sources of inspiration for the development of a judicial EU Charter of Rights.[37] Although the principle according to which the ECHR constitutes one of the fundamental elements for the protection of human rights within the Union was codified only by the Maastricht Treaty in 1992,[38] its explicit enunciation dates back to 1974, when the Luxembourg Court affirmed that «international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law».[39] In the 1990s and early 2000s, the CJEU then began referring to Strasbourg case-law, and this trend has continued through a long list of cases.[40] For instance, in *Hoechst v. Commission*,[41] the Luxembourg judges ruled that Art.8 ECHR protecting privacy did not apply to companies, but the ECtHR went on to rule in *Niemietz v. Germany*[42] that such provision did apply to companies. In a subsequent ruling, the CJEU reversed *Hoechst* so as to bring Union law in line with the Strasbourg case-law.[43] As Ahmed writes, across CJEU jurisprudence in this period, «there is both an acknowledgment of the ECtHR as an

[37] *See* G. PALOMBELLA, *From Human Rights to Fundamental Rights. Consequences of a Conceptual Distinction*, in *Philosophy of Law and Social Philosophy*, 93, 2007, pp. 399-400.
[38] The Maastrich Treaty, at Art. 6(2) TEU, has enshrined that «the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law».
[39] Court of Justice of the European Communities, judgment of 14 May 1974, Case C-4/73, *Nold KG v. Commission*, EU:C:1974:51, point 13.
[40] By way of example, *see* Court of Justice of the European Union, judgment of 8 July 1999, Case C-235/92, *Montecatini v. Commission*, EU:C:1999:362; Court of Justice of the European Union, judgment of 28 March 2000, Case C-7/98, *Krombach*, EU:C:2000:164; Court of Justice of the European Union, judgment of 11 July 2002, Case C-60/00, *Carpenter*, EU:C:2002:434; Court of Justice of the European Union, judgment of 7 January 2004, Case C-117/01, *K.B.*, EU:C:2004:7; Court of Justice of the European Union, judgment of 12 September 2006, Case C-145/04, *Spain v. United Kingdom*, EU:C:2006:543.
[41] *See* Court of Justice of the European Communities, judgment of 21 September 1989, Case C-46/87 and C-227/88, *Hoechst v. Commission*, EU:C:1989:337.
[42] *See* European Court of Human Rights, judgment of 16 December 1992, App. no. 13710/88, *Niemietz v. Germany*.
[43] *See* Court of Justice of the European Union, judgment of 22 October 2002, Case C-94/00, *Roquette Frères*, EU:C:2002:603.

external standard and the value of an in depth, case-specific analysis of human rights complaints by individuals».[44] It then emerges that, throughout the 1990s and 2000s, the EU Court built up such a strong commitment to ECHR standards of human rights protection that commentators have noted that the CJEU was «tending to "follow" rather than merely refer to» the Strasbourg case-law as persuasive authority.[45] However, it must be noted that, soon after that Luxembourg Court began to use the ECHR as a source for Community rights, it also clarified that it had no jurisdiction to examine the compatibility between the ECHR and the national legislations that do not fall within the scope of Community law.[46] Similarly, it is worth recalling that, although the Maastricht Treaty enshrined that the Union shall respect the fundamental rights articulated in the ECHR, the Luxembourg judges have not taken this provision to mean that they are necessarily bound by such instrument. In *Emesa Sugar*,[47] for instance, the applicant complained to have been deprived of the right to a fair hearing, since it was not given an opportunity to respond to matters raised by the Advocate General. As the Statute of the Luxembourg Court made no provision for the parties to submit observations in response to the Advocate General's Opinion, the applicant relied on the Strasbourg case-law concerning the scope of Art. 6(1) ECHR, providing for the right to a fair hearing. While recognizing that the ECHR «has special significance»,[48] the CJEU nevertheless declared the claim to be inadmissible *ratione materiae*.[49]

Notwithstanding the above, the CJEU commitment to the ECHR was confirmed with the adoption of the EU Charter in 2000. Notably, not only the Charter has replicated almost

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[44] T. AHMED, *The Opposition of the CJEU to the ECHR as a Mechanism of International Human Rights*, in *Journal of International and Comparative Law*, 4, 2017, p. 441.
[45] S. DOUGLAS-SCOTT, *A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights* Acquis, in *Common Market Law Review*, 43, 2006, p. 650. *See also* M. BRONCKERS, *The Relationship of the EC Courts with Other International Tribunals: Non-Committal, Respectful or Submissive?*, in *Common Market Law Review*, 44, 2007, p. 601.
[46] *See in particular* Court of Justice of the European Communities, judgment of 11 July 1985, Cases C-60/84 and C-61/84, *Cinéthèque v. Fédération nationale des cinemas français*, EU:C:1985:329; Court of Justice of the European Communities, judgment of 18 June 1991, Case C-260/89, *ERT v. DEP*, EU:C:1991:254.
[47] *See* Court of Justice of the European Union, judgment of 4 February 2000, Case C-17/98, *Emesa Sugar*, EU:C:2000:70.
[48] *Ibid*., para. 8.
[49] *Ibid*., para. 19.

literally all of the rights listed in the ECHR, but Art. 52(3) Charter has also explicitly integrated respect for the ECHR into the Union's human rights protection scheme:

> «In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection».

When interpreting the Charter, the CJEU then shall take into consideration the ECHR both as a legislative text with its Protocols of amendment and in its jurisprudential interpretation.[50] Accordingly, as will emerge in Chapter 2, the CJEU has recognized in the *G4S Solutions* and *Bougnaoui* judgments that the issue of the wearing of the Islamic headscarf falls under the notion of religious freedom as set out by Art. 10 Charter, on the basis of Art. 9 ECHR. Moreover, pursuant to Art. 52(3) Charter, the Luxembourg judges have taken into account the relevant case-law of the ECtHR, which has repeatedly addressed the issue of the exhibition of religious apparel in the workplace.

Lastly it must be noted that, although the Lisbon Treaty has enshrined at Art. 6(3) TEU that the «fundamental rights, as guaranteed by the [ECHR], shall constitute general principles of the Union», the CJEU has often interpreted such provision as not formally binding the EU to the Strasbourg Convention.[51] Nevertheless, in their more recent case-law, the Luxembourg judges have frequently adhered both to the ECHR and the Strasbourg jurisprudence. In *DEB*, for instance, not only the CJEU affirmed that the right to access to justice enshrined in Art. 47 Charter corresponds to that of Art. 6 ECHR,[52] but it also explicitly conformed to the Strasbourg interpretation of such provision, claiming that Art. 47 Charter «*must be interpreted* in its context, *in the light of* other provisions of

[50] *See* P. GORI, *Diritto comparato nelle pronunce CEDU e loro rilevanza nella giurisprudenza CGUE sui diritti fondamentali*, Milano, 16 October 2013, available at http://www.ca.milano.giustizia.it/allegato_corsi.aspx?File_id_allegato=1096 (last accessed on 31 December 2021).
[51] *See* T. LOCK, *The ECJ and the ECtHR: The Future Relationship Between the Two European Courts*, in *Law and Practice of International Courts and Tribunals*, 8, 2009, p. 387.
[52] *See* Court of Justice of the European Union, judgment of 22 December 2010, Case C-279/09, *DEB*, EU:C:2010:811, para. 32.

EU law, the law of the Member States and *the case-law of the European Court of Human Rights*».[53]

As will be discussed in Chapters 2 and 3, the ECtHR has accumulated a relatively extensive case-law covering a range of issue relating to Art.9 ECHR's protection of the right to religious freedom along with other rights that, under certain circumstances, impact on religion and its role in society such as Art. 8 ECHR, enshrining the right to private life, Art. 10 ECHR, providing for freedom of expression, and Art. 14, setting out freedom from discrimination. The analysis of the Strasbourg jurisprudence on the management of religion in the occupational context then appears instrumental for the scope of the present work and for critically evaluating the CJEU rulings on such issue. On the one hand, as discussed above, the CJEU has developed a deferential approach to the Strasbourg regime, frequently following the judgments of the ECtHR. On the other, it is worth stressing that, while the ECtHR is a right-focused court whose sole task is to interpret its Convention, the CJEU addresses religion-related cases as part of its wider duty to interpret EU law as a whole including defining workable norms for the Union's legal and political order. Accordingly, as McCrea writes, «there is scope for [the CJEU] to depart from the conclusion of the Strasbourg court even when it defers to that Court's assessment of the fundamental rights elements of the case before it».[54]

[53] *Ibid*., para. 37. [emphasis added]
[54] R. MCCREA, above, p. 185.

Chapter 1. European Union as a post-secular society

1. Introduction

In the eighteenth century, with the advent of the Enlightenment, the belief about the decline or even disappearance of religion firmly emerged among the European elites. In the next decades, along with the development of social sciences, it was attempted to legitimize this belief scientifically.[55] The conviction that the more modernization, then the less religion was thus defined as the "theory of secularization" and, in the twentieth century, became the main theoretical approach to the relationship between religion and social progress.[56] The development of quantitative research seemed to corroborate this. Especially in Europe, statistical data documented declining levels of believers' participation in traditional religious practice.[57] The collection of these data has made many sociologists accept the theory of secularization dogmatically and announce the imminent death of religion. Wallace, a recognized anthropologist of religion, affirmed:

> «Belief in supernatural beings and in supernatural forces that affect nature without obeying nature's laws will erode and become only an interesting historical memory. To be sure, this even is not likely to occur in the next hundred years […]. But as a cultural trait, belief in supernatural power is doomed to die out, all over the world, as a result of the increasing adequacy and diffusion of scientifical knowledge and the realization by secular faiths that supernatural belief is not necessary to the efficient use of ritual».[58]

The situation began to change in the 1970s and 1980s. Events such as the Islamic Revolution in Iran or the key role played by churches in the collapse of communist

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[55] Auguste Comte theorized, for instance, that human knowledge progressed through three different steps: from the theological step, through the metaphysical step, to the scientific (positive) step. *See* A. COMTE, *The Positive Philosophy of Auguste Comte*, Cambridge University Press, 1853. A second example may be the work of Karl Marx, for whom religion was a social product, destined to disappear with the rise of a modern class society. *See* K. MARX, *A Contribution to the Critique of Hegel's Philosophy of Right: Introduction*, in J. O'MALLEY (Eds.), *Marx: Early Political Writings*, Cambridge University Press, 2012, pp. 57-70.

[56] *See for instance* G. DAVIE, *The Sociology of Religion*, SAGE, 2007, pp. 46-66.

[57] *See* T. LUCKMANN, *The Invisible Religion. The Problem of Religion in Modern Society*, MacMillan, 1967, pp. 28-40.

[58] A.F.C. WALLACE, *Religion: An Anthropological View*, Random House, 1966, p. 265.

systems in Eastern Europe, along with a religious revival in many of these countries, urged social researchers to revise, and sometimes even reject, the theory of secularization. One particularly forceful voice to confront the perceived revival of religion was Casanova's, for whom the growth of religious influence in national public spheres worldwide necessitated a re-assessment of the basic hypotheses of the secularization theory.[59] Casanova was not alone in this. Berger, former prophet of the secularization theory, sensationally renounced his early assumptions on religious decline when faced with the revival of religion. Berger's conversion took the form of a dialectic: the rise of modernity had some overall secularizing effects, but also led to numerous counter-secularizing efforts. Moreover, he noted that «secularization on the societal level is not necessarily linked to secularization on the level of individual consciousness».[60]

Building on such a debate, in 2001, Habermas invoked the "post-secular" to characterize modern societies. The concept of post-secularity represents an expanded approach to religion in contemporary States and communities. It theoretically overcomes the link between modernity and the loss of significance of religion, while simultaneously offering a tool to analyse the empirical processes of public religious vitality. Today's societies are composite and plural, and cannot be explained merely by picking between two options: "secularization" *versus* "non-secularization". Rather, according to Habermas, they «can be described in terms of "post-secular societ[ies]" to the extent that [they] still ha[ve] to adjust to the continued existence of religious communities in an increasingly secularized environment».[61] In the varied and unprecedented religious composition of post-secular societies, new problems and new opportunities open up in terms of religion. As in other parts of the world, the traditional European system is thus challenged and innovative solutions that guarantee the pacific co-existence of different social groups are necessary. In this perspective, after having discussed the origins of the post-secular paradigm and the model of secularism that could be appropriate to the contemporary pluralistic context,

[59] The work of Casanova will be addressed in detail in the next subsection.
[60] P. BERGER, *The Desecularization of the World: A Global Overview*, in P. BERGER (ed.), *The Desecularization of the World: Resurgent Religion and World Politics*, Eerdamans Pub Co, 1999, p. 3.
[61] J. HABERMAS, *A "Post-Secular" Society – What Does That Mean?*, paper presented at the Istanbul Seminars organized by Reset Dialogues on Civilizations in Istanbul from 2nd to 6th of June 2008, available at https://www.resetdoc.org/story/a-post-secular-society-what-does-that-mean/ (last accessed on 31 December 2021).

the present chapter aims to conduct a preliminary assessment of whether or not the approach that the European Union is adopting can be considered adequate to a post-secular context.

2. From the theory of secularization to post-secularism

In the twentieth century the theory of secularization has turned into a dominant paradigm in Europe, becoming «the main theoretical and analytical framework through which the social sciences have viewed the relationship of religion and modernity».[62] Scholars have frequently claimed that, due to the «process of rationalization released by modernization», secularization is an inescapable consequence of modernity.[63] If it is true that democratic States today are required not only to protect their citizens' freedom of religion, but also to draw some boundaries between the spiritual and temporal dimensions, and that «everyone [commonly] agrees that modern, diverse democracies have to be "secular" in some sense»,[64] the appropriate meaning of this term remains nonetheless debatable.

Casanova has claimed that the term secularization should be given at least three different and independent connotations: secularization as the decline of religious beliefs and practices, as the privatization of religion, and as the differentiation of the secular spheres from religious institutions and norms.[65] Among these propositions, only the latter factually appears as an inevitable by-product of modernization. Modern societies have indeed witnessed «the transformation of the church from a state-oriented to a society-oriented institution. Churches cease being or aspiring to be state compulsory institutions and become free religious institutions of civil society».[66] In the European highly

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[62] J. CASANOVA, *Public Religions in the Modern World*, University of Chicago Press, 1994, p. 211.
[63] P. BERGER, *The Social Reality of Religion*, Faber and Faber, 1969, p. 113. *See also* H. COX, *The Secular City: Secularization and Urbanization in Theological Perspective*, Macmillan, 1965; S.S. ACQUAVIVA, *The Decline of the Sacred in Industrial Society*, Blackwell Publishers, 1979.
[64] C. TAYLOR, *Secularism and Multiculturalism*, in *Values and Ethics for the 21st Century*, BBVA, 2012, p. 77.
[65] *See* J. CASANOVA, *Oltre la secolarizzazione. Le religioni alla riconquista della sfera pubblica*, Il Mulino, 1994, pp. 379-380.
[66] J. CASANOVA, *Public Religions*...above, p. 220.

pluralistic and complex societies of modernity, it would be extremely difficult for confessional bodies to re-establish an official role of integrating all aspects of society similar to that exercised in medieval Christendom. In this perspective, «the freeing of different spheres – state, market, law, arts, education – from ecclesiastical dominations» can be seen as «the enduring core of secularization theory».[67]

On the contrary, the other two connotations proposed by Casanova have proved to be contingent processes not inherent to modern European societies. As concerns the decline of religious beliefs and practices, it is unquestionable that an increasing share of the European population has ceased participating in traditional religious practices since the 1960s, even considering that the rates of religiosity vary remarkably across Europe. Significant diversity emerges in particular between the "Protestant North", with low church attendance and adherence to traditional beliefs, and the "Catholic South", characterised by higher (yet declining) levels.[68] Nevertheless, whereas diminishing church attendance points to «a process of decline in the social significance of religion»,[69] large numbers of European citizens identify themselves as religious, retaining at least a nominal confessional affiliation and suggesting a submerged religious identity even in the most secularized countries. For instance, although levels of weekly church attendance in Denmark and Sweden come in at under four percent, more than half of Swedish population and sixty-five percent of Danish nationals identify themselves as Christians.[70] In this respect, theorists have referred to a process of "unchurching" of the European population or to a situation of "believing without belonging", pointing to the fact that religion remains a key feature of European population's identity and that Europeans have

[67] D. MARTIN, *Sociology, Religion and Secularization: An Orientation*, in *Religion*, 25, 1995, p. 302.
[68] *See* G. DAVIE, *Religion in Modern Europe. A Memory Mutates*, Oxford University Press, 2000, pp. 71-72; L. HALMAN, T. PETTERSSON, *Differential Patterns of Secularization in Europe: Exploring the Impact of Religion on Social Values*, in L. HALMAN, O. RIIS (eds.), *Religion in Secularizing Society: The Europeans' Religion at the End of the 20th Century*, Brill, 2003, p. 54.
[69] B. WILSON, *Reflections on a Many Sided Controversy*, in S. BRUCE (ed.), *Religion and Modernization*, Clarendon Press, 1992, p. 200.
[70] *Eastern and Western Europeans Differ on Importance of Religion, Views of Minorities, and Key Social Issues*, Pew Research Center, 29 October 2018, p. 19, available at https://www.pewforum.org/2018/10/29/eastern-and-western-europeans-differ-on-importance-of-religion-views-of-minorities-and-key-social-issues/ (last accessed on 31 December 2021).

not become less religious, but diversely so.[71] Davie argues for instance that a large number of Europeans, although not participating in traditional religion actively, still holds a religious sensitivity, approving of religion in general terms.[72] Also Berger, former prophet of the secularization theory, has renounced his predictions of religious decline when confronted with such mutated scenario:

> «[A] body of data indicates strong survivals of religion, most of it generally Christian in nature, despite the widespread alienation from the organized Churches. A shift in the institutional location of religion, then, rather than secularization, would be a more accurate description of the European situation».[73]

Even recognizing that de-confessionalization is a reality,[74] the complexity of the picture then throws the simple "decline of religion" assumption into question.

Secularization theory's assumption of the relegation of religion to the private sphere has also proved to be incorrect. Even though secular spheres are differentiated and emancipated from religious institutions and norms, religion continues to have a role in European public arenas. Scholars highlight that modern societies are witnessing a phenomenon of de-privatization of religion, as confessional actors throughout the world refuse to confine themselves to the marginal role they have been accorded by theorists of modernity and secularization.[75] Religions are indeed (re)entering the public sphere and the political arena not only to defend their autonomy, but also to actively participate in

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[71] *See* G. DAVIE, *Religion in modern Europe*…above; J. CASANOVA, *Immigration and the New Religious Pluralism*, in T. BANCHOFF (ed.), *Democracy and the New Religious Pluralism*, Oxford University Press, 2007, p. 62.
[72] *See* G. DAVIE, *Religion in modern Europe*…above.
[73] P. BERGER, *The Desecularization of the World…*, above, p. 10.
[74] In 2019, agnostic and atheist people accounted for twenty-seven percent of European Union population. *See* European Commission, *Special Eurobarometer 493 – Report on Discrimination in the European Union*, October 2019, p. 234, available at https://www.cartapariopportunita.it/wp-content/uploads/2020/09/Eurobarometer_focus-on-Discrimination_2019.pdf (last accessed on 31 December 2021).
[75] *See* G. KEPEL, *La revanche de Dieu: chrétiens, juifs et musulmans à la reconquête du monde*, Seuil, 2003; G. DAVIE, *Religion in Europe in the 21st Century: The Factors to Take into Account*, in *European Journal of Sociology*, 47, 2006, pp. 271-296; M. LILLA, *The Stillborn God: Religion, Politics and the Modern West*, Knopf, 2007; J. HABERMAS, *La rinascita della religione: una sfida per l'autocomprensione laica della modernità?*, in A. FERRARA (ed.), *Religione e politica nella società postsecolare*, Meltemi, 2009, pp. 24-42; U. BECK, E. GRANDE, *Varieties of Second Modernity: The Cosmopolitan Turn in Social and Political Theory and Research*, in *The British Journal of Sociology*, 61, 2010, pp. 409-443.

the re-definition of boundaries between public and private spheres, legality and morality, and society and the State. [76] Churches thus can still have a major impact in the public sphere of civil society, especially in relation to State attempts to legislate on sensitive moral issues.

It then emerges that, while secularization theory's core assumption of an inevitable differentiation between secular and religious spheres appears valid, its proponents have fallen into error by not examining the validity of Casanova's three connotations independently from each other. Much of the contemporary discussion on the issue assumes that secularization involves by definition at least the differentiation of the spiritual and temporal dimensions (*i.e.* Casanova's third proposition) and the relegation of religion to the private sphere (*i.e.* Casanova's second proposition), assumed to be both equally crucial to the definition of a secular society.[77] In Europe, differentiation has even been largely interpreted as a result achievable only via the privatization of religion.[78] Such approach is epitomized by French *laïcité*, as the country «abides by a secular tradition which sees national republic identity as taking precedence over individual identity, with ethnic belonging and religious differences relegated to the private sphere».[79] The French perspective is that the strict neutrality of the public arena is the *sine qua non* for a peaceful coexistence among different religions.[80] The secular dimension is therefore promoted as

[76] *See* J. CASANOVA, *Oltre la secolarizzazione*… above, p. 12.
[77] *See* J. RAWLS, *A Theory of Justice*, Harvard University Press, 1999; R. AUDI, *Religious Commitment and Secular Reason*, Cambridge University Press, 2000; T.ASAD, above; R. RORTHY, *Religion in the Public Square: A Reconsideration*, in *Journal of Religious Ethics*, 31, 2003, pp. 141-149.
[78] *See* J. CASANOVA, *Religion, European Secular Identity and European Integration*, in T. BIRNES, P. KATZENSTEIN (eds.), *Religion in an Expanding Europe*, Cambridge University Press, 2006, pp. 66-67; L. VANONI, *Pluralismo religioso e Stato (post) secolare: una sfida per la modernità*, Giappichelli, 2006, p. 3.
[79] European Centre for Law and Justice, *ECHR – Lautsi v. Italy*, Legal Memorandum, April 2010, p. 3, available at https://7676076fde29cb34e26d-759f611b127203e9f2a0021aa1b7da05.ssl.cf2.rackcdn.com/eclj/ECLJ-MEMO-LAUTSI-ITALY-ECHR-PUPPINCK.pdf (last accessed on 31 December 2021).
[80] *See* M. TROPER, *French Secularism or* Laïcité, in *Cardozo Law Review*, 21, 1999, pp. 1267-1284; J.P. WILLAIME, *The Paradoxes of* Laïcité *in France*, in E. BARKER (ed.), *The Centrality of Religion in Social Life: Essays in Honour of James A. Beckford*, Ashgate, 2010, pp. 41-54; P. RAYNAUD, *La* Laïcité. *histoire d'une singularité française*, Gallimard, 2019.

strictly independent of any religious influence and the need for public order is often used to justify interference with freedom of religion.[81]

In fact, secularization theory should be revised to properly distinguish between the diverse propositions theorized by Casanova. The establishment of an *a priori* wall of separation between religion and politics is neither a necessary consequence of modernization nor an imperative feature of secular democracies. Such rigid separation appears both «unjustified and probably counterproductive [as it] lead[s] to curtailing the free exercise of the civil and political rights of religious citizens and will ultimately infringe on the vitality of a democratic civil society».[82] Secularization theory should then be revised so as to consider differentiation of spiritual and temporal dimensions as a structural consequence of modernity and privatization of religion as a mere contingent option. Accordingly, secularization could be understood not as a single teleological process of pre-ordained separation, but as a non-linear theory allowing for multiple historically-contingent patterns of church-State relations.[83] From this perspective, it would be possible to develop an account of secular society acceptable to both those that advocate for secularity and those who resist the privatization of their beliefs.

The "return of religion", meant as its claim of a voice in the public sphere, was nevertheless initially interpreted as an attack on modernity by theorists of secularization. In this sense, in the late 1990s, Berger used for the first time the term "de-secularization" to warn about the attack of religion, the return of which was considered capable of pushing our contemporary world back in a situation of pre-modernity.[84] The prefix "de-", indicating a movement on the vertical axis, suggested that «the modern secular order ha[d] risen, and it ha[d] fallen, […] on its way back to the *status-quo-ante*, exposed to

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[81] *See* R. CHARVIN, J.J. SUEUR, *Droits de l'homme et libertés de la personne*, Litec, 1994, p. 172 ; D. LE TOURNEAU, *La laïcité à l'épreuve de l'Islam: le cas du port du 'foulard islamique' dans l'école publique en France*, in *Revue Générale de Droit*, 28, 1997, p. 277 ; R.J. PAULY, *Islam in Europe : Integration or Marginalization?*, Ashgate, 2004, pp. 42-43.

[82] J. CASANOVA, *Rethinking Secularization: A Global Comparative Perspective*, in *Hedgehog Review*, 8, 2006, p. 20.

[83] *See* U. BECK, *Il Dio personale. La nascita della religiosità secolare*, Laterza, 2009, p. 48; I. BIANO, *Il* Postsecular Turn*: politica, religione e società oltre la secolarizzazione?*, in *Società Mutamento Politica*, 8, 2017, pp. 87-88.

[84] *See* P.L. BERGER, *The Desecularization of the World…*above; V. KARPOV, *Desecularization: A Conceptual Framework*, in *Journal of Church and State*, 52, 2010, pp. 232-270.

pre-modern forms of religion».[85] Alongside this interpretation of the religious comeback, part of the social and political sciences started to express «dissatisfaction with the influential tradition of […] rational secularism built on the Manichean opposition between reason and faith».[86] Building on the assumption that religion could indeed enter the public arena and move within secular institutional frameworks, scholars developed the concept of "post-secularism". While de-secularization and post-secularism both aims at shedding light on the return of religion, the two concepts present profound differences. In particular, the former intended to highlight the inherent incompatibility of religion and modernity; the latter regards their relation as a potential «positive-sum game of mutual interaction and transformation».[87] The prefix "post-" indeed indicates «a movement on the vertical as well as on the horizontal axis», suggesting that «religion in post-secular society is not the same as the one in pre-secular society, [it does not represent] a falling-back into something that was before».[88] But there is more. In a post-secular perspective, not only the "returning" religion is mutated, but the social climate of our modern societies has changed too. The historical context in which European secular States have originated is today fundamentally challenged by globalization, multiculturalism and substantial migration flows - phenomena which make constitutional democracies much more religiously diverse and thus require a profound reconsideration of the traditional secularization paradigm. While preserving their secular and neutral institutions, our societies should thus adopt a legal and political framework that takes into consideration such mutated context. As Habermas claims,

> «in the post-secular society, there is an increasing consensus that certain phases of the "modernization of the public consciousness" involve the assimilation and the reflexive transformation of both religious and secular mentalities. If both sides agree to understand the secularization of society as a complementary learning process, then they will also

[85] K. STOEKL, *Defining the Postsecular*, 2011, available at https://synergia-isa.ru/wp-content/uploads/2012/02/stoeckl_en.pdf (last accessed on 31 December 2021).
[86] C. UNGUREANU, *Uses and Abuses of Post-Secularism: An Introduction*, in F. REQUEJO, C. UNGUREANU (eds.), *Democracy, Law and Religious Pluralism in Europe: Secularism and Post-Secularism*, Routledge, 2014, p. 4.
[87] *Ibid.*
[88] K. STOEKL, above.

> have cognitive reasons to take seriously each other's contributions to controversial subjects in the public sphere».[89]

The post-secular dimension is then characterized by the recognition of the simultaneous presence in our contemporary secular societies of religion and modernity, which interact in a reciprocal relationship of tension and reflexivity.[90] The ideologic neutrality of post-secularist societies, guaranteed through the functional differentiation of the secular institutions from religious structures and norms, does not prevent religion from entering the public sphere. Rosati indeed claims that a proper post-secular society recognizes the existence of de-privatized public religions, experiences a pronounced pluralism and allows both religious and non-religious citizens to participate in the public discourse.[91] In this perspective, post-secularism should not be regarded as opposing to secularization, but as its final - although not conclusive - outcome. Secularization (and secularism) *per se* is not threatened with disappearance, but is required to mutate and evolve alongside societal changes. Through the lenses of post-secularism, it therefore becomes possible to give account of today's pluralism and accept the detachment of modernization from the traditional understanding of secularization without questioning the modern character of European societies.[92]

3. Which model of secularism?

From a legal and political point of view, today's post-secularist scenario significantly challenges the traditional European system and requires it to come up with innovative solutions that guarantee the pacific co-existence of different social groups. It then comes as no surprise that, in the last years, European institutions have increasingly turned their attention to religion, asking themselves what model of secularism should be adopted in

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[89] J. HABERMAS, *Pre-Political Foundations of the Democratic Constitutional State?*, in J. HABERMAS, J. RATZINGER (eds.), *The Dialectics of Secularization: On Reason and Religion*, Ignatius Press, 2006, pp. 46-47.
[90] *See* I. BIANO, *Religione e politica nel nuovo millennio: una laicità postsecolare? Il caso dell'Unione Europea e della CEDU*, in *Annali della Fondazione Einaudi*, 2016, p. 115.
[91] M. ROSATI, *The Making of a Postsecular Society: A Durkheimian Approach to Memory, Pluralism and Religion in Turkey*, Routledge, 2015, p. 85.
[92] *See* J. HABERMAS, *Perché siamo post-secolari*, in *Reset*, 108, 2008, pp. 26-27.

the contemporary ever-increasing pluralistic context. If it is true that what could be defined as the "ethical core" of secularism – *i.e.* the recognition of religious freedom for all and the prohibition of discrimination on grounds of religion – remains valid even in the post-secular context, it is nonetheless appropriate to carefully consider what form of secularism could better protect such core in contemporary European societies.[93] For this purpose, it is useful to resort to the works of the scholars who have suggested post-secular approaches that may constitute an alternative to the traditional European separationist model.

Galeotti identifies three main models of secularism, namely "simple secularism", "preference secularism" and "lobby secularism".[94] The former consists in the neat separation between the spiritual and temporal dimensions and assumes that, in all areas of friction between the two, a schematic code of behaviour straightforwardly guarantees the mutual autonomy of State and religious actors. In order to ensure State neutrality, separation of the political and religious spheres must be achieved through the self-restraint of both State and churches and the exclusion of religious elements from the public discourse.[95] Nonetheless, as Hauerwas highlights, this form of secularity is not neutral but rather is biased against religious people, which are forced to set aside their convictions in public and to adapt to the language of non-religious people.[96] Non-believers have indeed «claimed the public sphere as their own turf and have forced religious people to set aside their religious specificity, speaking and acting as if they were unbelievers».[97] According to Galeotti, "simple secularism" is the model traditionally adopted in Europe and, more in general, in monotheist countries. Such assumption is widely confirmed by the work of other scholars. For instance, claiming the existence of a European common model of secularism, Milot holds that it essentially consists of those political and legal arrangements regulating the place of religion in civil society that

[93] *See* A.E. GALEOTTI, *Secolarismo e oltre*, in A. FERRARA (ed.), *Religione e politica nella società post-secolare*, Meltemi, 2009, p. 86.
[94] *Ibid*., pp. 81-99.
[95] *Ibid*., p. 87.
[96] *See* S. HAUERWAS, *A Community of Character: Toward a Constructive Christian Social Ethic*, University of Notre Dame Press, 1991, pp. 72-86.
[97] M. DOAK, *Defining Our Dilemma: Must Secularization Privatize Religion?, in American Journal of Theology and Philosophy*, 29, 2008, pp. 260-261.

recognize the respective and rigid autonomy of the temporal and spiritual dimensions.[98] Similarly, Willaime considers European societies to be secular in the sense that they respect freedom of conscience, thought and religion - subjecting it only to the respect for law and democracy -, they do not discriminate individuals on the basis of their religious or philosophical beliefs, and they firmly protect the independence of the State with regard to religions and vice versa.[99]

Whereas "simple secularism" comprises secular separatist principles that are traditionally established throughout Europe, the other models proposed by Galeotti belong more specifically to post-secular contemporary societies. On the one hand, "preference secularism" relies on the democratic principle according to which citizens should be free to vote in accordance with their own convictions, including religious beliefs. Building on this assumption, in "preference secularism", religion is allowed to participate in the public discourse, influencing believers' opinion. In return, the State is expected to respect citizens' will and take into account both religious and non-religious opinions.[100] While this model of secularism has the merit of potentially defusing societal tensions, it nonetheless poses problems with respect to the protection of fundamental rights and freedoms. The democratically-expressed moral and ethical convictions of the (religious) majority could indeed clash with such rights. This possibility is even more problematic in our increasingly pluralistic societies, where groups with minoritarian ethical and moral beliefs are becoming more numerous.[101] On the other hand, "lobby secularism" understands democracy as competition among organized interest groups and considers religion as one of these actors, legitimized in its lobbying activity. This model is nevertheless likely to compromise the protection of fundamental rights too and, in addition, excludes confessional non-organized interests from the public discourse.[102] From what emerges above, it is possible to conclude that "simple secularism" effectively

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[98] *See* M. MILOT, *Laïcité dans le nouveau monde: le cas du Québec*, Brepols, 2002, p. 34.
[99] *See* J.P. WILLAIME, *Peut-on parler de laïcité européenne?*, in J. BAUBÉROT (ed.), *La laïcité à l'épreuve: religions et libertés dans le monde*, Universalis, 2004, pp. 53-63 ; J.P WILLAIME, *Cultures, religions, laïcités: divergences et convergences des modèles nationaux*, in A. BERGOUNIOUX, P. CAUCHY, J.F. SIRINELLI, L. WIRTH (eds.), *Faire des européens? L'Europe dans l'enseignement de l'histoire, de la géographie et de l'éducation civique*, Delagrave, 2006, pp. 69-82.
[100] *See* A.E. GALEOTTI, *Secolarismo e oltre*…above, p. 89.
[101] *Ibid*., pp. 89-90.
[102] *Ibid*., p. 90.

protects the principles of freedom of religion and prohibition of religious discrimination, but its strictly separationist approach precludes the recognition of contemporary pluralism. On the contrary, the two post-secular models provide a more appropriately democratic accommodation of pluralistic co-existence, but do not guarantee the respect of the secular "ethical core".[103] In its research for the most adequate form of secularism, Europe should therefore try to move beyond the excessive rigidity of "simple secularism", integrating the democratic suggestions of the other two models. In this regard, Galeotti concludes that post-secular contemporary societies should be characterized by the full legitimacy for both religious and non-religious actors to participate in the public discourse, the mutual recognition among the parties and, lastly, the neutrality of political institutions.[104]

Other scholars have suggested variations to the dominant European separationist approach too. Zucca, for instance, highlights the importance of inclusivity in post-secular societies. The author suggests a model of "inclusive secularism", centred on «the art of devising institutions for plural societies to maximize religious diversity, at the same time preserving a unitary legal-political framework».[105] While preserving the structure and substance of the secular State, this model attenuates its exclusionary tendencies as it does «not silent religious voices, [but] allows for their participation in the public sphere». Inclusive secularism retains the traditional framework of the neutral State, but mitigates the meaning of neutrality itself. This term cannot be interpreted anymore as a mere indifference from the side of public institutions, but should be understood instead as indicating impartiality and inclusivity.[106] Zucca's model can then be portrayed as «being equally distant from religious and non-religious people» while simultaneously promoting «mutual understanding and nudg[ing] towards practical compromise between different constituencies».[107]

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[103] *Ibid*., p. 91. *See also* I. BIANO, *Religione e politica*…above, pp. 117-118.
[104] *See* A.E. GALEOTTI, *Secolarismo e oltre*…above, p. 99.
[105] L. ZUCCA, above, p. xxi.
[106] *See also* M.C. FOBLETS, K. ALIDADI, Z. YANASMAYAN (eds.), *Belief, Law and Politics: What Future for a Secular Europe?*, Routledge, 2014, p. 9.
[107] L. ZUCCA, above, p. xxii.

The need for inclusivity is similarly stressed by Taylor, who argues that State neutrality, beside ensuring «equality between people of different faiths or basic beliefs», should be interpreted so as to include «all spiritual families […] in the ongoing process of determining what the society is about (its political identity) and how it is going to realize these goals (the exact regime of rights and privileges)».[108] Notwithstanding the importance of the protection of the "ethical core" of secularism, Taylor also emphasizes the need for the procedural inclusion of all groups in post-secular societies. Secularism is not anymore understood from a separatist perspective, which is likely to exclude religious voices, nor is merely associated with the need to protect individual rights. On the contrary, secularism is considered also as an active form of governance of religious pluralism, the function of which is to achieve the optimal balance between the principles of equality and freedom of religion through a policy of positive inclusion.[109] From this perspective, Taylor's approach represents the overcoming of what Kuru calls "passive secularism", in which the secular State does not exclude religion from the public sphere, but plays «a "passive" role in avoiding the establishment of any religion».[110]

Building on the work of the above-mentioned scholars, Buckley proposes one of the most convincing models of secularism – *i.e.* "benevolent secularism".[111] Such institutional configuration is defined as comprising three dimensions. Firstly, Buckley's model ensures the formal differentiation of temporal and spiritual dimensions. In conformity with secularization theory's core assumption, the State is fundamentally emancipated from religious bodies through constitutional disestablishment of religion. On the one side, such dimension signals to secular actors that religious groups will not break down State autonomy. On the other, it communicates to minorities that «the majority will not pursue domination of State institutions and basic guarantees of civil liberties and human rights will be made on a nonsectarian basis».[112] Secondly, recalling the work of Galeotti, Zucca

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[108] C. TAYLOR, *The Meaning of Secularism*, in *The Hedgehog Review*, 12, 2010, p. 23.
[109] *See* J. MACLURE, C. TAYLOR, *La scommessa del laico*, Laterza, 2013, p. 41; A.A. JAMAL, J.L. NEO, *Religious Pluralism and the Challenge for Secularism*, in *Journal of Law, Religion and State*, 7, 2019, p. 5.
[110] A.T. KURU, *Passive and Assertive Secularism*, in *World Politics*, 59, 2007, p. 571.
[111] *See* D.T. BUCKLEY, *Beyond the Secularism Trap: Religion, Political Institutions, and Democratic Commitments*, in *Comparative Politics*, 47, 2015, pp. 439-458.
[112] *Ibid*., pp. 445-446.

and Taylor, benevolent secular institutions are required to guarantee the active cooperation between religion and State in public affairs, mainly in terms of policy consultation. This dimension is fundamental to reduce potential religious-secular divides, as publicly iterated interactions and communication networks strengthen the credibility of reciprocal commitments to cooperation.[113] Thirdly, benevolent secularism is characterized by what Bhargava calls a "principled distance" between public institutions and religious communities. Such concept indicates that the State should not aim necessarily at equal outcome but more so at equal opportunity for all religious groups. In particular, "principled distance" allows that «a practice that is banned or regulated in one culture may be permitted in the minority culture because of the distinctive status and meaning that it has for its members».[114] "Principled distance" nonetheless cannot be interpreted as a mere *laissez-passer* for differential treatment in the disguise of special exemptions. On the contrary, depending on the historical and social conditions of specific religions, it may even imply State interference in some religions more than in others.[115] "Principled distance", allowing for context-specific decisions, then recognizes that the State cannot decide *a priori* that it «will interfere in each [religion] equally» and «it may not relate to every religion in society in exactly the same way».[116] In light of this, according to Buckley, benevolent secular institutions must respect the autonomy of religious entities, the guarantees of which must be found «in constitutions, […] relevant pieces of legislation, and […] in jurisprudence».[117]

From the models discussed above, it emerges that, in today's post-secular context, secularism should be characterized by three key features. Firstly, contemporary societies are required to protect the "ethical core" of secularism, comprising both religious freedom for all and the prohibition of discrimination on grounds of religion. Secondly, as highlighted by Galeotti, Zucca, Taylor and Buckley, post-secular institutions must ensure a differentiation between the temporal and spiritual dimensions while simultaneously

[113] *Ibid*., p. 446.
[114] R. BHARGAVA, *Rehabilitating Secularism*, in C. CALHOUN, M. JUERGENSMEYER, J. VANANTWERPEN (eds.), *Rethinking Secularism*, Oxford University Press, 2011, p. 106.
[115] *Ibid*., p. 107.
[116] *Ibid*.
[117] D.T. BUCKLEY, above, p. 444.

promoting active cooperation between religion and State in public affairs. Post-secular pluralistic States are then required to move beyond the traditional rigid separation between the political and religious spheres and allow, instead, for the participation of religion in the public discourse. Lastly, in accordance with the works of Bhargava and Buckley, relations between public institutions and religious bodies are to be characterized by "principled distance". This approach assumes legal meaning through the adoption of norms enshrining the autonomy of religious actors so as to permit flexibility with respect to church-State relationships, allowing States to adopt context-specific decisions on the management of religion.

4. Preliminary considerations on European Union's secular character

In contemporary European societies, public opinion and institutions are increasingly turning their attention to religious issues. Political actors and courts question the traditional interpretation and application of religious freedom and ask themselves what role religion should be assigned in today's ever-increasing pluralistic context. According to Zucca, the answers to such questions cannot be found anymore at the national level, as the State has proved to be unable to promote reciprocal understanding and establish an adequate framework of co-existence for all social groups in a pluralistic context.[118] It is thus possible to say that «the struggle for the Soul of Europe has moved from the level of the state to the [supranational] level».[119] For this reason, it is of particular interest to analyse the approach that the institutions of the European Union have developed so far with regards to the management of religion, examining it in light of the above-mentioned suggested model of secularism. As the Union constitutes «a field of experimentation on the socio-political level» and forms a «laboratory for managing religious and philosophical diversity […] where new forms of relationships between communities of conviction and political/administrative authorities are being invented»,[120] close attention

[118] L. ZUCCA, above, p. 30.
[119] *Ibid.*
[120] J.P. WILLAIME, *European Integration,* Laïcité *and Religion,* in L.N. LEUSTEAN, J.T.S. MADELEY, *Religion, Politics and Law in the European Union*, Routledge, 2010, p. 26.

has indeed been paid to EU laws and other regulatory instruments concerning the treatment of religious matters. In particular, once recognized that Union's legal dispositions protect the "ethical core" of secularism (freedom of religion and prohibition of discrimination on religious grounds),[121] many scholars have assessed EU secular character in light of two recent reconfigurations occurred at the level of primary law. Lisbon Treaty has indeed included a reference to the «cultural, religious and humanist inheritance of Europe» in its Preamble and has adopted Article 17 TFEU, which provides Member States with the freedom to autonomously organize their relations with confessional bodies and commits the Union to maintain a dialogue with such bodies.

As emerged in the Introduction, whereas religious issues were virtually absent from the case law of the CJEU until 2017, since then European judges have issued numerous rulings on the matter. Among these, seven cases concerned religious discrimination at work. It then emerges that «the prohibition of discrimination on religious grounds in the field of employment ha[ve] had the biggest judicial impact so far». Issuing these judgments, the CJEU has had the opportunity to rule for the first time on the concrete interpretation of both Article 17(1) TFEU and the secondary-law instrument which regulates religious discrimination at work – *i.e.* Directive 2000/78. These judgments thus add a further crucial element to properly assess the secular approach that the Union (and by extension its Member States) is adopting, evaluating whether the concrete application of EU regulatory instruments in matters of religious discrimination in the workplace can be considered adequate to a post-secular and pluralistic context. Before turning to the analysis of such rulings, which constitutes the core of the present work, it is nevertheless appropriate, firstly, to provide an overview of those EU dispositions protecting the "ethical core" of secularism and, secondly, to retrace scholars' attempts to assess EU secular nature in light of the above-mentioned novelties introduced by the Lisbon Treaty.

[121] *See in particular* Article 10 Charter of the Fundamental Rights of the European Union, which recognizes freedom of thought, conscience and religion; Art. 21 Charter, which enshrines the general prohibition of discrimination based on inter alia religion; Directive 2000/78/EC, which forbids discrimination in the workplace on religious grounds among other grounds.

4.1. EU normative instruments protecting the "ethical core" of secularism

The European Union protects the "ethical core" of secularism, which comprises the recognition of freedom of religion and the prohibition of discrimination on religious grounds, by virtue of two regulatory instruments. On the one hand, the Charter of the Fundamental Rights of the European Union (Charter) enshrines both religious freedom (Art.10) and the prohibition of discrimination based on *inter alia* religion (Art. 21).[122] On the other, Directive 2000/78/EC lays down the prohibition of discrimination on different grounds, including religion, in the field of employment.

4.1.1. Art. 10 and Art. 21 Charter

Within the EU legal order, religious freedom is mainly protected by Art. 10 Charter, which at its paragraph 1 enshrines that

> «Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance».

As confirmed by the official Explanations of the EU Charter, this formulation is virtually identical to that of Art. 9(1) ECHR. Conversely, whereas the second part of the latter disposition provides limitations on freedom of thought, conscience and religion, Art. 10 Charter does not contain similar restrictions. Nevertheless, by virtue of Art. 52(3), Charter articles that correspond to ECHR provisions must be given the same meaning and scope as those laid down in the ECHR.[123] Art. 10 Charter is thus to be interpreted as allowing limitations on religious freedom when they are «necessary in democratic society for the protection of public order, health or morals, or for the protection of the rights and

[122] Beside such dispositions that protect the individual dimension of religious freedom, it is worth highlighting that Art. 22 Charter also enshrines that the Union shall respect cultural, *religious* and linguistic diversity.

[123] «In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law to providing more extensive protection».

freedoms of others», as set out in Art. 9(2) ECHR. Such limitations can be introduced only in relation to the external realm of freedom of religion. Indeed, even though the Charter does not provide a definition of the term "religion", the CJEU has affirmed that this concept must be understood as covering both typical dimension of personal faith - *i.e.* «the *forum internum*, that is the fact of having a belief, and the *forum externum*, that is the manifestation of religious faith in public».[124] The former dimension enjoys absolute protection and cannot be violated under any circumstances, so that «a man who has faith but no deeds is a believer who enjoys absolute protection under human rights law».[125] On the other hand, the latter cannot be considered an absolute right and can thus be limited for the reasons laid down in Art. 9(2) ECHR.

The effective enjoyment of the right to freedom of religion is also protected by Art. 21 Charter, which, at its paragraph 1, prohibits

> «any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, *religion or belief*, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation». [emphasis added]

This disposition displays some differences from analogous provisions contained in other human rights instruments. Firstly, whereas in most other tools, such as Art. 14 ECHR, the prohibition of discrimination has effect solely in relation to the enjoyment of substantive rights and freedoms protected by said instruments, the wording of Art. 21(1) Charter enshrines such prohibition in a general manner. Since the official Explanations affirm that «in so far as [Art. 21] corresponds to Article 14 of the ECHR, it applies in compliance with it», someone may conclude that Art. 21(1) Charter has an ancillary nature too. Nevertheless, scholars do not endorse this interpretation[126] and, in 2005, Protocol No. 12

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[124] Judgment *G4S Secure Solutions*, above, para. 28; Judgment *Bougnaoui and ADDH*, above, para. 30.
[125] P. SLOTTE, *What is a Man if He Has Words but Has No Deeds? Some Remarks on the European Convention of Human Rights*, in *Ars Disputandi*. 11, 2011, p. 268.
[126] *See* E.DECAUX, *Commentaire de l'Article II-81, Paragraphe I, Non-Discrimination*, in L. BURGOURGUE-LARSEN, A. LEVADE, F. PICOD (eds.), *Traité Établissant une Constitution pour l'Europe. Partie II. La Charte des Droits Fondamentaux de l'Union Européenne – Commentaire article par article*, Bruylant, 2005, p. 296 ; F. SPITALERI, *Art. 14*, in S. BARTOLE, P. DE SENA, V. ZAGREBELSKY (eds.), *Commentario breve alla Convenzione Europea dei Diritti dell'Uomo*, Cedam, 2012, p. 548.

came into force extending the scope of Art. 14 ECHR to «any right set forth by law», turning the prohibition of discrimination there enshrined into a free-standing right.[127] Secondly, the Charter stands out for the number of discrimination grounds it prohibits. Not only Art.21(1) Charter forbids discrimination based on the seven grounds mentioned in Art. 19 TFEU (sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation), but adds to the list five further grounds (genetic features, political or any other opinion, membership of a national minority, property and birth). Furthermore, as suggested by the phrase "such as", Art.21(1) Charter is to be interpreted as an open-ended list of status discrimination grounds, so that it can extend to virtually any ground of discrimination.[128] In light of this, the Explanations felt the urge to highlight that Art. 21(1) Charter «does not create any power to enact anti-discrimination laws» in those areas falling outside the field of application of EU law, but «only addresses discriminations by the institutions and bodies of the Union themselves […] and by member States only when they are implementing Union law».[129]

4.1.2. Directive 2000/78/EC

Directive 2000/78/EC, *i.e.* the so-called Employment Equality Directive, enshrining prohibition of discrimination on the basis of *inter alia* religion in the workplace, is the second normative tool through which the Union protects the "ethical core" of secularism. This instrument was adopted under what is currently Art. 19 TFEU,[130] which provides the EU institutions with powers to combat discrimination, and aims to fight discrimination

[127] *See also* European Court of Human Rights, Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, 31 December 2020, p. 9, available at https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf (last accessed on 31 December 2021).

[128] *See for instance* Court of Justice of the European Union, judgment of 7 February 2019, Case C-49/18, *Escribano Vindel*, EU:C:2019:106, para. 58, in which the CJEU considered length of service as a discrimination ground falling under the scope of Art. 21(1) Charter.

[129] *See for instance* Court of Justice of the European Union, judgment of 18 December 2014, Case C-354/13, *Kaltoft*, EU:C:2014:2463, in which a challenge to national action whereby a public employee was dismissed on grounds of obesity was considered as falling outside the scope of Art. 21(1) Charter.

[130] «[...] the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation».

on the grounds of «*religion or belief*, disability, age or sexual orientation as regards employment and occupation».[131] In this regard, it is interesting to notice that the CJEU had already issued numerous rulings regarding alleged discrimination on grounds of disability[132], age[133] or sexual orientation[134] since 2003. Yet, it is only since 2017 that religious discrimination has been addressed. The Directive's field of application covers the conditions for access to employment and vocational guidance, the employment and working conditions (including dismissals and pay) and the membership of an organization of workers or employers.[135] Conversely, the Directive does not apply to State social security or protection schemes.[136]

In relation to the principle of equal treatment, the instrument sets out a fundamental distinction between direct and indirect discrimination. The former category includes all those cases in which «one person is treated less favorably than another is, has been or would be treated in a comparable situation».[137] However, exceptions are contemplated if in light of the nature of the occupational activity and of the context in which it is carried out, a characteristic related to a discriminatory ground constitutes «a genuine and determining occupational requirement», provided that the aim is legitimate and the requirement is proportionate.[138] The latter category refers to those circumstances «where an apparently neutral provision, criterion or practice would put […] at a particular disadvantage»[139] a person by virtue of one of the grounds covered by the Directive. Every act or behavior which aims to consciously prejudice a person by virtue of his/her group

[131] Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303 of 2.12.2000, Art. 1. [emphasis added]
[132] Among the others, Court of Justice of the European Union, judgment of 11 April 2013, Cases C-335/11 and C-337/11, *HK Danmark,* EU:C:2013:222; Court of Justice of the European Union, judgment of 4 July 2013, Case C-312/11, *Commission v. Italy*, EU:C:2013:446.
[133] Among the others, Court of Justice of the European Union, judgment of 22 November 2005, Case C-144/04, *Mangold*, EU:C:2005:709; Court of Justice of the European Union, judgment of 16 October 2007, Case C-411/05, *Palacios de la Villa*, EU:C:2007:604; Court of Justice of the European Union, judgment of 13 September 2011, Case C-447/09, *Prigge and Others*, EU:C:2011:573.
[134] Among the others, Court of Justice of the European Union, judgment of 1 April 2008, Case C-267/06, *Maruko*, EU:C:2008:179; Court of Justice of the European Union, judgment of 10 May 2011, Case C-147/08, *Römer*, EU:C:2011:286.
[135] Directive 2000/78, above, Art. 3(1).
[136] *Ibid.*, Art. 3(3).
[137] *Ibid.*, Art. 2(2)(a).
[138] *Ibid.*, Art. 4(1).
[139] *Ibid.*, Art. 2(2)(b).

belonging therefore amounts to direct discrimination. Conversely, conducts resulting from the application of criteria which, despite being formally neutral, have concrete adverse effects on the members of a specific group constitute indirect discrimination. Such definition of indirect discrimination expressly allows its objective justification. Art. 2(2)(b)(i) Directive 2000/78 permits a measure that is prima facie indirectly discriminatory to be lawful where it is «objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary».

The Directive also allows churches and other organizations the ethos of which is based on religion or belief to derogate from the anti-discrimination provisions in case «a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organization's ethos».[140] Directive 2000/78 further specifies that its provisions are without prejudice also to those national measures which, in a democratic society, are deemed necessary to maintain both public security and public order and to protect health.[141] In addition, in order to ensure full equality in practice, the instrument recognizes that Member States are permitted to maintain or adopt additional specific measures aimed at preventing or compensating for disadvantages linked to any of the discrimination grounds covered by the Directive itself.[142]

4.2. An assessment of EU secular character in light of the Preamble of the Lisbon Treaty

At the heart of Europe's history lies an enduring debate on the respective contribute that Christianity and secularism, meant as a by-product of humanism, provide to European identity.[143] Indeed, as Roy has noted, both concepts represent a competing pole around which European character can be understood.[144] In 2003, this tension became a major feature of the negotiations on the Treaty Establishing a Constitution for Europe. In

[140] *Ibid.*, Art. 4(2).
[141] *Ibid.*, Art. 2(5).
[142] *Ibid.*, Art. 7(1).
[143] *See* J. LE GOFF, *The Birth of Europe*, Blackwell, 2005, pp. 22-40; J.T.S. MADELEY, *European Liberal Democracy and the Principle of State Religious Neutrality*, in J.T.S. MADELEY, Z. ENYEDI (eds.), *Church and State in Contemporary Europe: The Chimera of Neutrality*, Frank Cass Publishing, 2003, pp. 1-22.
[144] O. ROY, *Is Europe Christian?*, Oxford University Press, 2020.

particular, controversy arose about whether or not the Preamble of the Treaty should contain an explicit mention to either God or Christianity. The Conference of European Churches (CEC) and the Commission of the Bishops' Conferences of the European Union (COMECE) were particularly vocal on the issue, as they strongly claimed that EU's constitutional values were «inspired by the Judaeo-Christian image of mankind».[145] For this reason, they argued that the «Constitutional Treaty of the European Union should recognise the openness and ultimate otherness associate with the name of God. An inclusive reference to the transcendent provides a guarantee for the freedom of the human person».[146] Such claims were supported by several member States, stressing that «religions and Christianity […] have been part and parcel of our continent's history».[147] On the other side, non-confessional organizations and States which promulgated a rigid separation of church and State strongly opposed the explicit mention of a particular religion or God.[148] Josep Borrell for instance affirmed that:

> «a lot of our values have been forged against the Church or the churches. If we are to celebrate historical heritages we should remember the whole story: with its religious wars, the massacres of the Crusades; the nights of Saint Bartholomew and the Inquisition's autos-da-fe; Galileo and the forced evangelisations; the pogroms and the turning of a blind eye to fascism. […] When it comes to democracy, human rights and equality, God is a recent convert».[149]

This debate resulted in the following agreed formula of the Preamble of the Constitutional Treaty, retained also in the Lisbon Treaty:

> «Drawing inspiration from the *cultural, religious and humanist inheritance* of Europe,

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[145] *The Future of Europe, Political Commitment, Values and Religion: Contribution of the COMECE Secretariat to the Debate on the Future of the European Union in the European Convention*, COMECE, Brussels, 21 May 2002.
[146] *Ibid.*
[147] Personal Remarks by Professor Danuta Hubner, Representative of the Government of Poland to the European Convention Plenary Session, 27-28 February 2003, available at http://european-convention.europa.eu/docs/speeches/7171.pdf (last accessed on 31 December 2021). *See also* Speech Delivered by Joszef Szayer, Hungary, at the European Convention, 27 February 2003, available at http://european-convention.europa.eu/docs/speeches/9468.pdf (last accessed on 31 December 2021).
[148] *See God Missing from EU Institutions*, in *BBC News*, 6 February 2003, available at http://news.bbc.co.uk/2/hi/europe/2734345.stm (last accessed on 31 December 2021).
[149] Contribution submitted by Mr Joseph Borrell Fontelles, member of the Convention, *Let's Leave God Out of This*, Brussels, 22 January 2003, available at http://european-convention.europa.eu/pdf/reg/en/03/cv00/cv00501.en03.pdf (last accessed on 31 December 2021).

> from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law».

The role accorded to religious inheritance was thus counterbalanced by references to cultural and humanist influences. According to McCrea, this approach stands at odds with the traditional European separatist model as it «involves, in contrast to strictly secular public order, the recognition of a religious element to the Union's constitutional values and public morality».[150] At the same time, the mention of religion is counterbalanced by references to humanist influences, which historically reduced religious influences over public sphere in Europe.[151]

Unsatisfied with a preamble that it is neither traditionally secularist nor straightforwardly supportive of the EU Christian basis, some scholars have fallen in what Buckley calls "secularist trap", defined as «the breakdown of democracy due to the decision of either religious or secular [actors] to pursue maximalist demands related to the place of religion in democratic politics».[152] On the one side, some have claimed that the refusal to explicitly mention Europe's Christian roots is overly misleading and indicative of a rigid secular approach. Weigel for instance, claiming that «Christianity is the story that has arguably had more to do with constituting Europe than anything else», interprets the Preamble as a form of "aggressive secularism", the foundation of which is to be found in an underlying "christofobia".[153] His view largely echoes the work of Weiler, who argues against a "Christian deficit" or ideological "thundering silence" in relation to the omission of the reference to EU Christian values.[154] In particular, Weiler claims that the wording of the Preamble is meant to impose an «EU-enforced *laïcité*» that actually clashes with Union's «declared moral commitment to tolerance».[155] Such approach has been widely

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[150] R. MCCREA, *The Recognition of Religion within the Constitutional and Political Order of the European Union*, in *LSE "Europe in Question" Discussion Paper Series*, 10, 2009, p. 6.
[151] *Ibid*.; *see also* C. TAYLOR, *A Secular Age*, Harvard University Press, 2007.
[152] D.T. BUCKLEY, above, p. 439.
[153] G. WEIGEL, *The Cube and the Cathedral: Europe, America and Politics without God*, Basic Books, 2005, p. 70. J
[154] J.H.H. WEILER, *A Christian Europe? Europe and Christianity: Rules of Commitment*, in *European View*, 6, 2007, p. 145.
[155] *See* discussion in A.J. MENENDEZ, *Review of A Christian Europe*, in *European Law Review*, 30, 2005, p. 133.

criticised for failing to recognize the conflict which has often marked the relationship between Christianity and the liberal State. As Cvijic and Zucca note,

> «the claim that the liberal ideal derives directly from Christian philosophy and that it is accordingly illogical that the Preamble of the European Constitution invokes humanist values but refuses to make a direct allusion to Christian values, fails to give due recognition to the full picture of the relationship between humanism and Christianity».[156]

From this perspective, scholars' complaint that the Preamble fails to identify the roots of EU commitment to democracy and human rights wrongly assumes a harmonic relationship between these principles and Christianity. On the other side, traditionally-secularist critiques have unduly disregarded the degree to which religion in general – and Christianity in particular – is actually recognized as an element of EU public morality. Menendez for instance argues that «defining constitutional ethics in Christian terms may obstruct the integration of those with other or no religious belief who face other barriers to full membership of our society».[157]

As McCrea notes, the fact that both those who understand European identity as strictly secular and those who understand it as Christian were dissatisfied with the wording of the Preamble, suggests that the EU has steered away from the traditional secularization theory and adopted instead a post-secular view on the relationship between religion and modernity.[158] The approach adopted in Lisbon «marks a departure from the principle of "separation"»[159], as humanist/religious influences are understood as mutually reinforcing each other, framed in reciprocal relationship of tension and reflexivity. The wording of the Preamble recognizes religion, together with humanism and Member States' cultures, as a crucial influence to the values underpinning the EU constitutional order. The Preamble can then be seen as the reflection of the Union's "value pluralism", under which conflicts between different rights and approaches are considered to be normal and are

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[156] S. CVIJIC, L. ZUCCA, *Does the European Constitution need Christian Values?*, in *Oxford Journal of Legal Studies*, 24, 2004, p. 744.
[157] A.J. MENENDEZ, above, p. 133.
[158] *See* MCCREA, *The Recognition of Religion*…above, pp. 9-12.
[159] C. INVERNIZZI-ACCETTI, *Is the European Union Secular? Christian Democracy in the European Treaties and Jurisprudence*, in *Comparative European Politics*, 16, 2017, p. 678.

resolved through balancing conflicting elements rather than prioritizing one over another in a hierarchical fashion.[160]

Scholars have further noted that, although the recognition of religion in the Preamble is formally denominational-neutral, the reference to the «cultural, religious and humanist *inheritance*» implies that the religious traditions that are considered as legitimate sources of "inspiration" for the EU institutions are those that have been historically dominant in Europe.[161] In this respect, the wording of the Preamble matches the position of "principled distance" that, according to Bhargava and Buckley, should characterize post-secular societies. As previously mentioned, "principled distance" recognizes that States cannot relate to every religion in the same manner, allowing them to intervene in some religions depending on the historical and social context. In line with this, as McCrea highlights, the Preamble

> «ensure[s] that EU law does not undermine the cultural or institutional role of particular religions at member State level, including, for instance, the arrangement of leisure periods around particular religious patterns or the role of particular religions as sources of national identity».[162]

The use of the notion of inheritance thus not only allows the Union and its Member States to recognize that certain religions have greater influence over the EU's constitutional values than others, but also seems to protect the different forms of church-State relationships historically developed in each Member State.

From the reflections above, it therefore emerges that the wording of the Preamble is in line with the second and third features that, according to scholars, should characterize a post-secular pluralistic society. On the one side, the Preamble moves beyond the traditional neat separation between the political and religious spheres, recognizing the role of religion in shaping public societal values. On the other, it encourages "principled

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[160] J. BENGOEXTEA, N. MACCORMICK, L. MORAL SORIANO, *Integration and Integrity in the Legal Reasoning of the European Court of Justice*, in G. DE BURCA, J.H.H. WEILER (eds.), *The European Court of Justice*, Oxford University Press, 2001, p. 64.
[161] *See* C. INVERNIZZI-ACCETTI, above, p. 685; R. MCCREA, *The Recognition of Religion*…above, p. 7.
[162] R. MCCREA, *The Recognition of Religion*…above, p. 7.

distance", allowing national institutions to adopt context-specific decisions in relation to the management of their specific church-State relations.

4.3. An assessment of EU secular character in light of Art. 17 TFEU

Scholars have assessed the secular character of the Union also in light of Art. 17 TFEU, which enshrines:

> 1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.
>
> 2. The Union equally respects the status under national law of philosophical and non-confessional organizations.
>
> 3. Recognizing their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organizations.

The introduction of this disposition in the Lisbon Treaty has represented the arrival of a long path, started with the project "A Soul for Europe" conceived under Jacques Delors' Presidency of the European Commission (1985-1995).[163] During his mandate, Delors strongly claimed that the European project could not be based solely on market and supranational bureaucracy. In particular, he argued that churches could have a crucial supportive role in integrating Europe:

> «If the next ten years we haven't managed *to give a soul to Europe*, to give it spirituality and meaning, *the game will be up*. This is why I want to revive the intellectual and spiritual debate on Europe. *I invite churches to participate actively in it.* The debate must be free and open. We don't want to control it; it is a democratic discussion, not to be monopolized by technocrats. I would like to create a meeting place, a space for free discussion open to men and women of spirituality, to believers and non-believers, scientists and artists».[164]

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[163] S*ee* L.HOGEBRING, *Europe's Heart and Soul. Jacques Delors' Appeal to the Churches,* in *Globethics.net CEC,* 2, 2015, available at https://www.globethics.net/documents/4289936/17575651/GE_CEC_2_web.pdf/9f959b11-9a1a-4c8c-a213-fd8156cef009 (last accessed on 31 December 2021).

[164] *President Delors and the Churches,* Newsletter of the European Ecumenical Commission for Church

Delors then aimed to overcome a purely economic and legal understanding of the European integration process and wished to incorporate civil society's spiritual perspectives in it. Accordingly, in 1994 a series of meetings with European religious leaders were launched under the name of *Une âme pour l'Europe* (A soul for Europe). These meetings were coordinated by the Forward Studies Unit in the European Commission and aimed to establish formal links with religious bodies in order to frame a «dialogue […] with experts wondering if and to what extent traditional Church and State patterns […] could be exported to the legal system of the EU».[165] By virtue of the expansion into social and political fields, religion officially entered both the European discourse and the Union's legal system. Such a development produced complex outcomes. On the one hand, a significant number of churches and religious organizations developed a closer relationship with the Union and began establishing delegations in Brussels and Strasbourg[166]; on the other, tensions arose from the impact of the European project on religion. As highlighted by Ventura, the combined effect of the completion of the single market and of the Treaty recognition of fundamental human rights as part of Union law[167] resulted in the tightening of a «threefold divisive pattern of opposing forces»[168] - *i.e.* secular versus religious, minorities versus majorities and States versus Europe. Indeed, such developments not only potentially exposed dominant religions and majorities to the dissent of defiant individuals or groups, but also challenged the traditional State-based conception of sovereignty in relation to the assessment of legitimate religious practice. Religious actors, majorities and the States joined forces to reverse this trend. The most influential religious subjects at both the domestic and European level strongly advocated for a clause aimed at defusing potential European policies that, directly or indirectly, could have an impact on their political and juridical status in the Member States. In

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and Society, Brussels, 2 May 1992, cited in L.N. LEUSTEAN, *Representing Religion in the European Union*, Routledge, 2012, p. 4.

[165] M. VENTURA, *Dynamic Law and Religion in Europe. Acknowledging Change. Choosing Change*, EUI Robert Schuman Centre for Advanced Studies, 2013/91, p. 14.

[166] *See* L.N. LEUSTEAN, *The Ecumenical Movement and the Making of the European Community*, Oxford University Press, 2012, p. 195.

[167] Both developments were achieved in the Treaty of Maastricht (1992). For further information, *see* J.M. GRIECO, *The Maastricht Treaty, Economic and Monetary Union and the neo-realist research programme*, in *Review of International Studies*, 21, 1995, p. 21.; E.F. DEFEIS, *Human Rights, the European Union, and the Treaty Route: from Maastricht to Lisbon*, in *Fordham International Law Journal*, 35, 2017, p. 1207.

[168] M. VENTURA, above, p. 18.

particular, they requested that in exchange of their support to the capitalist liberal model and the European project at large, «European law [would] help to preserve those religious monopolies that European societies were dismantling through secularization and religious diversification».[169]

The effort carried out by the European confessional actors resulted in the inclusion of Declaration No. 11 in the Treaty of Amsterdam in 1997. Although the text was not legally binding, it nevertheless represented the institutionalization of a fundamental political principle. The first paragraph affirmed: «*the European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States*». The political vision advocated by European religious actors so was endorsed by an official act, which acknowledged that the national church-State arrangements fell out of the EU sphere of interference. Nonetheless, mainstream churches paid a price for the safeguard of their advantages under domestic law, as the Declaration stated at its second paragraph: «*The European Union equally respects the status of philosophical and non-confessional organizations*». The declaration in fact placed on an equal footing the legal status of both confessional and non-confessional organizations, i.e. atheistic, agnostic and freethinkers' associations. Although the European Christian churches interpreted such provision as diminishing the symbolic value of Declaration No. 11, which in their eyes should have epitomized the unique legal arrangements of religious institutions in the EU system, they had to reluctantly accept such compromise solution.[170]

The adoption of the Declaration did not mark the end of the European churches' lobbying activity. In September 2002, the CEC and COMECE agreed on a draft on a European constitutional norm[171], setting out three objectives. First, the proposal aimed to secure

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[169] *Ibid.*

[170] *See* F. MARGIOTTA BROGLIO, *Il fenomeno religioso nel sistema giuridico dell'Unione europea*, in F. MARGIOTTA BROGLIO, C. MIRABELLI, F. ONIDA (eds.), *Religioni e sistemi giuridici. Introduzione al diritto ecclesiastico comparato*, Il Mulino, 1997, p. 161; A. LICASTRO, *Unione europea e «status» delle confessioni religiose. Fra tutela dei diritti umani fondamentali e salvaguardia delle identità costituzionali*, Giuffrè, 2014, p. 135.

[171] «1. The European Union recognises and respects the right of the churches and religious communities to freely organise themselves in accordance with national law, their convinctions and statuses and to pursue their religious aims in the framework of fundamental rights. 2. The European Union respects the specific identity and the contribution to public life of churches and religious communities and maintains a structured

«the right to self-determination of churches and religious communities in their teaching and organisation» and to protect «worship, charitable and cultural activity».[172] According to the CEC and COMECE, the protection of the corporate religious freedom was needed especially in the light of the recently-adopted Charter of Nice (2000). Indeed, a collective safeguard would have compensated the individual right to freedom of religion, enshrined by Art. 10 Charter. Second, in order to «promote the widest participation of citizens»[173] and to recognize «the specificity of churches and religious communities» the draft encouraged the maintenance and development of the «dialogue with organised civil society».[174] Last, by virtue of the horizontal and vertical dimension of the principle of subsidiarity, the proposal aimed to officially acknowledge that the structures of law governing religion «have grown over a long time and reflect diversity and national identity».[175] In close relation to the latter claim, as discussed above, the CEC and COMECE were particularly vocal in demanding a specific reference to God or Christianity in the Constitutional Treaty's Preamble.

In the face of the lacking of a specific reference to Christian roots, not only European confessional actors obtained the transposition of Declaration No. 11 into Article I-52 Constitutional Treaty, but also a third paragraph was added enshrining the need of a regular dialogue between EU institutions and churches. Although the rejection of the Constitutional Treaty by French and Dutch voters in 2005 brought the ratification process to an end, the Treaty of Lisbon indeed integrated unchanged the provisions of Art. I-52 into Article 17 TFEU. After decades since Delors endorsed the first approach of European institutions towards religious actors, this provision has finally represented an unprecedented legally binding primary-law systematization of the relations between the EU and the churches. The attribution of a legally binding value to this provision represents a fundamental step, since Art. 17 TFEU now integrates and completes the Treaties' and

dialogue with them. 2. The European Union respects and does not prejudice the status under national law of churches and religious communities in the Member States. The Union equally respects the status of philosophical and non-confessional organisations». For further information, *see* www.comece.org.

[172] Para. 5, original document available at http://www.comece.eu/dl/oupmJKJOmLkJqx4KJK/20020927PUBCONV_EN.pdf (last accessed on 31 December 2021).

[173] *Ibid.*, para. 10.

[174] *Ibid.*, para. 11.

[175] *Ibid.*, para. 14.

Charter's dispositions regarding religious or philosophical beliefs both at the individual and collective level. On the one side, in line with Declaration No. 11, paragraphs 1 and 2 constitute a safeguard clause aimed at protecting the exclusive competence of Member States in regulating the legal status of both confessional and non-confessional organizations. On the other, in a rather innovative way, paragraph 3 officially acknowledges the potential contribution of these bodies to the European social progress and, accordingly, commit the Union's institutions to a regular dialogue with them.

Scholars have commonly interpreted Art. 17 TFEU as indicative of a secular attitude adequate to the contemporary scenario in terms of both the second and third features that, as previously discussed, should characterize a post-secular pluralistic society. As concerns the overcoming of the rigid separation between the temporal and spiritual dimensions, McCrea notes that, by highlighting the «*specific contribution*» of religion to the European project, Art. 17(3) TFEU recognizes the specific input of confessional bodies to law-making and «implicitly identifies religious perspectives as a legitimate and necessary element of policy formation».[176] This conclusion is also supported by the fact that the recognition of the right of confessional actors to be consulted is enshrined in a separate provision from that dedicated to civil society in general. Art. 11(2) TEU indeed commits the EU to maintain «*an open, transparent and regular dialogue with representative associations and civil society*». The fact that the Union has dedicated a specific norm to confessional bodies indicates that EU institutions view them as bringing perspectives to lawmaking which other organizations cannot provide to the same degree. In addition, it is worth noting that Art. 17(3) TFEU goes beyond the constitutional norms of most Member States, which «do not generally impose a *duty* on those States to engage in dialogue and cooperate with religion».[177]

Nevertheless, as obvious, the recognition of such religious influence does not result in EU legislation's justification in theological terms. While churches have been accepted as traditional European moral guardians, the Union has not associated itself with confessional perspectives but has, instead, granted equal recognition to religious and not-

[176] R.MCCREA, *The Recognition of Religion*…above, p. 18.
[177] N. DOE, *Law and Religion in Europe*, Oxford University Press, 2011, p. 254.

religious viewpoints. Art. 17 TFEU itself enshrines the equal status of «*philosophical and non-confessional organisations*» too and, at its third paragraph, shows Union's commitment to maintain a dialogue also with such bodies. The EU thus balances the recognition of religious contribution with the acknowledgment of the specular legitimacy of non-confessional worldviews. In this perspective, confessional actors' right to participate in the law-making process derives from historical considerations, rather than from the inherent validity of the message of such bodies. In particular, as highlighted by Doe and McCrea, the explicit mention of religious bodies and the acknowledgment of their specific contribution would be justified on the grounds of religious organizations' historic role played in relation moral and social affairs.[178] This approach mirrors that of the Commission with regards to the relations with «*Religions, Churches and Humanisms*», as the European institution justifies the dialogue with such organizations on the basis that «they are representatives of European citizens. In this respect, Community law protects the churches and religious communities, as they would any other partner in Civil Society».[179] Therefore, whereas Art. 17(3) recognizes religious actors as relevant contributors to public morality and, consequently, to EU law and policy making, it nevertheless establishes a forum which equally includes religious and non-religious perspectives. Balancing confessional and humanist viewpoints, the Union then recognizes religion «as one influence amongst many in the process of law making».[180] This approach appears in line with the second feature that, according to the above-discussed scholars, should characterize a post-secular pluralistic society. On the one side, by acknowledging the participation of other non-religious perspectives in the political and legal arena, Union's secular institutions ensure the procedural differentiation of the temporal and spiritual spheres; on the other, religious worldviews are actively incorporated into the public discourse.

Invernizzi-Accetti further argues that Union's commitment to actively support the activity

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[178] *See* N. DOE, above, p. 252; R.MCCREA, *The Recognition of Religion*…above, p. 17.

[179] Group of Policy Advisers, Commission Document on Dialogue with Religions, Churches and Humanisms: Introduction to the Legal Aspects of the Relations between the European Union and the Communities of Faith and Conviction, available at http://ec.europe.dgs/policy_advisers/archives/activities/dialogue_religions_humanisms/legal_e n.htm (last accessed on 31 December 2021).

[180] R. MCCREA, *The Recognition of Religion*…above, p. 21.

of religious bodies can also be gleaned from the wording of Art. 17(1) TFEU, which states that the EU «*respects and does not prejudice*» the national status of religious bodies. According to the author, «the use of a double formulation here suggests that the notion of "respect" should be interpreted as implying something more than the merely negative idea implicit in the terms "does not prejudice"».[181] This conclusion appears to be confirmed by the interpretation of the term "respect" that has been offered by the ECtHRin relation to the principle of religious freedom. In *Folgero and Others v. Norway*, the ECtHR has indeed affirmed that «the verb "respect" means more than "acknowledge" or "take into account". In addition to a primarily negative undertaking, it implies some *positive obligation* on the part of the state».[182] In line with this interpretation, Art. 17(1) TFEU should not be understood merely as a prohibition on EU institutions to interfere with any kind of church-State relationship, but also as permitting the active endorsement of specific sets of belief in the European public sphere so as to preserve national cultures and tradition and a sense of collective identity.

It thus emerges that, as recommended by Galeotti, Zucca, Taylor and Buckley, Art. 17 TFEU respects the necessary differentiation of confessional and political bodies while simultaneously promoting active cooperation between religion and State in public affairs.

At its first paragraph, Art. 17 TFEU respects also the "principled distance" approach that, as previously discussed, should characterize post-secular societies. The approach developed in the Preamble, which suggests that Union law cannot undermine the historical institutional role of confessional bodies at Member State level, has indeed achieved explicit recognition in Art. 17(1) TFEU, which ensures respect to the legal status that Member States grant to churches, religious communities and philosophical organizations. Doe and McCrea suggest that the main reason for such deference from the part of the EU is to be found in Union's lack of a strong cultural identity of its own. On the one hand, it is noted that

> «the approaches of the member States to religion are heavily influenced by particular

[181] C. INVERNIZZI-ACCETTI, above, p. 681.
[182] European Court of Human Rights, judgment of 29 June 2007, App. no. 15472/02, *Folgero and Others v. Norway*, para. 84.

> religious traditions reflected in their religious demography, and that the views of States about religion and its role in society are based on shared historical and cultural assumptions».[183]

On the other, the authors argue that the Union lacks the authority to effectively intervene in the relations between religion, law and the State, since it does not possess «a strong cultural identity of its own and is still in the process of developing its political institutions».[184] In light of these considerations, Art. 17(1) TFEU would thus represent Union's commitment to give greater weight to religious perspectives which are culturally and institutionally rooted at the level of Member States.[185] This conclusion is also confirmed by the fact that, although the Union lays down numerous formal condition for membership, it does not stipulate rigid requirements in relation to church-State relations. EU membership is for instance understood as compatible with both the constitutional establishment of the principle of *laïcité* (as is the case in France) and the recognition of a specific religion of State (as is the case in Ireland, Sweden, Denmark and Greece).[186] Furthermore, an even greater degree of variety among Member States can be noted in terms of national policies, in matters such as education.[187] As Invernizzi-Accetti highlights, the EU thus seems to refuse to establish a homogeneous judicial space for regulating the relations between politics and religion, providing Member States with «a relatively wide "margin of appreciation" in the concrete determination of the policies to be pursued» in this respect.[188] Accordingly, Art. 17(1) TFEU has recognized that Member States, with due regard for the equality principle and EU law, are legitimized to autonomously regulate the status that churches, religious organizations and philosophical communities enjoy within the national territory. In this perspective, the individual dimension of religious freedom fundamentally differs from the associative-institutional

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[183] N. DOE, above, pp. 243-244.
[184] R. MCCREA, *Religion and the Public Order of the European Union*, Oxford University Press, 2010, p. 3.
[185] *See* R. MCCREA, *The Recognition of Religion…* above, p. 24.
[186] *See* S. FERRARI, above.
[187] *See* P. PORTIER, *Les laïcités dans l'Union Européenne: vers une convergence des modèles?*, in G. SAUPIN, R. FABRE, M. LAUNAY (eds.), *La tolérance, colloque international de Nantes*, Presses Universitaires de Rennes, 1999, pp. 303-319; F. PAJER, *L'istruzione religiosa nelle scuole dell'Unione Europea: un'identità plurale e in evoluzione*, in *Revista Pistis Praxis*, 2, 2017, pp. 449-478.
[188] C. INVERNIZZI-ACCETTI, above, p. 673.

one: the former is legally protected by the Union law and States' constitutions; the latter is subject to independent regulation at the national level. This approach perfectly matches the position of "principled distance", which allows States to adopt flexible decisions in terms of management of religion on grounds of context-specific historical and social conditions. As mentioned above, Buckley argues that this approach assumes legal meaning through the adoption of norms enshrining the autonomy of religious actors so as to allow for variability with respect to church-State relationships. Indeed, Art. 17(1) TFEU explicitly protects the autonomy of such relations, accepting both that a State cannot relate to every religion in the same manner and that the same faith cannot be managed equally by all Member States.

It thus emerges that also Art. 17 TFEU is in line with the second and third features that, according to scholars, should characterize a post-secular pluralistic society. On the one side, by allowing for the participation of both religious and non-religious perspectives in the public discourse, Art. 17(3) TFEU moves beyond the traditional neat separation between the political and religious spheres and actively incorporates (also) religious worldviews into the public arena. On the other, Art. 17(1) TFEU abides by the approach of "principled distance", as it explicitly protects States' autonomy in adopting context-specific decisions in relation to the management of their relations with religions.

From the reflections above, it is then possible to claim that EU institutions have developed an approach which, at least formally, results adequate to today's post-secular pluralistic societies. Firstly, Union's dispositions protect the "ethical core" of secularism – Art. 10 Charter enshrining religious freedom, Art. 21 Charter and Directive 2000/78 setting out the prohibition of discrimination on grounds of religion. Secondly, both Lisbon Treaty's Preamble and Art. 17 TFEU ensure a differentiation between the temporal and spiritual dimensions while simultaneously promoting active cooperation between religion and State in public affairs. In particular, the former moves beyond the traditional neat separation between the political and religious spheres, recognizing the role of religion in shaping public societal values; the latter, at its third paragraph, actively incorporates religious worldviews in the political and legal arena. Lastly, the wording of the Preamble and Art. 17(1) TFEU abide by the position of "principled distance", as they allow the

Union to recognize that certain religions have greater influence over the EU's constitutional values than others, and protect the different forms of church-State relationships historically developed in each Member State. As mentioned above, since 2017 the CJEU has issued six judgments concerning, for the first time, the concrete interpretation to be given to both the prohibition of religious discrimination in the workplace enshrined in Directive 2000/78 and to Art. 17(1) TFEU. Such judgments can be broken into two main categories: three out of six concerned the use of the Islamic headscarf in the workplace, while the remaining judgments examined the degree of autonomy recognized to Member State in organizing their relations with religious bodies in the occupational field. The next chapters of the present work will thus focus on the analysis of such rulings, as they represent further key elements to properly assess whether the secular approach that the Union is adopting can be considered, also from a substantial point of view, adequate to a post-secular and pluralistic society.

Chapter 2. Religious clothing and symbols in employment

1. Introduction

In several European States, workplace frictions have arisen due to Muslim women's religious apparel for a long time now, often requiring national courts to step in.[189] The CJEU nevertheless ruled on the use of the Islamic headscarf at work for the first time only in March 2017, when it issued the *G4S Secure Solutions* and *Bougnaoui and ADDH* judgments on the compatibility of internal company policies that prohibit the wearing of religious apparel by employees with Directive 2000/78. These issues came before the EU judges again in July 2021 in the joined cases *WABE* and *MH Müller Handel*.

How to correctly behave when a worker's freedom of religion comes into explicit contrast with the employer's interest is a topical issue. A demographic research published by the Pew Research Center's Forum on Religion & Public Life has found that, in 2020, more than eighty percent of the world population belonged to a faith, notably to Christianity (thirty-two percent) and Islam (twenty-five percent).[190] The study has then estimated that religious affiliation - especially to the Islam faith – will further grow, reaching almost ninety percent by 2030. These data become crucial when considering that, due to phenomena connected to globalization, migration flows have experienced such an expansion that today more than twenty-three million non-EU people legally reside in the Union's territory.[191] By welcoming migrants and their cultural, religious and linguistic baggage, European societies have *de facto* become multicultural societies and their

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[189] *See* W. SHADID, P.S. VAN KONINGSVELD, *Muslim Dress in Europe: Debates on the Headscarf*, in *Journal of Islamic Studies*, 16, 2005, pp. 36-61; N. HERVIEU, *Un nouvel équilibre européen dans l'appréhension des convictions religieuses au travail*, in *Stato, Chiese e Pluralismo Confessionale*, 5, 2013, pp. 1-19; S. TARANTO, *Il simbolismo religioso sul luogo di lavoro nella più recente giurisprudenza europea*, in *Stato, Chiese e Pluralismo Confessionale*, 1, 2014, pp. 1-13.

[190] Pew Research Center's Forum on Religion & Public Life, *Pew-templeton Global Religious Futures Project*, available at http://www.globalreligiousfutures.org/explorer/custom#/?subtopic=15&chartType=pie&data_type=percentage&destination=from&year=2020&religious_affiliation=all&countries=Worldwide&gender=all&age_group=all&pdfMode=false (last accessed on 31 December 2021).

[191] Eurostat, *Migration and Migrant Population Statistics*, March 2021, available at https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Migration_and_migrant_population_statistics (last accessed on 31 December 2021).

traditional Christian matrix must necessarily consider today's scenario of confessional pluralism, in which millions of people with different beliefs try to co-exist. In this regard, as discussed in the previous chapter, European States have traditionally adopted a separationist model, based on the assumption that the spiritual and temporal dimensions can be neatly separated. Nonetheless, the post-secular dimension of contemporary societies makes impossible to restrict religious practices solely to the private sphere and triggers a dialectic tension between the principles of secularism and religious freedom. European States are consequently often torn between the respect of cultural differences and the concern that local traditions could be undermined. In this perspective, courts are called to intervene, identifying potential situations of conflict and drawing a boundary line between multiculturalism and freedom rights.

The three rulings on the use of the Islamic veil in the workplace issued by the CJEU are therefore of particular importance as they have inevitable repercussions not only on the integration of third-countries individuals into the EU, but also on the delicate balance between conforming to the values of an open and pluralistic European society, founded on the respect for fundamental rights, and protecting the rights and freedoms of others, including the principle of neutrality and freedom of enterprise. In particular, all the three judgments required a balancing exercise between two conflicting rights: on the one hand, the employee's religious freedom, enshrined in Art. 9 ECHR and Art. 10 Charter; on the other, the employer's freedom to conduct business, recognized in Art. 16 Charter. The CJEU's approach to these cases thus represent a first key element to investigate whether the approach of the Union on the management of religion can be considered, also from a substantial point of view, adequate to the contemporary European post-secular and pluralistic society. Before turning to such analysis, it is nonetheless useful to examine the jurisprudence developed by the ECtHR on the use of religious symbols in the workplace. As discussed in the Introduction of the present work, despite having different mandates and legal powers, the Luxembourg and Strasbourg Courts have indeed developed a fruitful and unique relationship in the field of fundamental rights.

SECTION 1. Religious symbols, public functions and the ECtHR: the primacy of the principle of secularism

2. The jurisprudence of the ECtHR on religious symbols in the public spaces

The Strasbourg Court has examined numerous cases involving the alleged violation of Articles 9 and 14 ECHR, which enshrine religious freedom and prohibition of discrimination, respectively. Among these, despite referring to different factual circumstances, the rulings concerning religious symbology present some recurring elements. Firstly, the large majority of the case-law on the use of symbols and apparel that are associated with a specific religious faith has concerned national norms regulating Islamic garments, notably the *hijab*[192] and the *burqa.*[193] Secondly, almost the entire Strasbourg jurisprudence on the matter has addressed disputes related to the public sector, especially to the field of education, with the only important exception of the *Eweida and Others v. United Kingdom*[194] decision. Lastly, in these rulings the Court has clearly placed the emphasis on the protection of the principle of secularism and on values such as neutrality and prevention of indoctrination, with a detrimental effect on freedom of religion. In particular, the use of the Islamic headscarf has often been forbidden because considered as carrying symbolic meanings incompatible with the democratic order protected by the ECHR and, consequently, the *forum externum* of the individual religious freedom has been sacrificed. The latter finding is the direct result of the approach that, since the historical *Arrowsmith*[195] decision, the Strasbourg judges have adopted in relation to controversies concerning the matter at hand. According to this approach, religion is to be considered primarily a matter of belief, and only derivatively a matter of manifesting

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[192] *See*, among the others, European Court of Human Rights, judgment of 15 February 2001, App. no. 42393/98, *Lucia Dahlab v. Switzerland*; European Court of Human Rights, judgment of 10 November 2005, App. no. 443774/98, *Leyla Şahin v. Turkey*; European Commission of Human Rights, decision of 24 January 2006, App. no. 65500/01, *Kurtulmuş v. Turkey.*

[193] *See* European Court of Human Rights, judgment of 1 July 2014, App. no. 43835/11, *S.a.S. v. France*.

[194] European Court of Human Rights, judgment of 15 January 2013, Apps. no. 48420/10, no. 59842/10, no. 1671/10 and no. 36516/10, *Eweida and Others v. United Kingdom*.

[195] European Commission of Human Rights, report of 12 October 1978, App. no. 7050/75, *Arrowsmith v. United Kingdom*.

such belief.[196] The European Commission of Human Rights indeed held that Art. 9 ECHR «does not always guarantee the right to behave in the public sphere in a way which is dictated by a [personal] belief».[197] In contrast to the professed centrality of freedom of thought, conscience and religion within the Strasbourg system, this approach has paved the way for a minimalist interpretation of freedom to behave according to one's own conscience. In later years, this approach of the Commission has been explicitly endorsed by the Court, significantly reducing not only the actual scope of Art. 9 ECHR, but also the presence of religion in the public discourse, endorsing the traditional rigid separation between the temporal and spiritual dimensions.[198]

Even though the ECtHR has rendered numerous decisions concerning the use of religious symbols in the public workplace, in this context it proves impossible to examine such jurisprudence in its entirety.[199] This section will then focus specifically on the *Bulut-Karaduman v. Turkey*,[200] *Dahlab v. Switzerland*[201] and *Şahin v. Turkey*[202] cases. Although concerning the public education sector, these rulings have indeed touched upon issues extremely relevant for the four above-mentioned controversies brought before the CJEU. In particular, as will be discussed, the Luxembourg Court seems to have adopted the ECtHR's jurisprudential approach developed in *Bulut-Karaduman*, *Dahlab* and *Şahin*, granting primary value to the principle of secularism at the expense of both individual religious freedom and participation of religion in the public sphere.

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[196] *See* D. J. HILL, D. WHISTLER, *The Right to Wear Religious Symbols*, Palgrave Macmillan, 2013, pp. 15-35.
[197] European Commission of Human Rights, decision of 3 May 1993, App. no. 16278/90, *Karaduman v. Turkey*, p. 108.
[198] *See* European Court of Human Rights, judgment of 1 July 1997, App. no. 20704/92, *Kalaç v. Turkey*, para. 27; European Court of Human Rights, judgment of 26 October 2000, App. no. 30985/96, *Hasan and Chaush v. Bulgaria*, para. 60.
[199] For a general overview of the ECtHR's case-law on this issue, *see* M. FERRI, *La libertà di abbigliamento religioso nella giurisprudenza della Corte Europea dei Diritti dell'Uomo*, in A. SANTINI, M. SPATTI (eds.), *La libertà di religione in un contesto pluriculturale*, Libreria Editrice Vaticana, 2021, pp. 35-62.
[200] European Commission of Human Rights, decision of 3 May 1993, Apps. no. 16278/90 and no. 18783/91, *Bulut-Karaduman v. Turkey*.
[201] Judgment *Dahlab*, above.
[202] Judgment *Şahin*, above.

2.1. The Bulut-Karaduman v. Turkey *case: a misunderstanding of the State's duty of neutrality*

One of the first decisions on the matter rendered by the Strasbourg Court has concerned Turkey's alleged violations of the right to religious freedom (Art. 9 ECHR) and of the non-discrimination principle (Art. 14 ECHR). In these joined cases, the applicants were Muslim female students who, despite having successfully completed a university course, could not get a degree certificate because they refused to provide an identity photograph showing them without the Islamic headscarf. This decision was justified by virtue of Ankara University's regulations and a 1982 ministerial circular, both prohibiting the use of photographs displaying religious symbols. Ms Karaduman and Ms Bulut then appealed to national courts, alleging an infringement of their right to religious freedom and freedom to manifest one's belief. As the Turkish judges dismissed their appeals, claiming that the university's administrative decision was valid and did not violate the students' fundamental rights, the applicants referred the question to the European Commission of Human Rights.

The Commission stated that the claim was inadmissible, because the regulatory provision conflicted neither with religious freedom nor the principle of non-discrimination. In their decision, the European judges seem to conform to the approach of the national courts, according to which the prominence of the principle of secularity within the Turkish context justifies both the prohibition of religious symbols and the adoption of provisions, such as those at issue in the main proceedings, meant to protect other students' sensitivity. Indeed, not only Art. 2 of the Constitution states that «[t]he Republic of Turkey is a democratic, secular and social state», but also Art. 136 establishes the Department of Religious Affairs, *i.e.* an *ad hoc* body tasked with monitoring the compliance with «the principles of secularism, […] national solidarity and integrity». It then emerges that, at least from a formal point of view, Turkish legal and regulatory system ensures a differentiation between the temporal and spiritual dimensions while, simultaneously, granting pluralistic openings to the different confessional options present in the national

territory.[203] In relation to the *Bulut-Karaduman* controversy, the national judges thus constantly claimed that the significance of the principle of secularism justifies the prohibition of symbols and behaviours evocative of specific religious belongings so as to ensure the neutrality of public spaces.

The Commission seems to have endorsed this approach as it argued that, by entering a secular university, the two applicants had agreed to abide by its rules, which may include to limit the students' manifestation of their religious beliefs so as to ensure harmonious co-existence between individuals of different faiths.[204] The European judges further claimed that, especially in countries where the vast majority of the population belongs to one particular confession, the lack of restrictions to the manifestation of the observance of that religion may exert pressure on those students who do not practice that faith. As a consequence, they concluded that dress regulations such as those in the main proceedings may ensure that «certain fundamentalist religious movements do not disturb public order in higher education or impinge on the beliefs of others».[205]

Such an approach appears to be the result of a basic misunderstanding. In contrast to what suggested by the Commission, it is indeed the duty of the State – and not of the individual citizens - to adopt an authentically secular attitude.[206] Public institutions are indeed required to provide the most favourable conditions for individual expression, exercising their powers in accordance with the principle of neutrality towards society's different beliefs and not taking any stand in support of specific ideological options. Only when refraining from obliging citizens to adhere to a strictly secularist ideology and allowing them to freely choose their preferred religious option, national institutions truly protect individuals' religious freedom.[207]

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[203] *See* P. LILLO, *Profili giuridici del pensiero islamico*, in *Archivio Giuridico Filippo Serafini*, CCXXIII, 2003, pp. 421-422; E. ÖKTEM, *La Turquie et les dimensions internationales de la liberté religiouse*, in *Quaderni di Diritto Politico Ecclesiastico*, 10, 2002, p. 265.
[204] Decision *Bulut-Karaduman*, above, p. 6.
[205] *Ibid*.
[206] *See* A. VITALE, *Laicità e Modelli di Stato*, in M. TEDESCHI (ed.), *Il Principio di Laicità nello Stato Democratico*, Rubbettino, 1996, pp. 236-237; A. BALDASSARRE, *Libertà. 1) Problemi Generali*, in *Enciclopedia Giuridica "Treccani"*, XI, Treccani, 1990, p. 16.
[207] *See* M. PARISI, *Simboli e comportamenti religiosi all'esame degli organi di Strasburgo. Il diritto all'espressione dell'identità confessionale tra (presunte) certezze degli organi sovranazionali europei e*

As Martínez-Torrón writes:

> «To consider that state neutrality towards religious ideas is a requirement of the protection of religious freedom seems reasonable when neutrality is conceived as the state's incompetence to judge the truth or falsity of religious doctrines. But it is less reasonable when the Court tends to understand neutrality as […] easily justifying […] state prohibitions of personal expressions of religious belief in public, particularly in educational environments».[208]

The European judges appear to have forgotten that the actual enjoyment of the right to freedom of religion is the necessary precondition for the concrete realization of secularity. The Strasbourg Court seems also not to have appreciated the difference between authoritatively imposing the use of a religious garment and merely exhibiting it as a sign of a specific religious sentiment. In the former case, the unconditional permission of the use of religious symbols in the public sphere may indeed correspond to the identification of State values with the confessional message and, therefore, would be in sharp contrast to the principle of differentiation between the temporal and spiritual dimensions. Yet, the latter scenario would simply result in the realization of a fundamental freedom, the enjoyment of which should not be considered detrimental to State neutrality because, as previously mentioned, it is up to public institutions - and not to private citizens - to adhere to the secular principle. From this perspective, the public manifestation of religious belief and the use of religious symbols could be restricted only if unacceptably infringing on the rights and freedoms of others. It seems at least doubtful that the wearing of the Islamic headscarf poses such a serious threat and impinges upon other people's rights to such an extent that it necessitates a sharp decision like that rendered by the Strasbourg Commission.

(verosimili) incertezze dei pubblici poteri italiani, in M. PARISI (ed.), *Simboli e comportamenti religiosi nella società plurale*, Edizioni Scientifiche Italiane, 2006, p. 6.

[208] J. MARTÍNEZ-TORRÓN, *Religious Pluralism: The Case of the European Court of Human Rights*, in F. REQUEJO, C. UNGUREANU (eds.), *Democracy, Law and Religious Pluralism in Europe*, Routledge, 2014, p. 132.

2.2. The Lucia Dahlab v. Switzerland *case: the prohibition of Islamic symbols as a "precautionary necessity"*

The restrictive approach emerged in *Bulut-Karaduman* has been confirmed by the *Dahlab* judgment, in which the Strasbourg Court dismissed the claim of Ms Dahlab, a primary-school teacher living in Geneva. The applicant, converted to Islam after she had joined the school, started wearing in the workplace long loose clothing and a headscarf in 1990. Despite having worn this for years without any objection from students, parents or colleagues, in 1996 the Directorate General for Primary Education in the Canton of Geneva directed Ms Dahlab to stop wearing religious apparel at school on the grounds that it constituted «an obvious means of identification imposed by a teacher on her pupils, especially in a public, secular education system».[209] Alleging the violation of her religious freedom, she appealed against the decision before the Swiss judges, who rejected her claims reiterating that a public teacher wearing religious garments went against State denominational neutrality. Ms Dahlab then took her case before the ECtHR, relying on Articles 9 and 14 ECHR. The European Court found the application «manifestly ill-founded», arguing that the legitimate aim of ensuring the neutrality of the Swiss primary-education system justifies measures that limit the public manifestation of religious beliefs.[210] When weighing the need to protect pupils' religious sensitivity against the teacher's freedom of religion, the ECtHR has given primary importance to the former, at the expense of the individual freedom of the applicant. By recognizing the legitimacy of the ban on religious garments in the performance of teaching duties, the Court has therefore endorsed the vision of a strictly secular school system, in which all students should enjoy the right to an education respectful of their own beliefs, even if this implies restrictions on teachers' religious freedom.[211]

Even acknowledging that public authorities have the legitimate power to adopt a measure such as that in the main proceedings to protect the collective interest, it is nevertheless

[209] Judgment *Dahlab*, above, p. 1.
[210] *Ibid*., pp. 13-14.
[211] *See* M.G. BELGIORNO DE STEFANO, Foulard *islamico e Corte Europea dei Diritti dell'Uomo (modello laico e modelli religiosi di genere di fronte al diritto alla libertà di coscienza e parola*, in *Rivista della Cooperazione Giuridica Internazionale*, 9, 2001, pp. 82-83.

questionable whether the use of the traditional Islamic headscarf infringes upon the rights and freedoms of others in such a manner as to justify the suppression of dialogue among the different beliefs, which, pursuing the logic of an open and democratic discourse, is itself one of the aims of the teaching mission.[212] As discussed in the previous chapter, post-secular societies should indeed promote the dialogue among individuals with different religious feelings, without requiring them to set aside their confessional convictions in order to enter the public arena. In this perspective, authentically post-secular States should encourage the co-existence of divergent worldviews, which, even if potentially incompatible, mutually recognize each other's legitimacy.

The restrictive measure discussed in *Dahlab* is at odds with this post-secular configuration, provided that the use of the religious symbol simply signifies the applicant's adherence to a specific faith, rather than, on the contrary, be a means of forced indoctrination. As Evans notes, «if Ms Dahlab had been giving explicit religious instruction to students, or had required them to participate in religious activities such as praying, then the case for proselytism would have been made out quite easily»[213]. Yet, the applicant's clothing and behaviour do not appear to have concretely jeopardized the neutrality of Swiss education system. The pupils were merely exposed to a symbol of the faith practiced by their teacher, which should be regarded as a natural manifestation of contemporary pluralism. Furthermore, the student-teacher relationship is not based on a total absence of ability to judge and rational assessment on the part of the pupils. Although schools are required to adopt appropriate precautionary measures so as to limit the excessive intrusion of teachers' personal convictions in the classroom, the education of the new generations cannot be founded on the concealment of today's ever-increasing social heterogeneity.[214] It is indeed unrealistic to look at matters concerning the visibility of ethnic-religious minorities as they were external to our societies nowadays.

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[212] *See* R. BOTTA, *Simboli religiosi e autonomia scolastica*, in *Corriere Giuridico*, 2, 2004, p. 242; P. CUMPER, T. LEWIS, *"Taking Religion Seriously"? Human Rights and* Hijab *in Europe: Some Problems of Adjudication*, in *Journal of Law and Religion*, 24, 2008, p. 609; A. ABDOOL, F. POTGIETER, J.L. VAN DER WALT, C. WOLHUTER, *Inter-Religious Dialogue in Schools: A Pedagogical and Civic Unavoidability*, in *Theological Studies*, 63, pp. 543-560.

[213] C. EVANS, *The "Islamic Scarf" in the European Court of Human Rights*, in *Melbourne Journal of International Law*, 7, 2006, p. 62.

[214] *See* M. PARISI, above, p. 10.

Yet, the ECtHR does not seem to support this argument as, in *Dahlab*, was unduly sensitive to the students' psychological conditioning that could have potentially derived from the alleged violation of their freedom of conscience. In particular, when assessing the lawfulness of the ban on the *hijab*, the Court did not consider whether less-restrictive measures – equally effective to reach the pursued objective – existed nor if such prohibition was actually strictly necessary to protect the rights of the pupils. On the contrary, the European judges reasoned only in abstract terms, implicitly associating the religious veil with militant forms of Islam and thus suggesting the irreconcilability between the headscarf symbolism and secular democracy,[215] without identifying a concrete conflict between rights. Although there was no evidence that Ms Dahlab had tried to propagandize her religious beliefs and there had been no complaints from parents or pupils, the Court claimed that the mere principle of neutrality in education justifies restrictions on teachers' clothing so as to prevent religious conflicts.[216] Thus, the ECtHR assumed that the exhibition of a symbol that arouse curiosity about a certain faith is likely to lead to "conflict" and, consequently, when weighing between the individual right to religious freedom against the State interest, associated the latter with the prevention of such a conflict. Nonetheless, in practice, this interest does not seem to be jeopardized by the simple use of a religious symbol on the part of a teacher.

It then emerges that the judges interpreted the notion of "necessity" in a broad, if not precautional, manner.[217] From this perspective, the existence of less-restrictive measures would be superfluous since confessional symbols and religious harmony are considered

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[215] « [I]t cannot be denied outright that the wearing of a headscarf might have some kind of proselyting effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which […] is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for other and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils». Judgment *Dahlab*, above, p. 13.

[216] The exhibition of the Islamic veil was considered *per se* an infringement of neutrality capable of jeopardizing religious harmony, as «her pupils are young children who are particularly impressionable [and] the appellant can scarcely avoid the questions which her pupils have not missed the opportunity to ask [about why she wears the *hijab*]. It is therefore difficult for her to reply without stating her beliefs. […] Furthermore, religious harmony ultimately remains fragile in spite of everything, and the appellants attitude is likely to provoke reactions, or even conflict, which are to be avoided». *Ibid.*, p. 6.

[217] *See* N. BHUTA, *Two Concepts of Religious Freedom in the European Court of Human Rights*, in *EUI Working Paper LAW*, 33, 2012, p. 17.

mutually exclusive *a priori*:

> «The court accepts that it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children […]. In [the case of children aged four to eight] *it cannot be denied outright* that the wearing of the headscarf *might* have some kind of proselytizing effect, seeing that it appears imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It *therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.* Accordingly, weighing the right of a teacher to manifest her religion against the *need to protect pupils by preserving religious harmony,* the court considers that […] the Geneva authorities did not exceed their margin of appreciation and that the measure they took was therefore not unreasonable».[218]

The language used and, in particular, the expression «*it cannot be denied outright that the veil might have a proselytizing effect*» clearly point to the lack of evidence of the applicant's proselytizing effort and are indicative of a notion of "precautionary necessity", which considers Islamic symbols as a potential threat to religious harmony and thus authorize the State to prevent such hypothetical risks of conflict. The matching of Islamic practices with concepts such as intolerance, discrimination and inequality echoes the traditionally secular critique of the religious values *per se* and implicitly endorses the preservation of an outdated wall of separation between religion and politics as an imperative feature of secular democracies. The ruling indeed implies that religion cannot be a part of the public sphere, which should only be presided over by a secularism that allows for the presence of non-religious ideas or symbols but not their religious counterparts. At no time did the judges question whether such an exclusive notion of secularism could be replaced, for the sake of a higher protection of religious freedom, by an inclusive notion of secularism that would let pupils see in their own school a reflection of the pluralism existing in their State. The *Dahlab* judgment clearly runs counter to the post-secular approach, through which it is possible to give account of contemporary

[218] Judgment *Dahlab*, above, p. 6. [emphasis added]

pluralism and accept the detachment of modernization from the traditional understanding of secularization without questioning the modern character of today's societies.

2.3. The Leyla Şahin v. Turkey *case: a reasoning in abstract terms*

A few years after, the Strasbourg Court addressed the ban on the wearing of the Islamic headscarf in Turkey again in *Şahin.* In this case, the Islamic student Leyla Şahin, after having studied for four years at the University of Bursa, enrolled at the Faculty of Medicine at Istanbul University in 1997. A year later, a circular banning beards and headscarves in Istanbul University was circulated and Ms Şahin, refusing to remove her veil, was refused into lectures and examinations on a number of occasions. The student then lodged an application before the Turkish judges, submitting that there was no statutory basis for the circular and the chancellor of the University had no regulatory power in that area. The national court dismissed the application, observing that neither the circular at issue nor the measures taken against the applicant could be considered illegal as they were consistent with both Turkish relevant legislation and the jurisprudence of the Constitutional Court. The applicant thus claimed the violation of Articles 9 and 14 ECHR before the Strasbourg Court, arguing that the ban on wearing the headscarf in institutions of higher education constituted an unjustified and discriminatory interference with Islamic students' right to manifest their religion. Ms Şahin further maintained that her choice of dress had to be treated as obedience to a religious rule and not, on the contrary, as protest against the constitutional principle of secularity nor as an act of proselytism. In this regard, it is interesting to note that numerous scholars hold that the use of religious symbols in public places by the member of ethnic-religious minorities is to be considered not only as a manifestation of personal convictions, but also as a way to reclaim one's own roots and resist the standardising forces of globalization.[219] The ECtHR

[219] *See* M.G. BELGIORNO DE STEFANO, above, p. 79; V. TOZZI, *La trasformazione dello Stato nazionale, l'integrazione europea, l'immigrazione ed il fenomeno religioso*, in G. MACRÍ (ed.), *La libertà religiosa in Italia, in Europea e negli ordinamenti sovranazionali*, Gutenberg, 2003, p. 23; G. MOSCONI, *Crisi del diritto, pluralismo religioso e mutamento culturale in Europa*, in *Sociologia del Diritto*, 2, 2004, pp. 229-230; S. BACQUET, *Religious Symbols and the Making of Contemporary Religious Identities*, in R. SANDBERG (ed.), *Religion and Legal Pluralism*, Ashgate, 2015, pp. 113-132.

found that the University regulation that prohibited the use headscarves was indeed an interference with applicant's right to manifest her religion but, in spite of the arguments discussed above, it added that such measure was justified under Art. 9(2) ECHR because it was «necessary in a democratic society» and pursued a legitimate aim.

In her request for a referral to the ECtHR, Ms Şahin surprisingly maintained that, even though she regarded the use of the *hijab* as an Islamic «recognized practice», she did not contest that university authorities could use the powers prescribed by law to limit the right to wear the headscarf.[220] The applicant nonetheless claimed that the lack of a national norm prohibiting the exhibition of the Islamic veil made the University measure unlawful, because «it could not validly be argued that the legal basis for that regulation was the case law of the Turkish courts, as the courts only had jurisdiction to apply the law [and] not to establish new legal rules».[221] In return, the European judges rejected such formal interpretation of the expression "prescribed by law" and argued that the impugned measure had a legal basis since «"law" must be understood to include both statutory law and judge-made "law"».[222] Furthermore, after having noted that other Turkish universities allowed the use of Islamic religious symbols, the ECtHR observed that the approval of the ban on the headscarf had been the subject of a long-running debate and that, therefore the Istanbul University authorities were better placed than an international court to concretely evaluate whether such decision was adequate to their local needs. The Strasbourg judges then concluded that, by endorsing the prohibition of the headscarf, the Turkish Constitutional Court had pursued the legitimate aims of protecting the rights and freedoms of others and of protecting the democratic public order. Referring to the *coups d'état* which had determined the structure of the judicial and university systems in Turkey, Ms Dahlab nevertheless questioned the democratic character of the State and contested the wide margin of appreciation recognized to national public authorities in the matter at hand. In addition, she claimed that the allegation that her use of the headscarf could have violated the rights and freedoms of other was wholly unfounded. In response, the ECtHR argued that the majority of the Turkish population could not easily tell apart the religious

[220] Judgment *Şahin*, above, paras. 73 and 76.
[221] *Ibid*., para. 80.
[222] *Ibid*., para. 88.

and political meaning of the *hijab* and observed the presence on the territory of extremist political groups aiming to impose on society a theocratic order. In light of this, the European judges considered the adoption of drastic measures such as that in the main proceedings to be lawful, especially since the ban on the headscarf was «based in particular on the two principles of secularism and equality».[223] The ECtHR finally pointed to the specific characteristics of the university environment, arguing that exhibition of religious symbols in this context would be contrary to the values of gender equality and respect of the rights of others that are taught there, and found the impugned measure to be compatible with the principle that State education must be neutral.

One of the most interesting aspects of *Şahin* is the dissenting opinion delivered by Judge Mrs Tulkens, who argued that the consequence of the use of the margin of appreciation in this case was to diminish critically the rigour with which the ECtHR assessed whether a State's action could be considered "necessary in a democratic society". As will be discussed in section 4., the margin of appreciation doctrine normally accompanies the lack of a European consensus on a subject-matter by wider discretionary powers allowed to States in that area. Yet, not only the Strasbourg Court adopted a position on the meaning of wearing the Islamic headscarf by accepting without question the reasons given by the Turkish authorities, but it also ignored that no other European State has the ban on exhibiting religious symbols extended to university education. According to the dissenting opinion, an authentic democratic (and, it might be added, post-secular) society should «seek to harmonise the principles of secularism, equality and liberty, not to weigh one against the other».[224] In this perspective, the freedom to religious manifestation cannot be sacrificed *a priori* in the name of State secularism. On the contrary, limitations to such right can be introduced only if founded on clear norms and indisputable facts. The ECtHR nevertheless reasoned only in abstract terms, while, in practice, there was no evidence that Ms Şahin herself posed any threat whatsoever to the constitutional principles of secularism and equality. As Judge Tulkens said, the rights and freedoms of others would have been infringed

[223] *Ibid.*, para. 112.
[224] Judgment *Şahin*, above, dissenting opinion of Judge F. Tulkens, para. 4.

> «if the headscarf the applicant wore as a religious symbol had been ostentatious or aggressive or was used to exert pressure, to provoke a reaction, to proselytise or to spread propaganda and undermined – or was liable to undermine – the convictions of others. However, the Government did not argue that this was the case and there was no evidence before the Court to suggest that Ms Şahin had any such intention».[225]

Judge Tulkens further argued that the existence of radical Islamic political groups, which surely pose a threat to pluralism, cannot justify the straightforward association of the wearing of the headscarf with fundamentalism. Analogously, in contrast to what the ECtHR suggested, the use of the *hijab* does not necessarily symbolise the submission of women to a patriarchal culture and, in certain cases, can even be a means of emancipation.

In contrast to the dissenting opinion, the Strasbourg Court adopted a sensitive approach to Turkey's political and social reality, at the expense of a concrete protection of personal religious freedom. The *Şahin* ruling is indeed in tune with the reasoning of Turkish courts, according to which the exhibition of the headscarf not only is equivocal but, in the historic moment in which the dispute arose, supposedly amounted to supporting fundamentalist anti-systemic movements. In principle, this approach is consistent with post-secular "principled distance", which, allowing context-specific decision, recognize that States may interfere in some religions more than in others. Yet, as noted in previous chapter, "principled distance" cannot be interpreted as a mere *laissez-passer* for differential treatment and international judicial authorities are required to supervise the respect of the principle of proportionality, taking into account all relevant circumstances. The ECtHR itself has regularly pointed out that it is for the Court to have the final say on whether limitations to freedom to manifest one's own religion are justified in principle and proportionate.[226] Yet, as in *Dahlab*, the judges applied in a lenient way their traditional margin of appreciation doctrine, performing a poor assessment of the factual evidence presented by the parties. In *Şahin*, nothing suggested that the applicant wore the headscarf to support subversive political movements. The ECtHR had previously affirmed that

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[225] *Ibid*., para. 8.

[226] *See* European Court of Human Rights, judgment of 25 March 1983, Apps. no. 5947/72, no. 6205/73, no. 7052/75, no. 7061/75, no. 7107/75, no. 7113/75 and no. 7136/75, *Silver and Others v. United Kingdom*, para. 97; European Court of Human Rights, judgment of 25 May 1993, App. no. 14307/88, *Kokkinakis v. Greece*, para. 47.

national authorities have the burden of the proof with regard to the necessity of a restrictive measure, *i.e.* they must demonstrate that «the applicant […] carries on activities other than those stated»,[227] especially if such activities pose a political threat to State authority.[228] Yet, though Turkey failed to produce concrete evidence of Ms Şahin's social dangerousness, the Strasbourg judges found the restriction on the applicant's freedom to manifest her religious belief justified and proportionate. It then appears that «the decision in *Şahin* is […] strongly influenced by the court's general ambition to curb political Islam»,[229] as judges' approach implicitly suggests that Muslims are considered *a priori* to pose a threat to the increasingly secularized Western societies. If we compare *Şahin* to *Dahlab*, two contradictory views of Muslim women then emerge. They are seen simultaneously as victims and aggressors, without any recognition of the inherent contradiction between the two stereotypes and with no evidence to prove that either cliché was accurate with respect to the applicants.[230] On the one hand, Ms Şahin and Ms Dahlab embody gender inequality – oppressed, submissive and victims of Islamic patriarchy. On the other, those very same women are dangerous destabilizers of the democratic State. In this connection, Evans writes that the «link [between the two stereotypes] seems to be the idea of threat […] to the liberal, egalitarian order».[231] In its rulings, rather than focusing on the applicants' actual freedom to manifest their religious convictions, the ECtHR seems to have diverted the debate towards political considerations. As Pimor holds:

> «The emerging pattern seems to show that Strasbourg does not necessarily deal with the protection of Muslim women's individual rights per se, but instead endeavours to tackle the polemical and political angle of Islam, the result of which is an attempt to possibly subdue religious expressions of the Muslim faith in order to render Islam more acceptable in Europe, by making it less visible and therefore less threatening to western and secular

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[227] European Court of Human Rights, judgment of 13 December 2001, App no. 45071/99, *Metropolitan Church of Bessarabia v. Moldova*, para. 125.
[228] *See* European Court of Human Rights, judgment of 20 January 1998, App no. 19392/92, *United Communist Party and Others v. Turkey*, para. 59.
[229] H. SKJEJE, *Headscarves in Schools: European Comparisons*, in M. LOENEN, J. GOLDSCHMIDT (eds.), *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?*, Intersentia, 2007, p. 133.
[230] *See* E. HOWARD, above, pp. 72-73.
[231] C. EVANS, above, pp. 64-65.

values».[232]

More generally, in such cases, the Strasbourg judges implicitly held that Art. 9 ECHR does not offer any protection to the right to manifest religious beliefs against obligations stemming from national norms that pursue a legitimate secular interest and are not directly aimed at the restriction of freedom of religious choice. From this perspective, «the state 's neutral law must automatically prevail, without the need to justify it under Art. 9(2) ECHR».[233] Just as in *Bulut-Karaduman* and *Dahlab*, the ECtHR took for granted that the neutrality of the public sphere is best preserved when religion is absent or at least conceived. Yet, «the paradoxical consequence of this reasoning is to assume that a climate of tolerance and respect can be achieved through intolerance towards a particular form of religious expression».[234]

3. Religious symbols, the private workplace and the ECtHR: the Eweida *case*

As previously noted, the ECtHR has developed an extensive body of jurisprudence on religious freedom and, in particular, has issued numerous rulings relating to the manifestation of religious beliefs at work. Whereas the vast majority of these judgments concerned restrictive measures on public employees' freedom of religion,[235] the Strasbourg judges almost invariably have declared the applications of workers in the private sector to be inadmissible.[236] For instance, this was the case with the *Stedman v. United Kingdom* dispute, concerning the dismissal of a travel agent who had refused to work on Sunday due to her religious convictions.[237] In this case, the Court rejected the

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[232] A. PIMOR, *The Interpretation and Protection of Article 9 ECHR: Overview of the Denbigh High School (UK) Case*, in *Journal of Social Welfare and Family Law*, 28, 2006, p. 333.
[233] J. MARTÍNEZ-TORRÓN, above, p. 126.
[234] *Ibid*., p. 134.
[235] *See in particular* European Court of Human Rights, judgment of 9 April 1997, App no. 29107/95, *Stedman v. United Kingdom;* Judgment *Kurtulmus*, above; European Court of Human Rights, judgment of 3 April 2007, App. no. 41296/04, *Karaduman v. Turkey*; European Court of Human Rights, judgment of 26 November 2015, App. no. 64846/11, *Affair Ebrahimian v. France*.
[236] *See* E. SORDA, *Lavoro e fede nella Corte di Strasburgo. Note a margine della sentenza* Eweida e Altri c. Regno Unito, in *Forum Costituzionale*, 2013, available at http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/paper/0440_sorda.pdf (last accessed on 31 December 2021).
[237] Judgment *Stedman*, above.

applicant's complaints on the grounds that she had voluntarily "contracted-out" of protection by undertaking the private employment at issue. Nonetheless, in one of the four cases joined in *Eweida and Others v. United Kingdom*, the ECtHR ruled on the use of religious symbols by private employees. Though all four claims arose from the similar context of an employer's refusal to accommodate an employee's religious practices, three of them (*Ladele*, *Mc Farlane,* and *Chaplin*) concerned either the public sector or the enjoyment of the right to conscientious objection.[238] For this reason, the present paragraph will focus exclusively on the only case which involved the wearing of religious symbols in the private workplace, *i.e. Eweida*.

Before getting to the heart of this judgment, it is useful to mention the preliminary considerations applicable to all four claims that the Court made, for they represent further indications of the ECtHR's approach to religious controversies in the workplace. Firstly, the judges held that UK legislation on religious freedom (just as that of most European countries) is not adequate, particularly with regards to the wearing of religious symbols at work.[239] Secondly, after having acknowledged the numerous cases where the "freedom to resign" doctrine[240] was held to bar a finding of interference with a worker's freedom

[238] For the sake of completeness, *Ladele* concerned the dismissal of a Christian registrar who refused to officiate at civil partnership ceremonies because this would have been contrary to her religious beliefs. The ECtHR dismissed Ms Ladele's complaints, arguing that her dismissal was a proportionate measure legitimately aiming to promote equality on grounds of sexual orientation. Analogously, in *Mc Farlane*, a Christian psychosexual counsellor was dismissed for refusing to comply with his employer's policies of providing sexual counselling also to same-sex couples. Again, the applicant lost his claim before the ECthR, as the judges observed that he had autonomously decided to work that employer, even though he knew full well that he would have not been able to filter out clients depending on their sexual orientation. Lastly, *Chaplin* involved the redeployment of a nursing sister who refused to stop exhibiting a crucifix necklace contrary to the national health and safety policy. Noting that the grounds for the measure were health and safety and that the applicant had been offered the alternative of hiding the cross under a high-necked top, the ECtHR found that the interference had not been disproportionate and dismissed Ms Chaplin's claim.

[239] Judgment *Eweida*, above, paras. 41-46.

[240] The "freedom to resign" doctrine states that, as long as an employee voluntarily enters into a contract of employment and is free to resign if and when the occupational activities conflict with his/her religious convictions, there is no interference with the right to manifestation of belief of such employee. According to this reasoning, by entering into the work relationship voluntarily, the employee has consented to certain restrictions on his/her exercise of religion within that context. Scholars commonly agree that the ECtHR has started chipping away at "freedom to resign" jurisprudence as national courts often abused this doctrine, referring to it any time an employee claimed the breach of a fundamental right at work. Since the 2010 *Konstanstin Markin v. Russia* judgment, the Court has regularly claimed that the "freedom to resign" argument is not enough to resolve all employer-employee conflicts, but is it just a factor to take into consideration in the justification and proportionality assessment. *See also* European Court of Human Rights, judgment of 24 June 2010, App. no. 30141/04, *Schalk and Kopf v. Austria*. For further information, *see* S. OUALD CHAIB, *Religious Accomodation in the Workplace: Improving the Legal Reasoning of the*

of religion, the Court argued that a better approach when faced with claims that employees had experienced restrictions on their religious freedom in the workplace was resort to the principle of proportionality. Lastly, in relation to States' margin of appreciation, the judges noted that, even though private companies' decisions are not directly attributable to public authorities, certain general principles are applicable to both the private and public sectors as they directly affect the interests of the community either way.[241]

The ECtHR then proceeded to examine the case, concerning a check-in assistant for British Airways that was sent home from work without pay following repeated infringements of her employer's uniform policy by wearing a Catholic cross on a necklace while at work. In order to protect clients' religious sensitivity, the uniform policy prohibited the exhibition of any religious symbol, with the important exception of those clothing items that are required for mandatory religious reasons. British Airways had then authorized male Sikh employees to wear a turban and bracelets and female Muslim staff members were allowed to wear the *hijab*. Since Catholicism does not require believers to wear a cross, Ms Eweida was asked to conceal the necklace under the uniform and, as an alternative, was offered administrative work without customer contact, which would not have required her to wear a uniform. She rejected both these opportunities. At this time, Ms Eweida's case had reached the British and international media, which were very critical of British Airways. The airline eventually altered their policy allowing the visible wearing of any religious symbol and she returned to work, though the employer refused to pay compensation for the earning she had lost during the months she had been away

European Court of Human Rights, in K. ALIDADI, M. FOBLETS, J. VRIELINK (eds.), *A Test of Faith, Religious Diversity and Accomodation in the European Workplace*, Routledge, 2012, pp. 33-58; L. VICKERS, *Freedom of Religion and Belief, Article 9 ECHR and the EU Equality Directive*, in F. DORSSEMONT, K. LÖRCHER, I. SCHÖMANN (eds.), *The European Convention on Human Rights and the Employment Relation*, Hart, 2013, pp. 209-236; F. TULKENS, *Freedom of Religion under the European Convention of Human Rights: A Precious Asset*, in *Brigham Young University Law Review*, 3, 2014, pp. 509-530; K. ALIDADI, *Religion, Equality and Employment in Europe: The Case for Reasonable Accomodation*, Hart, 2017, pp. 27-28.

[241] «Where, as for the first and fourth applicants, the acts complained of were carried out by private companies and were not therefore directly attributable to the respondent State, the Court must consider the issues in terms of the positive obligation on the State authorities to secure the rights under Article 9 to those within their jurisdiction […]. Whilst the boundary between the State's positive and negative obligations under the Convention does not lend itself to precise definition, the applicable principles are, nonetheless, similar. In both contexts regard must be had in particular to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, subject in any event to the margin of appreciation enjoyed by the State». Judgment *Eweida*, above, para. 84.

from the workplace. Ms Eweida then presented claims on the basis of equality law and argued a breach of Art. 9 ECHR. These arguments did not convince the UK judges, as they interpreted the applicant's use of a cross as a personal choice – and not as a religious obligation -, thus considering the requirement of a group disadvantage to be lacking. In particular, the British courts claimed that there could be no talk of indirect discrimination for it requires discrimination against a specific group, not merely disadvantage to an individual. The national judges further argued that the uniform policy, even if it were to be indirectly discriminatory, was to be considered justified as it pursued a legitimate aim and the prohibition of religious symbols was proportionate to that aim.

However, when Ms Eweida took the case to Strasbourg, the European Court found that Art. 9 ECHR was indeed violated. After noting that the applicant's religious feeling was undoubtedly deep and that whether or not her faith required the exhibition of a symbol was therefore irrelevant[242], the ECtHR observed that the UK lacks legal provisions specifically regulating the use of religious clothing in the workplace.[243] The Court then proceeded to examine whether a fair balance had been struck between the applicant's rights and those of others. The judges considered the aim of British Airways to establish a certain corporate image as legitimate, but argued that its weight could not trump Eweida's fundamental freedom of religion.[244] The Court advanced three arguments in favour of this claim.[245] First, the cross at issue was discreet and, therefore, could not detract from the employer's professional image. Second, other employees had previously

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[242] «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. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular*, there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question*». [emphasis added] *Ibid*., para. 82. Even though the ECtHR had already adopted a similar approach (*see for instance* European Court of Human Rights, judgment of 7 December 2010, App. no. 18429/06, *Jacóbski v. Poland*), this reasoning is explicitly reiterated in the case at issue. Such an approach is likely to make the recognition of religious minorities easier, for the majority of the population could be not familiar with their practices.

[243] *Ibid*., paras. 91-92.

[244] In this connection, it is interesting to note that the ECtHR recognized that: «On one side of the scales was Ms Eweida's desire to manifest her religious belief. (…) this is a fundamental right: because a healthy democratic society needs to tolerate and sustain pluralism and diversity; *but also because of the value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others* » [emphasis added] *Ibid*., para. 94.

[245] *Ibid*.

exhibited items of religious clothing, such as turbans and Islamic headscarves, and did not have any negative economic impact on the airline. Last, British Airways itself amended the uniform policy to allow for the visible wearing of religious symbols, demonstrating that personnel's neutral image was not of crucial importance. For these reasons, the ECtHR found the restrictions on the applicant's freedom to manifest her religion to be unlawful.[246]

The *Eweida* judgment introduces a new approach to religion in the workplace which aims to ensure a fair balance between the fundamental rights and freedoms of an employee, and rights and interests of an employer as well as those of democratic pluralistic societies. While the United Kingdom's main defence relied on the application of the established "freedom to resign" doctrine, the ECtHR moved explicitly away from this formalistic reasoning, arguing:

> «Given the importance in a democratic society of freedom of religion, the Court considers that, 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*».[247]

In addition, while States may not have general dress policies relating to the private workplace, as in the case of United Kingdom, various regulation and practices may hinder the accommodation of religious clothing at work. In particular, company neutrality policies directly prevent any balancing of interests in religious dress controversies, granting total priority to the employer's aim to establish a neutral image. Yet, as Alidadi argues, *Eweida* implicitly establishes a degree of reasonable accommodation under Art. 9 ECHR, «one which seeks to give additional guidance to the level of balance that needs to be struck in religious dress (and other) cases».[248] The judgment also exposes the weakness of requiring 'group' disadvantage under the EU concept of indirect discrimination. Indeed, as suggested by Davies and Heys, «the exercise of trying to find

[246] *Ibid*., para. 95.
[247] *Ibid*., para. 83. [emphasis added]
[248] K. ALIDADI, above, p. 60.

a disadvantaged 'group' should be unnecessary if what law is really seeking to do is fulfil a basic principle that those with religious beliefs should be able to manifest them reasonably in the workplace».[249]

In sum, the *Eweida* judgment has important and potentially far-reaching consequences on religious accommodation cases. This decision indeed signifies a revitalization of religious freedom in the occupational context, with Art. 9 ECHR playing a much more prominent role. In contrast with decisions concerning the public sector, the Strasbourg judges have adopted an appropriate perspective for the protection of religious freedom *vis-à-vis* national norms that pursue legitimate secular aims, rejecting the idea that freedom of religion is not protected against neutral rules in the workplace, and that such rules do not constitute limits on personal freedom that fall within the limitation clause of Art. 9(2) ECHR. However, even though *Eweida* may have opened the door for the protection of more individualistic manifestations of religious beliefs, the ECtHR could have used this opportunity to outline more explicit principles. In particular, the argument concerning the dimension of the religious symbol is unclear, for British Airways had previously allowed for the exhibition of turbans and headscarves, which obviously cannot be considered "discreet" clothing items. Furthermore, the Strasbourg Court based its judgment on the finding that whether or not employees wore religious symbols was not of crucial importance to the airline. Yet, it is not clear what criterion to use when the employer does not display a conciliatory attitude such as that of British Airways and, thus, refuses to amend its dress policy.

4. The ECtHR and the margin of appreciation doctrine

In both *Dahlab* and the discussed-above cases brought against Turkey, the ECtHR formally based its judgments on the application of the margin of appreciation doctrine, which was mentioned also in *Eweida*. Scholars have provided several definitions of such a methodological approach. Arai-Takahashi, for instance, describes the margin of

[249] J. DAVIES, T. HEYS, *Reinventing Indirect Discrimination*, in Lewis Silkin, 26 September 2012, available at http://www.lewissilkin.com/Journal/2012/September/Reiventing-indirect-discrimination.aspx#.U2MHn9FOUdU (last accessed on 31 December 2021).

appreciation doctrine as «the measure of discretion allowed to the Member States in the manner in which they implement the Convention standards, taking into account their own particular national circumstances and conditions»,[250] while Macdonald holds that «the doctrine of margin of appreciation illustrates the general approach of the European Court of Human Rights to the delicate task of balancing the sovereignty of Contracting Parties with their obligations under the Convention».[251] The concept of the margin of appreciation thus refers to the discretionary power left by the ECtHR to European States in fulfilling their obligations under the Convention so as to allow them to balance such obligations with their domestic interests. This doctrine is closely linked to the principle of subsidiarity, as it recognizes that national judicial authorities, being 'closer' to the individual right-bearers at issue, remain the most appropriate organs to assess the scope of a fundamental right. States have indeed direct contact with fundamental developments in their territory and are generally in a better position than an international court to decide the proper application of the ECHR. In the words of Spielmann: «in applying [the margin of appreciation] doctrine, the Court imposes self-restraint on its power of review, accepting that domestic authorities are best placed to settle a dispute».[252] In this respect, the margin of appreciation doctrine largely echoes Bhargava's "principled distance", which allows States to adopt flexible decisions (on the management of religion) depending on their contingent historical and political context.[253] However, just as "principled distance" cannot be interpreted as a *laissez-passer* for differential treatment, the margin of appreciation allowed to States is limited. The ECtHR has argued that the margin «goes hand in hand with European supervision»[254] and often resorted to the

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[250] Y. ARAI-TAKAHASHI, *The Defensibility of the Margin of Appreciation Doctrine in the ECHR: Value-Pluralism in the European Integration*, in *Revue Européenne de Droit Public*, 13, 2001, p. 1163.
[251] R. ST. J. MACDONALD, *The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights*, in A. CLAPHAM, F. EMMERT (eds.), *The Protection of Human Rights in Europe, Collected Courses of the Academy of European Law*, Brill, 1992, p. 97.
[252] D. SPIELMANN, *Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?*, in *Cambridge Yearbook of European Legal Studies*, 14, 2012, p. 383.
[253] For instance, Arnadóttir claims that the margin of appreciation doctrine allows a greater degree of flexibility in finding the more appropriate solution to the case at hand. *See* O.M. ARNADÓTTIR, *The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights*, in *Human Rights Law Review*, 14, 2014, p. 669.
[254] European Court of Human Rights, judgment of 7 December 1976, App. no. 5493/72, *Handyside v. United Kingdom*, para. 49.

proportionality principle to assess whether national interferences with the enjoyment of fundamental rights are justified in light of the legitimate interests pursued by the State.[255] In this respect, the judicial task of the Strasbourg Court is not to examine *in abstracto* the compatibility of a given State measure with the ECHR, but to assess whether that State has overstepped its margin of discretion in the protection of Convention rights.[256]

The doctrine was first introduced into the Strasbourg system in relation to national security and, in particular, to Art. 15 ECHR, which allows States to suspend the Convention in cases of emergency of war. In the 1955 *Greece v. United Kingdom* case,[257] the European Commission of Human Rights argued that, due to the politically sensitive nature of the decision, national authorities have a certain measure of discretion in deciding whether the exigencies of the situation required to resort to Art. 15. Similarly, in *Lawless v. Ireland*,[258] the Strasbourg judges made reference to the margin of appreciation left to States in determining the existence of a public danger that can threaten national security. The margin of appreciation doctrine was thoroughly elaborated in the seminal case *Handyside v. United Kingdom*[259] and, since then, it has been used regularly whenever there is no regulatory consensus among European States for sensitive issues like those concerning morals or religion. In *Handyside*, the ECtHR examined whether the forfeiture of the Little Red School Book on grounds of obscenity violated the publisher's freedom

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[255] *See for instance* European Court of Human Rights, judgment of 22 December 2005, App no. 54968/00, *Padurel v. France*; European Court of Human Rights, judgment of 21 January 2006, App no. 64016/00, *Giniewski v. France*; European Court of Human Rights, judgment of 31 January 2007, App no. 72208/01, *Klein v. Slovakia*; European Court of Human Rights, judgment of 23 February 2010, App. no. 41135/98, *Ahmet Arslan v. Turkey*. *See also* M. KUMM, *Democracy is Not Enough: Rights, Proportionality and the Point of Judicial Review*, in M. KLATT (ed.), *The Legal Philosophy of Robert Alexy*, Oxford University Press, 2009, pp. 201-202. Though it is possible to distinguish different dimensions of the proportionality principle, Strasbourg supervisory bodies mainly use the requirement of a reasonable relationship between limitation and legitimate aim. *See* R. ALEXY, *A Theory of Constitutional Rights*, Oxford University Press, 2001, p. 397; Y. ARAI, *The System of Restrictions*, in P. VAN DIJK F. VAN HOOF, A. VAN RIJN, L. ZWAAK (eds.), *Theory and Practice of the European Convention of Human Rights*, Intersentia, 2006, p. 341.

[256] *See* M. IGLESIAS, C. UNGUREANU, *The Conundrum of Pluralism and the Doctrine of the Margin of Appreciation: The Crucifix "Affair" and the Ambivalence of the ECtHR*, in F. REQUEJO, C. UNGUREANU (eds.), *Democracy, Law and Religious Pluralism in Europe*, Routledge, 2014, pp. 140-141.

[257] European Commission of Human Rights, decision of 2 June 1956, App. no. 176/56, *Greece v. United Kingdom*.

[258] European Commission of Human Rights, decision of 20 August 1958, App. no. 332/57, *Lawless v. Ireland*.

[259] Judgment *Handyside*, above, paras. 48-50.

of expression. The judges held that:

> «*It is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals*. The view taken by their respective law of the requirements of morals varies from time to time and from place to place, especially in our era which is characterized by a rapid and far reaching evolution of opinions on the subject. *By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements*».[260]

The ECtHR thus argued that, because of the lack of a consensus, States had to be allowed a certain margin of discretion in enforcing freedom of expression. Such "European Consensus" standard continues to play a key role in the wider or narrower character of the application of the doctrine still today. Generally speaking, the existence of similar pattern of practice or regulation will correspond to a narrower margin of discretion for the State that stays within that framework.[261] Even though the ECHR assumes that signatory States share certain social, cultural and moral values, it nonetheless recognizes that these values are relative to the specific environment, circumstances and various other factors that may affect societies.[262] By resorting to the margin of appreciation doctrine, the Strasbourg Court then allows for a decentralized interpretation of ECHR rights, as they can be declined according to specific local circumstances.[263] However, it appears that decentralized versions are less acceptable with respect to certain "absolute rights" and more acceptable with respect to others. While the former are formulated so as to prevent any possibility of State limitation, the latter can be restricted due to reasons of public order, national security, health protection or public morality.[264]

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[260] *Ibid*. [emphasis added]

[261] *See* E. BENVENISTI, *Margin of Appreciation, Consensus, and Universal Standards*, in *New York Journal of International Law and Policy*, 31, 1999, pp. 850-853.

[262] *See* L. GARLICKI, *Cultural Values in Supranational Adjudication: Is There a "Cultural Margin of Appreciation" in Strasbourg?*, in *Der Grundrechtsgeprägte Verfassungsstaat*, 2012, pp. 727-743.

[263] *See* S. MANCINI, *La supervisione europea presa sul serio: la controversia sul crocifisso tra margine di apprezzamento e ruolo contro-maggioritario delle corti*, in *Giurisprudenza Costituzionale*, 5, 2009, p. 483; A. FOLLESDAL, *Exporting the Margin of Appreciation: Lessons for the Inter-American Court of Human Rights*, in *International Journal of Constitutional Law*, 15, 2017, pp. 363-364.

[264] *See* A. TANCREDI, *L'emersione dei diritti fondamentali "assoluti" nella giurisprudenza comunitaria*, in *Rivista di Diritto Internazionale*, 3, 2006, pp. 644-692; J.P. COT, *Margin of Appreciation*, in R.

Allowing States a margin of appreciation in enforcing all those rights that are not considered "absolute" carries the risk of jeopardizing the supranational system of protection of fundamental human rights. In particular, the assessment of the existence of a European consensus brings with it a great deal of uncertainty and, notably, compromise the universality of ECHR standards.[265] Some scholars warn against the risk of a "double standard" that may result from the different width of discretion allowed to States and, therefore, from the unequal enforcement of ECHR rights in similar situations.[266]

In *Handyside*, limitations to the freedom of thought were justified in light of the British morals. Similarly, in *Muller and Others v. Switzerland*,[267] the Strasbourg judges justified State restrictions to the exhibition of certain paintings - and therefore to freedom of artistic expression -, pointing to the lack of a European moral standard on the issue. Again, in *Otto-Preminger-Institut v. Austria*,[268] the ECtHR justified government seizure and forfeiture of a film that would be likely to offend the religious feelings of Catholics on the grounds of three arguments. Firstly, the Court noted that whoever exercises the freedom of expression in the context of religious opinions and beliefs must «avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate».[269]

WOLFRUM (ed.), *The Max Planck Encyclopaedia of Public International Law*, Oxford University Press, 2012, p. 1040.

[265] *See* M. R. HUTCHINSON, *The Margin of Appreciation Doctrine in the European Court of Human Rights*, *in The International and Comparative Law Quarterly*, 48, 1999, pp. 638-650; J.A. BRAUCH, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, in *Columbia Journal of European Law*, 11, 2005, pp. 113-150; J. KRATOCHVIL, *The Inflation of the Margin of Appreciation by the European Court of Human Rights*, in *Netherlands Quarterly of Human Rights*, 29, 2011, pp. 324-357.

[266] *See* P. MAHONEY, *Marvellous Richness of Diversity or Invidious Cultural Relativism?*, in *Human Rights Law Journal*, 19, 1998, pp. 1-6; P.G. CAROZZA, *Subsidiarity as a Structural Principle of International Human Rights Law*, in *American Journal of International Law*, 97, 2003, pp. 38-79; S. MANCINI, above; J. GERARDS, *The Discrimination Grounds of Article 14 of the European Convention on Human Rights*, in *Human rights Law Review*, 13, 2013, pp. 99-124; A. GIANNINI, *La Corte EDU e il margine di apprezzamento applicato ai simboli religiosi: due pesi per una stessa misura*, in *Filo Diritto*, 12 May 2016, available at https://www.filodiritto.com/articoli/2016/05/la-corte-edu-e-il-margine-di-apprezzamento-applicato-ai-simboli-religiosi-due-pesi-per-una-stessa-misura.htm (last accessed on 31 December 2021); J. DONNELLY, D. WHELAN, *International Human Rights*, Westview Press, 2017, pp.45-49.

[267] European Court of Human Rights, judgment of 28 May 1988, App. no. 1073/84, *Muller and Others v. Switzerland*.

[268] European Court of Human Rights, judgment of 20 September 1994, App. no. 13470/87, *Otto-Preminger-Institut v. Austria*.

[269] *Ibid*., para. 49.

Secondly, in relation to the (non)existence of a European consensus, the judges held:

> «As in the case of "morals" it is not possible to discern throughout Europe a uniform conception of the significance of religion in society […]; even within a single country such conceptions may vary. For that reason it is not possible to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others. A certain margin of appreciation is therefore to be left to the national authorities in assessing the existence and extent of the necessity of such interference».[270]

Lastly, the ECtHR argued that religious feelings should sometimes be evaluated on the grounds of local, and not supranational, standards:

> «The Court cannot disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner. […] Austrian authorities [cannot] be regarded as having overstepped their margin of appreciation in this respect».[271]

Just as in *Handyside*, the Court reasoned adopting a purely-majoritarian approach to the protection of human rights and, on top of that, gave particular weight to the local level, *i.e.* a playing field more homogeneous than the State and in which the potential for conflict is particularly low. Similar outcomes were seen when the margin of appreciation doctrine was used in relation to cases concerning the wearing of the Islamic headscarf, as ideological and religious minorities had to give up the enjoyment of certain fundamental freedoms for the sake of the protection of majoritarian religious and cultural sensitivity. In *Dahlab*, as discussed above, the ECtHR endorsed the dismissal of the applicant in light of both Swiss traditional secularity and pupils' "impressionability". Similarly, in the controversies against Turkey, the Court argued:

> «Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the

[270] *Ibid*., para. 50.
[271] *Ibid*., para. 56.

> national decision-making body must be given special importance […]. This will notably the case when it comes to regulating the wearing of religious symbols in educational institutions […]. Accordingly, the choice of the extent and form such regulations should take must inevitably be left up to a point to the State concerned, as it will depend on the specific domestic context […]».[272]

It is true that the Strasbourg judges did not actively support exclusively notions of neutrality and secularism and have only applied the traditional margin of appreciation doctrine that, adopting a posture of "principled distance", tries not to impose unnecessary uniform European standards on national systems of relation between the State and religion. However, State discretion is limited and the ECtHR is required to assess, on the basis of factual evidence, whether national authorities have overstepped their margin of appreciation in the protection of Convention rights. The very fact that the Court straightforwardly justified national secularist policies that limit individual religious expression, without evidence of a concrete danger to public order, «might denote a certain agreement with the philosophy [underlying those policies] – that the public sphere is better organized, and less problematic, when religion is absent».[273] As will be discussed in the next subsection, a similar notion of neutrality inspired the Chamber's ruling in the 2009 *Lautsi* case, in which the judges reiterated that the denominational neutrality of the public school system compels States to ban all visible religious symbols. Nonetheless, the Grand Chamber decision on the same case, overruling the previous judgment in 2011, concluded that the principle of State neutrality does not require the exclusion of religion from the public sphere but, on the contrary, can also be achieved by a school environment that is open to visible signs of both majority and minority worldviews.

4.1. The Lautsi *case: towards a post-secular approach?*

The *Lautsi* controversy concerned Ms Soile Lautsi, an Italian national living in Abano Terme (Italy) and her two children, attending a State school. In 2002, she asked the school

[272] Judgment *Şahin*, above, para. 109.
[273] J. MARTÍNEZ-TORRÓN, above, p. 137.

to remove the crucifix from the walls of the classroom in which her children received lessons. Following the decision of the school's governor to keep the religious symbol, Ms Lautsi brought a claim before the Veneto Administrative Court, complaining of the infringement of a number of constitutional principles of secularism and impartiality. The Administrative Court referred the question to the Constitutional Court, which, in turn, declared it to be manifestly inadmissible in light of two royals decrees (of 1924 and 1928) enshrining that each classroom must have a crucifix. The Administrative Court also confirmed this finding, noting that said decrees were still in force and that the principle of State secularism was not infringed, because the crucifix «represent[ed] in a way the historical and cultural development characteristic of [Italy] and in general of the whole Europe».[274]

When Ms Lautsi then took the case before the ECtHR alleging that the display of the crucifix was contrary to her right to ensure her children's education in conformity with her religious and philosophical convictions, surprisingly the European judges did not resort to the margin of appreciation doctrine. However, they acknowledged the specificity of the Italian context and traced the history of both the obligation of displaying crucifixes in classrooms and the relations between Italy and the Catholic Church. Observing that the presence of the crucifix was the legacy of a confessional conception of the State which was expressly abolished by the 1984 revision of the Lateran Pacts that put an end to State religion, the Second Section of the Strasbourg Court upheld the applicant's complaint. In particular, the judges found the presence of the crucifix to be incompatible with the State's duty of neutrality and argued that the protection of educational pluralism is essential for the preservation of a democratic society. An open school environment was deemed necessary to promote inclusion rather than exclusion, regardless of the students' social background, religious beliefs and ethnic origins. From this perspective, the Court argued that «[s]chools should not be the arena for missionary activities or preaching; they should be a meeting place for different religions and philosophical convictions, in which pupils

[274] European Court of Human Rights, judgment of 18 March 2011, App. no. 30814/06, *Lautsi and Others v. Italy*, para. 15 (hereinafter "*Lautsi GC*" means the judgment of 18 March 2011).

can acquire knowledge about their respective thoughts and traditions».[275] Since only State's neutrality ensures the concrete realization of pluralism in education, public authorities must refrain from imposing – directly, or indirectly - specific religious convictions in places where persons are dependent on them. Notably, the judges considered the schooling of children as a highly sensitive area in which «the compelling power of the State is imposed on minds which still lack […] the critical capacity which would enable them to keep their distance from the message derived from a preference manifested by the State in religious matters».[276] The Second Section of the ECtHR thus rejected Italy's argument of the crucifix having a neutral meaning with reference to Italian history and tradition, which are closely linked to Christianity, and representing a political compromise with parties having Catholic leanings that represent an essential part of the population. Just as in *Bulut-Karaduman*, the Strasbourg judges further held that in countries where the majority of the population belong to one particular faith, the manifestation of that faith may be restricted to protect the sensitivity of those who do not practice that religion. They further noted that negative freedom of religion does not only entail the absence of religious services or religious education, but it also extend to practices and symbols expressing a certain religious conviction, particularly if it is the State which expresses that conviction and dissenters are placed in a situation from which they cannot extract themselves easily. The Court thus concluded that

> «[w]hat may be encouraging for some religious pupils may be emotionally disturbing for pupils of other religion or those who profess no religion. The State has [then] a duty to uphold confessional neutrality in public education, where school attendance is compulsory regardless of religion, and which must seek to inculcate in pupils the habit of critical thought».[277]

Some scholars have welcomed the Second Section's ruling for its counter-majoritarian approach.[278] According to them, the very purpose of the international system of protection

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[275] European Court of Human Rights, judgment of 3 November 2009, App. no. 30814/06, *Lautsi and Others v. Italy*, para. 47 (hereinafter "*Lautsi 2nd s.*" means the judgment of 3 November 2009).
[276] *Ibid*., para. 48.
[277] *Ibid*., paras. 55-56.
[278] *See* S. MANCINI, above; C.M. ZOETHOUT, *Rethinking Adjudication under the European Convention*, in J. TEMPERMAN (ed.), *The* Lautsi *Papers: Multidisciplinary Reflection on Religious Symbols in the Public School Classroom*, Martinus Nijhoff Publishers, 2012, pp. 413-426; G. ITZCOVICH, *One, None*

of fundamental rights is to compensate for the flaws of majoritarian democracy and, thus, reinforce the protection of minorities.[279] Majority-controlled political institutions are indeed tasked with the identification of national interests, which, in turn, are given primary importance by national judicial systems. In this perspective, international courts would be in a better position to ensure that majoritarian interests do not unduly infringe upon the rights of minorities. These scholars have praised the Second Section of the ECtHR for having refrained from resorting to the margin of appreciation doctrine in *Lautsi* and, therefore, having protected Italian minorities' negative freedom of religion.

Nevertheless, several scholars have criticized the Second Section's ruling for having endorsed a traditional notion of secularization, according to which modern democratic States are required to «clip the wings of religious manifestations of the non-*laïque* State as far as possible».[280] In particular, the nature of secularism as a neutral stance on part of the State has been challenged by Judge Power as well as by the submission of the governments of nearly half of ECHR signatory countries, in which it was claimed that «favouring secularism was a political position that, whilst respectable, was not neutral».[281] The upshot of these critiques of secularism as an ideology is the claim that the State should pursue a pluralist rather than a secularist agenda. However, this statement also displays a mistake, for it ignores that secularism and pluralism may be deeply intertwined. If it is true that traditional secularism rejects the pluralist nature of contemporary societies by straightforwardly excluding religion from the public discourse, post-secularism preserves both the structure and the substance of traditional secular States while simultaneously allowing for the participation of religious (and non-religious) voices in the public sphere. As discussed in the previous chapter, post-secularism should not be regarded as opposing to secularism, but just to its traditional declination. Thus, secularism (and secularization) *per se* is not threatened with disappearance, but is required to mutate and evolve alongside societal changes. However, in *Lautsi*, the judges of the Second

and One Hundred Thousand Margins of Appreciations: The Lautsi *Case*, in *Human Rights Law Review*, 13, 2013, pp. 287-308.

[279] *See also* E. BENVENISTI, *Judicial Misgivings Regarding the Application of International Norms: An Analysis of Attitude of National Courts*, in *European Journal of International Law*, 4, 1993, pp. 159-183.

[280] J.H.H. WEILER, *State and Nation*…above, p. 581.

[281] Judgment *Lautsi GC*, above, para. 47.

Section seemed to stick to the traditional account of secularism. The assessment that the crucifix could be emotionally distressful for pupils was made only in abstract terms, without factual evidence and without examining the various contexts of the exhibition of that religious symbol in Italian public schools. Just as in *Dahlab* and in the above-discussed controversies against Turkey, the ECtHR seemed to endorse a notion of neutrality which resents manifestations of religion in some areas of public life and notably in educational environments. Yet, the result of this approach «can be described as *mutilated* pluralism and does not seem compatible with real *neutrality*, but rather with that deformation of neutrality»[282] that makes it synonymous with traditional rigid secularism. Even though the role of the Strasbourg Court is not that of imposing a uniform State-religion model – be it laicist, confessional or semi-confessional – but that of developing a constitutional framework to interpret the ECHR, the *Lautsi* ruling can be interpreted as an attempt to impose a uniform secularist model hostile to religion and as «a victory of reason over religious obscurantism».[283] The Second Section's decision seemed to endorse the traditional (and outdated) model of rational secularism, built on the Manichean opposition between reason and faith. Freedom of religion becomes a secondary right, conceded by the national authorities and held within the neutrality requirements of the public arena. The manifestation of religious beliefs is therefore limited due to necessities of the public order, which is understood as a neutral collective identity. From this perspective, «pluralism become the justification of a greater secularism, aiming at preserving a threatened public arena».[284] Applying a post-secular approach, the Strasbourg Court could have instead emphasized an inclusive concept of pluralism and neutrality, which is likely to protect the confessional identities of all and not only of those who hold traditionally secular convictions.

Since Second Section's reasoning was understood as susceptible of being extended to other symbols of States, such as flags and national anthems, numerous European countries launched a type of «alliance against secularism»,[285] supporting Italy to request the case's

[282] J. MARTÍNEZ-TORRÓN, above, p. 137.
[283] M. IGLESIAS, C. UNGUREANU, above, p. 179.
[284] G. PUPPINCK, *The Case of* Lautsi v. Italy*: A Synthesis*, in *Brigham Young University Law Review*, 3, 2012, p. 915.
[285] *Ibid*., p. 886.

referral to the Grand Chamber of the ECtHR. The Grand Chamber eventually reversed the previous decision, concluding that the exhibition of crucifix in the classrooms was compatible with the principle of secularism and did not infringe upon any ECHR right. In developing their reasoning, the judges extensively referred to Art. 2 of Protocol 1 of the Convention, which enshrines the right to education in the following terms:

> «No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions».

According to the Grand Chamber, this notion of respect towards parental convictions implies both negative and positive obligations on the part of the State. However, since the notion of respect lacks a European consensus, States are allowed a wide margin of appreciation on the issue.[286] In other words, the judges observed that respect is a stringent universal legal requirement, but simultaneously held that it actually depends on the context and on consensus. This line of reasoning appears inconsistent, as the very positive obligation to take into account parents' convictions should limit State's discretion.[287] The Grand Chamber's understanding of the margin of appreciation doctrine was also criticized by the dissenting opinion delivered by Judge Mr Malinverni:

> «Can it be maintained that the States properly comply with that positive obligation where they mainly have regard to the beliefs held by the majority? Moreover, is the scope of the margin of appreciation the same where the national authorities are required to comply

[286] «Nevertheless, the requirements of the notion of "respect" (…) vary considerably from case to case, given the diversity of the practices followed and the situations obtaining in the Contracting States. As a result, the Contracting States enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals. (…) The Court concludes in the present case that the decision whether crucifixes should be present in State-school classrooms is, in principle, a matter falling within the margin of appreciation of the respondent State». *See* Judgment *Lautsi GC*, above, paras. 61-70.

[287] On the issue, Zucca writes: : «The Court manages to take away with one hand what it gives with the other in the very same paragraph, and in a feast of poor logic holds that the notion of respect will vary from country to country. (…) This is like saying I respect everyone's opinion, but I'm happy to silence those thoughts that are not approved by the majority (consensus). Or one can turn the table against the Court itself: I respect the ECHR, but I'm prepared to disregard it completely if there is no consensus on its authority». L. ZUCCA, Lautsi*: a commentary of the Grand Chamber decision*, in *International Journal of Constitutional Law*, 11, 2013, p. 226.

> with a *positive* obligation and where they merely have to comply with an obligation of *abstention*? I do not think so. I incline, rather, to the view that where the States are bound by positive obligations their margin of appreciation is reduced».[288]

However, the Grand Chamber noted that even the wide margin of appreciation recognized to Italy's involvement in education had its limits. According to the judges, the second sentence of Art. 2 of Protocol 1 implies that public authorities are forbidden to pursue an aim of indoctrination that may not respect parents' convictions.[289] The State is then required to be neutral in that it is to avoid religious indoctrination, while it has a positive obligation to recognize and foster religious and non-religious pluralism. The Second Section had found in the previous decision that the crucifix should be considered a "powerful external symbol", likely to be emotionally disturbing for non-Christian individuals.[290] In contrast, the Grand Chamber argued that the crucifix is «an essentially passive symbol», the effects of which must be distinguished from that of «didactic teaching» or «participation in religious activities», which can actively lead to indoctrination.[291] Indeed, as clearly established in previous ECtHR case-law, the stressing of one religion over another on the grounds of national history and tradition does not in itself indicate a departure from the principle of pluralism amounting to indoctrination.[292] Furthermore, various elements displaying religious tolerance in Italian education were deemed capable of neutralizing the symbolic importance of crucifixes in public schools.[293] The Court thus found that the crucifix's impact was too substantially limited to infringe upon the State's duty of confessional neutrality and further added that the applicant had not proved there was any concrete impact, whether on the pupils or their parents.[294]

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[288] Judgment *Lautsi GC*, above, dissenting opinion of Judge G. Malinverni, para. 1.
[289] *See* Judgment *Lautsi GC*, above, para. 62.
[290] *See* Judgment *Lautsi 2nd s.*, above, para. 54.
[291] Judgment *Lautsi GC*, above, para. 72.
[292] *See* Judgment *Folgero*, above, para. 89; European Commission of Human Rights, decision of 3 December 1986, App. no. 10491/83, *Angeleni v. Sweden*, p. 49; European Court of Human Rights, judgment of 9 October 2007, App. no. 1448/04, *Zengin v. Turkey*, para. 63.
[293] *See* Judgment *Lautsi GC*, above, para. 74.
[294] Concerning the pupils, it was noted that «there is no evidence before the Court that the display of a religious symbol on classroom walls may have an influence on pupils and so it cannot reasonably be asserted that it does or does not have an effect on young persons whose convictions are still in the process

The Grand Chamber's decision thus fundamentally differs from the previous *Lautsi* ruling with regard to the notion of neutrality it conveys. The Second Section of the ECtHR found the presence of the crucifix in the classrooms to be straightforwardly incompatible with the State duty of confessional neutrality, implicitly understanding secularism as the effacing of religion from the public sphere. On the contrary, the Grand Chamber understood neutrality as reconcilable with the exhibition of religious symbols in the public sphere - as long as such symbols do not constitute a form of indoctrination. This approach is adequate to contemporary pluralistic European societies. On the one hand, by recognizing that manifestations of religion in some areas of public life do not necessarily clash with neutrality, the judges of the Grand Chamber moved beyond the traditional rigid separation between State and religion and allowed for the participation of (also) religious perspectives in the public discourse. On the other, the second *Lautsi* decision abides by the approach of "principled distance", as it provides Italian public authorities with a wide margin of appreciation in the management of religion, while simultaneously examining in concrete terms – and not *in abstracto* – whether the State had overstepped such margin of discretion. According to the ECtHR, the secular and neutral character of the State is indeed compatible with the active recognition granted to the majority faith, provided that it does not constitute discrimination against other religious and non-religious options.[295] It is true that the Grand Chamber did not articulate its reasons on what features make a religious symbol "active" or "passive", even though this distinction seems to ultimately determine whether such symbol is compatible with the State's duty of neutrality or not.[296] However, the approach emerged in the second *Lautsi* ruling suggests that the Strasbourg Court might be revisiting the traditional church-State compromises in a post-secular world where different religious and non-religious groups seek a place in the public arena.

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of being formed». Towards the parents, it was held that «the applicant's subjective perception is not in itself sufficient to establish a breach of Article 2 of Protocol No. 1». *Ibid*., para. 66.

[295] Under the ECHR system, the existence of a special church-State relation is legitimate (e.g. that a country like Greece has an official religion) as long as freedom of religion, minority rights and pluralism as enshrined in the ECHR are not undermined. *See* C. EVANS, C.A. THOMAS, *Church-State Relations in the European Court of Human Rights,* in *Brigham Young University Law Review*, 3, 2006, pp. 699-726.

[296] *See* P. ANNICCHINO, *Tra margine di apprezzamento e neutralità: il caso* "Lautsi*" e i nuovi equilibri della tutela europea della libertà religiosa*, in R. MAZZOLA (ed.), *Diritto e religione in Europa. Rapporto sulla giurisprudenza della Corte Europea dei Diritti dell'Uomo in materia di libertà religiosa*, Il Mulino, 2012, p. 190; L. ZUCCA, Lautsi…above, p. 225.

4.2. The ECtHR and the Christianity-Islam dichotomy

In its decision, the Grand Chamber recalled Italy's argument that the exhibition of crucifixes in the classrooms was the result of context-specific historical development, a fact that gave the Christian symbol an identity-linked connotation and corresponded to a tradition that Italy deemed important to perpetuate.[297] Furthermore, it was argued that, beyond its religious connotation, the crucifix symbolized the principles and values underpinning European democracy and civilization and, thus, that its presence in State-school classrooms was justifiable on that account.[298] The judges of the Grand Chamber endorsed this approach and held that the decision whether or not to perpetuate such tradition fell within European States' margin of appreciation.[299] As those traditions have been historically dominated by Christianity, the inevitable consequence of this approach is that minority (non-Christian) traditions will not be equally perpetuated in the public reasoning.[300] In light of this, it has been argued that the Grand Chamber's ruling in *Lautsi* substantially confirms the Christian-centric outlook of European societies and institutions.[301] This conclusion comes as no surprise. As Joppke notes, «the equality claim, which asks for all religions to be treated equally […], is a trap that the liberal State has set for itself: it can never be met in reality because of historically grown, irredeemably particularistic religion-State relationships».[302] In other words, just as "principled distance" allows States to adopt flexible decisions in terms of management of religion depending on their specific historical and social context, also the European system as a

[297] *See* Judgment *Lautsi GC*, above, para. 17.
[298] *Ibid*., para. 36.
[299] *Ibid*., para. 68. In particular, Judge Bonello provided a strong defence of the defence of the respect of national cultural traditions in his concurring opinion: «No court, certainly not this Court, should rob the Italians of part of their cultural personality». Judgment *Lautsi GC*, above, concurring opinion of Judge G. Bonello, para. 1.2.
[300] *See* S. MANCINI, M. ROSENFELD, *Unveiling the Limits of Tolerance: Comparing the Treatment of Majority and Minority Religious Symbols in the Public Sphere*, Cardozo Legal Studies Research Paper No. 309, 28 September 2010; R. ADHAR, N. ARONEY, *Shari'a in the West*, OUP Oxford, 2011; D. MCGOLDRICK, *Religion in the European Public Square and in European Public Life – Crucifixes in the Classroom?*, in *Human Rights Law Review*, 11, 2011, pp. 497-498.
[301] *See* D. MCGOLDRICK, above, p. 498.
[302] C. JOPPKE, *Double Standards? Veils and Crucifixes in the European Legal Order*, in *European Journal of Sociology*, 54, 2013, p. 98.

whole cannot be expected to relate to every religion in the same manner.

Although the outcome of the application of the ECtHR's margin of appreciation doctrine will then be inevitably linked to the historical differences between minority and majority religions in Europe, the Strasbourg rulings seem nevertheless to be unduly based on the dichotomy Christianity/democracy versus Islam/fundamentalism. In its decisions concerning the Islamic headscarf, the ECtHR consistently interpreted the veil as a religious symbol irreconcilable with Western values. In the ECtHR's line of reasoning, juxtaposed against intolerant Islam is tolerant secularity, which must be protected against fundamentalism and what the judges describe as «political Islam».[303] Thus, the Strasbourg Court does not merely provide States with a wide margin of appreciation in deciding how to interpret the headscarf, but it also makes a values judgment. Whereas Christian symbols are interpreted mainly as historical and cultural signifiers of national identity, Islamic symbols are primarily considered as manifestations of political values and practices which are at odds with the Western democratic principles. Furthermore, in *Dahlab*, even though the applicant did not try to propagandize her religious beliefs, the Strasbourg judges found the prohibition of the headscarf to be justified on the mere grounds that such symbol might arouse pupils' curiosity and, therefore, wound their sensitivity. According to the ECtHR, a dialectical confrontation between different religious convictions is thus to be avoided for it is likely to disturb the peaceful coexistence in the educational environment. However, this reasoning was contradicted in *Lautsi*, as the Grand Chamber held:

«a Christian symbol on a classroom wall presents another and a different world view. […] It acts as a stimulus to dialogue. A truly pluralist education involves exposure to a variety of different ideas including those which are different from one's own. […] Education would be diminished if children were not exposed to different perspectives on life and, in being so exposed, provided with the opportunity to learn the importance of respect for diversity».[304]

The judges justified this contradiction by arguing that the crucifix, in contrast to the

[303] Judgment *Şahin*, above, para. 35.
[304] Judgment *Lautsi GC*, above, concurring opinion of Judge A. Power.

Islamic headscarf, is a "passive" symbol. Nevertheless, as previously noted, the Court did not clarify what features make a religious symbol "active" or "passive", even though this distinction seems to be of crucial importance.

In *Dahlab* and *Şahin*, the ECtHR also argued that Islamic religious symbols might jeopardize the fundamental principle of equality between the sexes. In particular, it claimed that the *hijab*:

> «appears to be imposed on women by a precept which is laid down in the Koran and which […] is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for other and, above all, equality and non-discrimination».[305]

While recognizing that in certain situations the wearing of the veil is a manifestation of oppression, there is no doubt that this is not always the case. When «the particular context of the […] case is that of an educated woman seeking to participate in the labour market of a […] Member State», then all the more reason to refrain from giving *a priori* an oppressive meaning to the headscarf, for «it would be patronising to assume that [the] wearing of the hijab merely serves to perpetuate existing inequalities and role perceptions».[306] Admittedly, in recent judgments, the Strasbourg judges have given little weight to the gender-equality argument.[307]

It was previously argued that the *Bulut-Karaduman*, *Dahlab* and *Şahin* decisions implicitly suggest that religion cannot participate in the public arena, which should only be presided over by a traditional secularism that allows for the presence of non-religious worldviews but not their religious counterparts. In light of the Grand Chamber's ruling in *Lautsi*, it nevertheless appears that the Strasbourg judges have adopted this approach only

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[305] Judgment *Dahlab*, above, p.6

[306] Court of Justice of the European Union, Opinion of Advocate General E. Sharpston delivered on 13 July 2016, Case C-188/15, *Bougnaoui*, fn. 76.

[307] In 2014, the ECtHR claimed for instance that «a State Party cannot invoke gender equality in order to ban a practice that is defended by women […] in the context of the exercise of the right enshrined in [certain] provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms» and, in relation to the wearing of the burqa, that «the Court is aware that the clothing in question is perceived as strange by many of those who observe it. It would point out, however, that it is the expression of a cultural identity which contributes to the pluralism that is inherent in democracy». Judgment *S.a.S.*, above, paras. 119-120.

in relation to Islamic ideas and symbols. As Mancini and Rosenfeld note, the Court «openly rel[ies] on the dichotomy between Islam and Christianity and assume[s] that, while the latter constitutes a structural element of democracy, the former is at odds with it».[308] The Christian crucifix has been protected even at the expense of infringing upon fundamental individual freedoms, for it has been perceived as compatible with the core values of the Convention. On the other hand, Islam, even when it constitutes the majority religion as in case of Turkey, has been heavily restricted on the grounds that it is inherently irreconcilable with the democratic principles of the State.[309] In all decisions concerning the headscarf, the furthering of pluralism has been the key justification of the ECtHR's restrictive line towards Islam. «Pluralism» as «indissociable from a democratic society» had been indeed central to the Strasbourg Court's first case ever concerning the alleged violation of Art. 9 ECHR by a signatory State, in *Kokkinakis v. Greece*,[310] and it has been referred to ever since as the «main model of the Court's case law related to freedom of religion and the core principle which organizes Church-State relations».[311] However, when applied to Islam, the pluralism argument was not used to foster but to restrict religious manifestations. It thus seems that «toward Christianity an accommodative stance of "liberal pluralism" prevails, whereas toward Islam a restrictive stance of "liberal antipluralism" is dominant».[312] While the recognition in *Lautsi* that manifestations of (Christian) religion in the public sphere do not necessarily clash with State neutrality is certainly to be welcomed, the matching of Islamic practices with concepts such as intolerance, discrimination and inequality endorses the preservation of rigid wall of separation between Islam and politics as an imperative feature of European secular democracies.

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[308] MANCINI, ROSENFELD, above.
[309] *See* S. MANCINI, *The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty*, in *European Constitutional Law Review*, 6, 2010, p. 23; D. MCGOLDRICK, above, p. 498.
[310] Judgment *Kokkinakis*, above, para. 31.
[311] F. TULKENS, *The European Convention on Human Rights and Church-State Relations. Pluralism vs. Pluralism*, in *Cardozo Law Review*, 30, 2009, p. 2580.
[312] C. JOPPKE, above, p. 98. *See also* P. DANCHIN, *Islam in the Secular Nomos of the European Court of Human Rights*, in *Michigan Journal of International Law*, 32, 2011, p. 706.

SECTION 2. Religious symbols in the private workplace: the jurisprudence of the CJEU

5. The case-law of the CJEU on religious symbols in the private sector

In March 2017, in relation to the *G4S Secure Solutions* (hereinafter, "*G4S*") and *Bougnaoui and ADDH* (hereinafter, "*Bougnaoui*") cases, the Court of Justice of the EU ruled for the first time on the compatibility of private workplace policies that prohibit the wearing of religious symbols by employees with Directive 2000/78 on discrimination in employment. The same issues came before the EU judges again in July 2021 in the joined cases *WABE* and *MH Müller Handel* (hereinafter, "*WABE and Müller*"). Before turning to the analysis of the three judgments, it should be noted that they all share certain commonalities. Firstly, they concerned the dismissal or suspension of Muslim employees due to their refusal not to wear the *hijab* at work in accordance with their employers' policies of neutrality. Secondly, the cases related to the same dispositions of Union's law. Notably, the Luxembourg judges were asked to assess the actual scope of the prohibition of discrimination enshrined by Directive 2000/78/EC, *i.e.* the so-called Employment Equality Directive. In particular, all decisions revolved around the distinction between direct and indirect discrimination – pursuant to Articles 2(2)(a) and 2(2)(b) Directive 2000/78, respectively – and their corresponding exemptions. The CJEU then recognized that the wearing of the Islamic headscarf is covered by the freedom of religion protected by Art. 10 Charter[313] and, in all rulings, referred to both Art. 21 Charter, which enshrines a general prohibition of discrimination, and Art. 16 Charter, which guarantees freedom to conduct a business.

5.1. The G4S *case*

[313] It should be noted that the Charter of Nice, proclaimed on 7 December 2000, has constituted primary EU law since the entry into force of the Treaty of Lisbon, in December 2009. Art. 6(1) TEU indeed provides that the Charter has the same legal value as the EU Treaties. *See* R. MASTROIANNI, O. POLLICINO, S. ALLEGREZZA, F. PAPPALARDO, O. RAZZOLINI (eds.), *Carta dei Diritti Fondamentali dell'Unione Europea*, Giuffrè, 2017.

The facts that originated the first ruling under examination concerned Ms Samira Achbita, of Muslim confession, who began working as a receptionist at the company '*G4S Secure Solutions NV*' in February 2003 and complied with an unwritten company policy that employees could not wear any outward sign of their political, philosophical or religious beliefs in the workplace. In 2006, after Ms Achbita communicated to her employer her intention to wear the headscarf during working hours, she was informed that this violated the G4S neutrality policy. The persistence of Ms Achbita in wearing the *hijab* motivated her employer to approve an amendment to the internal regulation, making the ban on visible signs of political, philosophical or religious convictions a written norm. In June 2006, one day before this explicit rule entered into force, Ms Achbita was finally dismissed with a severance payment for her persistent will to wear the Islamic veil at work. Following the rejection of the action brought before the Belgian Labour Court, she then lodged an appeal arguing that her dismissal amounted to unjustified discrimination pursuant to Directive 2000/78. The Belgian Higher Labour Court also rejected her claims, noting that ban on wearing visible signs of political, philosophical or religious convictions applied to all G4S employees and, therefore, gave rise neither to direct nor indirect discrimination nor infringement of individual religious freedom. Ms Achbita then lodged another appeal before the Belgian Court of Cassation, which decided to stay the proceedings and refer to the CJEU the question of whether a ban on a female Muslim employee wearing the *hijab* in the workplace should be considered as directly discriminatory when the employer prohibits all employees from exhibiting any visible sign of political, philosophical or religious convictions during working hours.

The EU judges rejected the existence of direct discrimination on religious grounds within the meaning of Art. 2(2)(a) Directive 2000/78. In particular, they noted that the G4S internal rules required each employee to dress neutrally and that, accordingly, Ms Achbita received the same treatment as compared to any other worker.[314] This line of reasoning echoes that of Advocate General Kokott that, after noting that previous EU case-law assumed direct discrimination to be present only in cases concerning individuals'

[314] *See* Judgment *G4S Solutions*, above, paras. 30-32.

immutable characteristics rather than subjective decisions or convictions,[315] claimed that the applicant had not been treated less favorably than non-believer employees or employees with different faiths.[316] In this perspective, the G4S internal policy could only result in a difference of treatment between employees wishing to give active expression to a particular conviction and their colleagues who do not have such compulsion. However, as Ms Kokott observes, this does not constitute a less favorable treatment that is directly linked to religion and, therefore, does not constitute direct discrimination pursuant to Art. 2(2)(a) Directive 2000/78.[317]

Having answered the referring court's question as to whether the G4S constituted direct discrimination, the CJEU decided to provide additional guidance as to how the national judges, who have the ultimate authority to decide factual matters, should approach the issue of indirect discrimination. In case of the existence of an indirect discrimination, the difference of treatment is justified within the framework of Directive 2000/78 «if it is objectively justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary».[318] Firstly, the EU Court considered the wish of the employer to project a religiously, politically and philosophically neutral image towards its customs as a legitimate aim to pursue in light of the freedom to conduct a business enshrined in Art. 16 Charter.[319] In this regard, the CJEU recalled the *Eweida* ruling, in which the Strasbourg judges argued that, within certain limits, freedom of religion can be lawfully restricted so as to prohibit private employees from wearing religious clothing in the workplace.[320] Secondly, as regards the appropriateness of the internal rule at issue, the CJEU found it to be adequate for the correct application of G4S policy of neutrality. However, the Court stressed that such policy must be pursued in a consistent and systematic manner and that it is up to the national judges to ascertain whether «G4S had, prior to Ms Achbita's dismissal, established a general and undifferentiated policy of

[315] *See* Opinion of Advocate General J. Kokott delivered on 31 May 2016, Case C-157/15, *G4S Secure Solutions*, paras. 44-45.
[316] *Ibid*., paras. 48-52.
[317] *Ibid*., para. 53.
[318] Judgment *G4S Solutions*, above, para. 35.
[319] *Ibid*., paras. 37-38.
[320] *Ibid*., para. 39.

prohibiting the visible wearing of signs of political, philosophical or religious beliefs».[321] Lastly, the CJEU claimed that the prohibition at issue could be considered necessary if it covered only employees who interacted with customers and, once again, ruled for the national court to ascertain whether G4S could have offered Ms Achbita an alternative post not involving any contact with clients, instead of straightforwardly dismissing her.[322]

5.2. The Bougnaoui *case*

The second ruling under examination concerned Ms Asma Bougnaoui, a Muslim IT engineer working for the private company "*Micropole SA*" since 2008. When Ms Bougnaoui was hired she was already wearing a *hijab*. Her employer did not object to that as such, but had warned her that this could be restricted if it would pose problems for the customers she had to work for. In 2009, following a client's complaint about her wearing the headscarf,[323] Micropole SA asked her not to wear the Islamic symbol during working hours. Ms Bougnaoui refused to comply and was therefore dismissed without notice nor compensation.[324] Considering the dismissal to be discriminatory, Ms Bougnaoui brought an action before the French Labour Tribunal. The judges ordered the employer to pay for compensation but dismissed the remainder of the action on the ground that the restriction of the applicant's freedom to manifest her religious convictions was both justified by her contact with clients and proportionate to the aim of protecting the

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[321] *Ibid*., para. 41.
[322] *Ibid*., paras. 42-43.
[323] «We asked you to work for the client, Groupama, on 15 May, at their site in Toulouse. Following that work, the client told us that the wearing of a veil, which you in fact wear every day, had embarrassed a number of its employees. It also requested that there should be "no veil next time"». Dismissal letter of 22 June 2009, quoted in Opinion of Advocate General E. Sharpston delivered on 13 July 2006, Case C-188/15, *Bougnaoui ADDH v. Micropole SA*, para. 23.
[324] «When you were taken on by our company, […] the subject of wearing a veil had been addressed very clearly with you. We said to you that we entirely respect the principle of freedom of opinion and the religious beliefs of everyone, but that, since you would be in contact internally or externally with the company's clients, you would not be able to wear the veil in all circumstances. In the interests of business and for its development we are constrained, vis-à-vis our clients, to require that discretion is used as regards the expression of the personal preferences of our employees. […] We consider that those facts justify, for the aforementioned reasons, the termination of your contract of employment. Inasmuch as your position makes it impossible for you to carry out your functions on behalf of the company, as we cannot contemplate, given you stance, your continuing to provide services on our clients' premises. You will not be able to work out your notice period. Since that failure to work during the notice period is attributable to you, you will not be remunerated for your notice period». *Ibid.*

company image and of not infringing upon customers' beliefs. The same conclusions were reached also by the Court of Appeal. Ms Bougnaoui then brought an appeal before the Court of Cassation, claiming that the Court of Appeal had infringed the national legislation implementing Directive 2000/78.[325] The Court of Cassation finally decided to stay the proceedings and refer to the CJEU the question of whether the wish of a customer not to have services supplied by an employee wearing the Islamic veil could be considered as a genuine and determining occupational requirement within the meaning of Art. 4(1) Directive 2000/78.

In answering the preliminary question, the Court of the EU firstly noted that, from the information available, it could not ascertain whether the difference of treatment at stake constituted direct or indirect discrimination. It then held that it was for the national court to verify the existence of a Micropole SA rule actually prohibiting all employees from exhibiting any outward symbol of political, philosophical or religious beliefs. Just as emerged in *G4S*, if such a generally applicable ban existed, it would be indirectly discriminatory within the meaning of Art. 2(2)(b) Directive 2000/78.[326] The CJEU then stressed that, if the French judges found the applicant's dismissal not to be based on a general ban but to be specific to the Islamic headscarf, Art. 4(1) Directive 2000/78 could be successfully invoked only in very limited circumstances and refers to requirements that are objectively demanded by the nature of the occupational activities concerned or by the context in which they are carried out. Accordingly, the provision «cannot […] cover subjective considerations, such as the willingness of the employer to take account of the particular wishes of the customer».[327] The CJEU thus concluded that Art. 4(1) Directive 2000/78 did not cover Ms Bougnaoui's professional performance, for the

[325] Transposing Directive 2000/78, the French Labour Court enshrines, in Art. L. 1121-1, that «no one may limit personal rights or individual or collective liberties by any restriction which is not justified by the nature of the task to be performed and proportionate to the aim sought». Art. L. 1132-1 establishes that «no person may be excluded from a recruitment procedure or from access to work experience of a period of training at an undertaking, no employee may be disciplined, dismissed or be subject to discriminatory treatment, whether direct or indirect, […] in particular as regards remuneration, […] incentive or employee share schemes, training, reclassification, allocation, certification, classification, career promotion, transfer, or contract renewal by reason of his […] religious beliefs». Lastly, Art. L. 1133-1 enshrines that «article L. 1132-1 shall not preclude differences of treatment arising from a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate».
[326] *See* Judgment *Bougnaoui ADDH*, above, paras. 31-32.
[327] *Ibid*., para. 40.

prohibition of the Islamic veil could not be considered a genuine and determining occupational requirement within the meaning of that provision.

While both *G4S* and *Bougnaoui* rulings largely mirrored Advocate General Kokott's Opinion, rendered in relation to the former case, it should be noted that Advocate General Sharpston defended quite an opposite view in her Opinion on *Bougnaoui*. In particular, Ms Sharpston argued that a ban generally prohibiting employees from wearing any visible sign of philosophical, religious and political belief during working hours is to be considered as directly discriminatory. Since Ms Sharpston touched on sensitive points that will be further elaborated in the next sections, it appears necessary to give a brief account of her Opinion.

The difference between Ms Sharpston's line of reasoning and that of Ms Kokott lies mainly in the interpretation given to the concept of "religion". The latter Advocate General interpreted religion as a sort of ideology, stressing that the neutrality policy adopted by G4S covered both religious and political beliefs. Notably, Ms Kokott noted that

> «[the] requirement of neutrality affects a religious employee in exactly the same way that it affects a confirmed atheist who expresses his anti-religious stance in a clearly visible manner by the way he dresses, or a politically active employee who professes his allegiance to his preferred political party or particular policies through the clothes that he wears (such as symbols, pins or slogans on his shirt, T-shirt or headwear)».[328]

Indeed, according to Ms Kokott, individuals' immutable physical features or personal characteristics, such as gender, age or sexual orientation, fundamentally differ from conduct based on a subjective decision or conviction, such as the wearing or not of a headscarf.[329] Whereas the former characteristics are «an unalterable fact» of an individual's identity, the latter are to be considered as «an aspect of an individual's private life, and one, moreover, over which the employees concerned can choose to exert an influence».[330] Advocate General Kokott further argued that a company policy such as that

[328] Opinion of Advocate General Kokott, above, para. 52.
[329] *Ibid*., para. 45.
[330] *Ibid*., para. 116.

in the main proceedings does not concern «religion *per se*, that is to say […] a person's faith (*forum internum*)», but only «the external manifestation of [that] religion […], and thus a single aspect of [employees'] religious practice (*forum externum*)».[331] It was from this perspective that both Ms Kokott and the EU judges concluded that a company policy prohibiting all employees from wearing any visible symbol of political, religious and philosophical convictions is not directly discriminatory, since such a policy results in a difference of treatment only between employees feeling the urge to give active expression to a particular belief and their colleagues who do not have such an impulse and, therefore, does not constitute a less favorable treatment directly linked to religion within the meaning of Art. 2(2)(a) Directive 2000/78. On the contrary, Advocate General Sharpston conceived religion as an element of identity, comparable to an individual's ethnic origins or sex:

> «[…] *to someone who is an observant member of a faith, religious identity is an integral part of that person's very being. The requirements of one's faith* […] *are not elements* that are to be applied when outside work […] but *that can be politely be discarded during working hours*. 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*».[332]

Accordingly, in contrast to what argued by Ms Kokott, religious identity cannot be "left at the door" when entering the company's premises. Advocate General Sharpston further noted that Art. 2(2)(a) Directive 2000/78 covers not only the religion of an employee (*forum internum*) but also the manifestation of that religion (*forum externum*) and, thus, concluded that a general policy applying to all religious symbols such as that in the main proceedings is to be considered as directly discriminatory towards Ms Bougnaoui, for she had been treated less favourably than another colleague who had not chosen to manifest his/her religious belief by wearing a particular garment.[333]

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[331] *Ibid*., para. 114.
[332] Opinion of Advocate General Sharpston, above, para. 118. [emphasis added]
[333] *See* Opinion of Advocate General Sharpston, above, paras. 83-88.

Two other elements that distinguish Advocate General Sharpston's line of reasoning deserve attention. Firstly, in contrast to both Ms Kokott and the CJEU, she dealt extensively with the potential impact of *Bougnaoui* (and *G4S*) on the EU system. In particular, she noted that the changes occurred in recent years in terms of social customs and labour market within the Union call for a general reflection on the co-existence between individuals with different faiths and ethnic origins. From this perspective, «the issues that arise in this Opinion do not relate to the Islamic faith or to members of the female sex alone».[334] Ms Sharpston further observed that the adoption of a clear position on the part of the CJEU on the wearing of religious symbols and garments at work might help to approximate Member States' laws in this field. Notably, «the legislation and case-law of the Member States relating to the wearing of religious apparel in an employment context […] displays a wide degree of variety»:[335] certain countries, as France and Belgium, have adopted laws prohibiting generally certain types of apparel in public places in the name of the principles of *laïcité* and *neutralité*, other States such as Germany show more tolerance and allow employers to prohibit their employees from wearing religious symbols only under exceptional circumstances, while still others such as the Netherlands have explicitly affirmed that bans of this kind are directly discriminatory.[336] Ms Sharpston also stressed the economic and moral impact of discrimination, quoting Advocate General Poiares Maduro's words in relation to the *Coleman*[337] case:

> «[…] People must not be deprived of valuable options in areas of fundamental importance for their lives by reference to suspect classifications. *Access to employment and professional development are of fundamental significance for every individual, not merely as a means of earning one's living but also as an important way of self-fulfilment and realization of one's potential*. The discriminator who discriminates against an individual belonging to a suspect classification unjustly deprives her of valuable options. As a consequence, that person's ability to lead an autonomous life is seriously compromised since an *important aspect of her life is shaped not by her own choices but by the prejudice of someone else. By treating people belonging to these groups less well because of their*

[334] Opinion of Advocate General Sharpston, above, para. 30.
[335] *Ibid*., para. 36.
[336] *Ibid*., paras. 36-44.
[337] *See* Court of Justice of the European Union, judgment of 17 July 2008, case C-303/06, *Coleman*, EU:C:2008:415.

> *characteristic, the discriminator prevents them from exercising their autonomy*. At this point, it is fair and reasonable for anti-discrimination law to intervene. In essence, by valuing equality and *committing ourselves to realising equality through the law, we aim at sustaining for every person the conditions for an autonomous life*».[338]

The Advocate General thus confirmed that the importance of these cases should not be underestimated for they may significantly shape the Union's – and by extension its Member States' – secular approach, notably in the field of religious discrimination in the workplace.

Secondly, despite having concluded that a company policy such as that in the main proceedings constitutes direct discrimination, Ms Sharpston considered the possibility that the CJEU may disagree with her reasoning and addressed also the question of indirect discrimination. Assuming that a hypothetical company rule imposing a neutral dress code on all employees actually existed, Ms Sharpston took Advocate General Kokott's view in *G4S* that such policy constituted indirect discrimination within the meaning of Art. 2(2)(b) Directive 2000/78 and considered whether it could be justified either by reference to Art. 4(1) Directive 2000/78 or by a legitimate aim, achieved through appropriate and necessary means. As regards Art. 4(1), after observing that such provision must be interpreted strictly and that the CJEU had previously ruled that direct discrimination cannot be justified on the ground of the potential financial loss of the employer,[339] Ms Sharpston claimed that the freedom to conduct a business «is not an absolute principle but must be viewed in relation to its function in society».[340] For the above reasons, she concluded that Art. 4(1) Directive 2000/78 cannot be said to apply to the occupational activities at stake in *Bougnaoui*, for nothing suggested that the applicant, by wearing the *hijab*, was unable to perform her duties as an IT engineer. As regards the second possibility of justification, also Ms Sharpston found the company aim to be legitimate.[341] However, she stressed that this does not imply an *a priori* sacrifice of religious freedom

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[338] Opinion of Advocate General M. Poiares Maduro delivered on 31 January 2008, case C-303/06, *S. Coleman v. Attridge Law and Steve Law*, paras. 8-10, quoted in Opinion of Advocate General Sharpston, above, para. 71. [emphasis added]
[339] *See* Court of Justice of the European Union, judgment of 3 February 2000, case C-207/98, *Mahlburg*, EU:C:2000:64, para. 29, cited in Opinion of Advocate General Sharpston, above, para. 100.
[340] Opinion of Advocate General Sharpston, above, para. 100.
[341] *Ibid*., para. 115.

in the name of the freedom to conduct a business but, rather, requires an accommodation so as to enhance the harmonious co-existence between these two protected rights.[342] From this perspective, the analysis of the question of proportionality *stricto sensu* assumes key importance. While admitting that particular forms of religious observance may not be regarded as essential by certain believers, who will therefore abide by an internal policy prohibiting the wearing of religious garments without conflict, and that there may be instances where the particular type of observance that the employee considers as essential to the practice of his/her faith actually prevents him/her to carry on a particular job, Ms Sharpston noted that more often the employer and the employee will need to seek an agreement so as to accommodate their conflicting rights.[343] In relation to the circumstances of the main proceedings, she recognized that it was for the national judges to have the ultimate responsibility for reaching a decision in the matter. However, in contrast to Ms Kokott and the judges of the EU, she considered unlikely that the restrictive measure adopted by Micropole SA could be considered as proportionate. On the one hand, she rejected the employer's argument that the restriction was proportionate due to the fact that Ms Bougnaoui's working time during which she was in contact with customers and therefore prohibited from wearing the *hijab* was not greater than five percent of her working hours, noting that «the amount of time in respect of which a prohibition may apply may have no bearing on the employee's reason for seeking to wear the head covering in question».[344] On the other, she argued that the employee's right to manifest her religious beliefs should be given more weight than the employer's interest in generating maximum profit. Indeed, «Directive 2000/78 is intended to confer protection in employment against adverse treatment […] on the basis of one of the prohibited factors. It is not about losing one's job in order to help the employer's profit line».[345]

5.3. The WABE *case*

[342] *Ibid*., paras. 116-119.
[343] *Ibid*., paras. 122-128.
[344] *Ibid*., para. 131.
[345] *Ibid*., para. 133.

The third case that appeared before the CJEU on the wearing of religious symbols during working hours concerned IX, a Muslim special needs carer working for the private German company "*WABE*", which runs numerous child day care centres. IX used to wear the Islam headscarf at work but, when she returned from a parental leave in 2018, was asked to remove it so as to comply with a newly-introduced internal policy prohibiting the exhibition of any outward symbol of political, ideological or religious convictions in the workplace. This neutrality policy did not apply to employees who did not come into contact with children or parents, but IX's professional duties did include such tasks. It should be noted that, on its website, WABE stated:

> «Gender, background, culture and religion or special needs – we firmly believe that diversity enriches our lives. By being open and curious, we learn to understand one another and to respect differences. Since we welcome all children and parents, this creates an atmosphere in which everyone can feels safe, feel a sense of belonging and can develop trust. This is the basis for a healthy social development and peaceful interaction».[346]

Following two official warnings for refusing to remove her *hijab*, IX was suspended from work. She then filed a complaint before the Hamburg Labour Court, contending not only that she had been directly discriminated against but also that WABE rule, which exclusively affected women, had to be examined in the light of the prohibition of discrimination on the grounds of gender too. In turn, WABE recalled *G4S*, which had recognized that a private employer can lawfully implement a policy of neutrality provided that it is pursued consistently and systematically and that is restricted to employees who are in contact with customers. The German Labour Court decided to stay the proceedings and refer to the CJEU the question of whether, under the Directive 2000/78, the instruction not to wear visible religious signs to an employee who, due to her Muslim faith wears a veil, should be regarded as direct or indirect discrimination. The referring then asked whether indirect discrimination on the grounds of religion and/or gender could be justified with the employer's wish to pursue neutrality even where the employer seeks to meet the subjective wishes of its clients. In addition, the German court asked whether

[346] Opinion of Advocate General A. Rantos delivered on 25 February 2021, cases C-804/18 and C-341/19, *WABE and MH Müller Handel*, para. 18.

the national provision establishing that an employer's wish to pursue a policy of religious neutrality (which restricts employees' right to religious freedom) is legitimate only if the company suffers economic harm if such policy did not exist, could be permitted under Art. 8(1) Directive 2000/78, which allows Member States to provide whether national rules more favourable to equal treatment on grounds of religion.

Before reaching the CJEU, both *WABE* and *Müller* (which will be discussed in detail in the next subsection) were allocated to Advocate General Sharpston. Nonetheless, after her departure from office in September 2020, they were re-allocated to her successor, Advocate General Rantos. As Sharpston's Shadow Opinion and Rantos' Opinion come to opposite conclusions in relation to religious discrimination and the possible justifications which employers can bring forward for discriminatory policies, it appears necessary to give a brief account of their divergent lines of reasoning.

Firstly, Ms Sharpston and Mr Rantos came to different conclusions regarding whether the neutrality policy at issue in the main proceedings constituted direct or indirect discrimination. Reiterating her Opinion in *Bougnaoui*, the former Advocate General held that such policy directly discriminated between employees who consider themselves required by their religion to wear certain apparel and employees who do not belong to religions that mandate specific clothing or who do not have a religion.[347] In support, Ms Sharpston referred to CJEU's earlier case-law:[348] *Cresco Investigation*,[349] where a difference in treatment between members of certain minority churches and members of other faiths was found to be directly discriminatory; *CHEZ*,[350] where a measure introducing a difference of treatment on the basis of racial or ethnic origin was held to be direct discrimination; and *Feryn*,[351] where the employer's statement that he would not hire "immigrants" because his clients did not want them to access their houses was

[347] *See* Shadow Opinion of Advocate General E. Sharpston delivered on 23 March 2021, cases C-804/18 and C-341/19, *WABE and MH Müller Handel*, para. 123.
[348] *Ibid*., paras. 183-184.
[349] *See* Judgment *Cresco Investigation*, above, para. 40. For further examination of this case, *see* Chapter 3, section 3.3.
[350] *See* Court of Justice of the European Union, judgment of 16 July 2015, Case C-83/14, *CHEZ Razpredelenie Bulgaria*, EU:C:2015:480, para. 109.
[351] *See* Court of Justice of the European Union, judgment of 10 July 2008, Case C-54/07, *Feryn*, EU:C:2008:397, paras. 23-25.

considered as directly discriminatory for it was likely to dissuade certain candidates to apply. On the contrary, Advocate General Rantos held that there is no direct discrimination where all employees are prohibited from wearing any visible sign of political, philosophical or religious convictions at work, because such neutrality policy treats all workers the same.[352]

Secondly, the two Advocates General adopted different approaches to the possible existence of intersectional discrimination in *WABE*. Ms Sharpston acknowledged that the neutrality policies such as that at issue in the main proceedings might constitute "triple discrimination" against a *hijab*-wearing woman, for she is Muslim (grounds of religion), she is a woman (grounds of gender), and she comes from a specific ethnic community (grounds of ethnic origin).[353] Accordingly, Ms Sharpston claimed that national courts must undertake an advanced and rigorous scrutiny of the justification brought forward by the employer so as to «provide adequate safeguards for these very vulnerable categories of potential employees».[354] On the other hand, Mr Rantos did not state anything in relation to intersectional discrimination. Even though the CJEU has often pointed out that it may provide guidance on the interpretation of provisions of EU law irrespective of whether the referring court mentioned these in its questions,[355] Mr Rantos merely noted that the German judges had not mentioned any EU law provision on gender discrimination and concluded that the material before the CJEU was insufficient to enable it to consider such issues in *WABE*.[356]

Thirdly, Ms Sharpston and Rantos reached different conclusions regarding the employer's justification of indirect discrimination. As mentioned above, the former Advocate General recommended a very advanced scrutiny of any justification of indirect discrimination to be applied to all three elements of the justification test – namely, the legitimate aim, the appropriateness of the means and necessity of such means. In particular, in order to determine whether the company's aim could be considered as legitimate, she suggested

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[352] *See* Opinion of Advocate General Rantos, above, paras. 47-52.
[353] *See* Shadow Opinion of Advocate General Sharpston, above, paras. 267-269.
[354] *Ibid*., para. 270.
[355] *See* inter alia Court of Justice of the European Union, judgment delivered on 12 February 2015, Case C-349/13, *Oil Trading Poland*, EU:C:2015:84, para. 45; Judgment *G4S*, above, para. 33.
[356] *See* Opinion of Advocate General Rantos, above, para. 59.

to submit the employer to a highly rigorous test comprising six stringent questions.[357] Mr Rantos, instead, held straightforwardly that a neutrality policy adopted in order to take account of the customers' wishes falls under the freedom to conduct a business enshrined in Art. 16 Charter.[358] As regards the assessment of the appropriateness and necessity of the means, Advocate General Rantos observed that, in *G4S*, the CJEU mentioned Art. 16 Charter and Art. 9 ECHR only in the context of ascertaining the legitimate aim.[359] He then deduced that neither the freedom to carry on a business nor the religious freedom are to be taken into account in the assessment of the appropriateness and necessity of the means and, accordingly, concluded that such rights do not have to be weighed one against each other in the proportionality test.[360] Thus, the difference between the two Advocates General lies on the level of scrutiny applied: whereas Ms Sharpston applied an extremely rigorous test, Mr Rantos applied a much more lenient test in the assessment of the employer's justification of indirect discrimination.

Lastly, in relation to the status of national rules providing protection that goes beyond that laid down by Directive 2000/78, both Advocates General agreed that neither the Directive nor Art. 16 Charter preclude national judges from applying such national norms.[361]

Adopting Mr Rantos' reasoning, the CJEU straightforwardly refused to engage on the issue of discrimination on grounds of sex on the basis that the referring court had limited its question to Directive 2000/78, which does not address this matter.[362] It then proceeded to answer the preliminary questions asked by the German Court. After having excluded that an internal rule such as that in the main proceedings constituted direct discrimination,

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[357] «(i) What precisely is the aim pursued by the employer (if the employer is neutrality per se, why is that legitimate? (ii) Is that aim consistent with other statement this employer has made as to his primary aims and objectives (if neutrality is being pursued to further some (other) primary aim, how or why does that make neutrality itself a legitimate aim? (iii) Does pursuit of that aim potentially create a disparate adverse impact upon an identifiable group of employees leading to potential indirect discrimination on one of the prohibited grounds? (iv) If so, does this employer have a specific and legitimate reason for the stated aim? (v) Is the stated aim a legitimate aim for this employer to hold in respect of its business as a whole? (vi) If not, is the stated aim a legitimate aim for this employer to hold in relation to the particular post(s) to which this complaint relates?». Shadow Opinion of Advocate General Sharpston, above, para. 225.
[358] *See* Opinion of Advocate General Rantos, above, para. 65.
[359] *Ibid*., para. 94.
[360] *Ibid*., paras. 95-100.
[361] *Ibid*., para. 112; Shadow Opinion of Advocate General Sharpston, above, para. 109.
[362] *See* Judgment *WABE and Müller*, above, para. 58.

as it applied indistinctly to all employees,[363] the CJEU addressed the second question. It reiterated its finding in *G4S* that an indirectly discriminatory measure could be indeed justified in the light of Art. 16 Charter, «in particular where the employer involves in the pursuit of [neutrality] aim only those workers who are required to come into contact with the employer's customers».[364] However, the CJEU added further details to the *G4S* decision by observing that the employer's mere desire to pursue neutrality would not be enough in itself. According to the Court, an employer must also demonstrate a "genuine need" for such a measure, taking into consideration both customers' rights and legitimate wishes and the adverse consequences that the employer would suffer in the absence of that measure. Examining the factual circumstances of *WABE*, the CJEU found that account had been duly taken of parents' right to ensure the education of their children in accordance with their own beliefs, enshrined in Art. 14 Charter, and that the employer had adduced evidence that, in the absence of the neutrality policy, it would suffer adverse consequences.[365] The judges thus concluded that, under the Directive 2000/78, indirect discrimination on religious grounds can be justified by the employer's wish to pursue a policy of religious neutrality with regard to its customers or users.[366] In relation to the last preliminary question, the CJEU agreed with the two Advocates General and noted that the Directive 2000/78 leaves to the Member States to reconcile between religious freedom and the legitimate aims that may be invoked to justify unequal treatment. The Directive indeed leaves a «margin of discretion to Member States, taking into account the […] place accorded to religion and beliefs within their respective systems».[367] While recognizing that this margin goes «hand in hand with supervision, by the EU judicature», the CJEU observed the lack of consensus on these matters amongst Member States.[368] It then concluded that national provisions protecting religious freedom are to be considered «as a value to which modern democratic societies have attached great importance for many years» and, accordingly, recognized them as national rules more favourable to the

[363] *Ibid*., para.52.
[364] *Ibid*., para. 63.
[365] *Ibid*., paras. 64-68.
[366] *Ibid*., para. 70.
[367] *Ibid*., para. 86.
[368] *Ibid*.

protection of equal treatment within the meaning of Art. 8(1) Directive 2000/78.[369]

5.4. The Müller *case*

The CJEU's last case on the prohibition of wearing religious symbols in the workplace also concerned a German Muslim woman, MJ. MJ had been employed as a sales assistant at a company which ran several chemist shops since 2002 and, after returning from a parental leave in 2014, decided to start wearing the Islamic veil during working hours. As she did not comply with the request to remove the headscarf at work, MJ was tasked with a different activity that did not require her to remove the veil. Nevertheless, in 2016, she was instructed to attend the workplace «without any conspicuous, large-scale political, philosophical or religious signs».[370] This neutrality policy applied to all shops and, unlike that at issue in *G4S*, *Bougnaoui* and *WABE*, did not prohibit all outward symbols but only the "prominent" and "large-scale" ones. MJ challenged the applicability of this instruction before the German judges, invoking her religious freedom and claiming that her employer's policy of neutrality had to be subject to a proportionality test. In turn the company invoked the *G4S* ruling, where the CJEU gave greater weight to the freedom to carry on a business than to freedom of religion. Then, the German court decided to stay the proceedings and refer to the EU Court the question of whether indirect discrimination on religious grounds could be justified only if an employer's rule prohibited all outward signs of religious, political and philosophical convictions rather than those signs which are prominent and large-scale. If the answer was negative, a second preliminary question was then asked on whether the right to religious freedom as enshrined in Art. 10 Charter and Art. 9 ECHR has to be taken into consideration when determining justification for difference of treatment.

Ms Sharpston and Mr Rantos came to different conclusions also in connection to *Müller*. The former Advocate General not only reiterated that a general ban on religious symbols directly discriminates employees who consider themselves mandated by their faith to

[369] *Ibid.*, para. 90.
[370] Judgment *WABE and Müller*, above, para. 35.

exhibit certain signs in comparison with members of religions who do not impose specific apparel and employees who do not have a religious feeling, but also noted that a partial ban, like the one at issue in the main proceedings, directly discriminates between religions.[371] On the contrary, the latter implicitly assumed that a neutrality policy banning only large-scale religious symbols does not constitute direct discrimination and, accordingly, proceeded to ascertain whether the company policy at issue was justifiable under Art. 2(2)(b) Directive 2000/78.[372] Even though, in *WABE,* Mr Rantos had claimed that direct discrimination could not occur where all faiths were covered in the same way by the neutrality policy,[373] he then appears not to apply this in *Müller,* as the internal rule at issue did have unfavourable effect on religious groups who wear particularly visible signs and, therefore, did distinguish between religions.

As concerns the employer's justification of indirect discrimination, whereas Ms Sharpston, as mentioned, suggested to submit the employer to a highly rigorous test in order to ascertain the legitimacy of the company's aim,[374] Advocate General Rantos held that the freedom to conduct a business also allows an employer to prohibit only the exhibition of large-scale religious symbols.[375] In particular, he considered that the preliminary question referred by the German judges amounted to determining whether the visible wearing, during working hours, of small-scale symbols is to be considered appropriate and he argued:

> «It is true that even small-scale signs […] may reveal to an attentive and interested observer the political, philosophical or religious beliefs of a worker. However, such discreet signs, which are not conspicuous, cannot, in my view, upset those customers of the undertaking who are not of the same religion or do not share the same beliefs as the employee(s) concerned».[376]

According to Mr Rantos, a policy prohibiting any visible symbol would then exceed what is necessary and «would, in respect of those who have chosen to wear a small-scale sign,

[371] *See* Shadow Opinion of Advocate General Sharpston, above, paras. 122-123.
[372] *See* Opinion of Advocate General Rantos, above, paras. 69-81.
[373] *Ibid*., para. 55.
[374] *See* Shadow Opinion of Advocate General Sharpston, above, para. 225.
[375] *See* Opinion of Advocate General Rantos, above, para. 75.
[376] *Ibid*., para. 74.

be punitive, solely because other persons have chosen to wear conspicuous signs».[377]

Finally, as mentioned above in connection to *WABE*, Advocate General Rantos held that neither the freedom to conduct a business nor the religious freedom are to be taken into account in the assessment of the appropriateness and necessity of the means and, accordingly, concluded that such rights do not have to be weighed one against each other in the proportionality test.[378] On the contrary, Ms Sharpston argued that the CJEU should not conduct the proportionality test in terms of applying one Charter provision (such as Art. 21) to the exclusion of other relevant provisions (such as Artt. 10 and 16), since «such an approach, like putting blinkers on a horse, risks obscuring the presence, importance and relevance of dicta relating to the proper understanding of the competing rights […] in play».[379] Accordingly, she recommended the EU judges to take into account fundamental human rights in all three parts of the justification test for indirect discrimination and to weigh the employer's right under Art. 16 Charter against those of the employee under Artt. 10 and 21 Charter.[380]

In contrast to the *WABE* decision, the CJEU largely mirrored Advocate General Sharpton's Shadow Opinion in relation to *Müller*. While leaving the national judges with the responsibility of ascertaining whether the neutrality policy at issue ultimately constituted direct or indirect discrimination, the Court of the EU argued that where a rule is based on a criterion that is «inextricably linked to a protected ground» this must be considered as directly discriminatory and noted that a ban targeting only conspicuous, large-scale religious symbols may affect unfavourably the members of one or more particular faiths specifically because of their religion.[381] In case such direct discrimination should have not been found to exist by the German judges, the CJEU provided additional guidance also in relation to the employer's justification of indirect discrimination. While it found the company's aim to avoid social conflicts and project a neutral image *vis-à-vis* customers to be legitimate,[382] the Court nevertheless undertook a strict justification test

[377] *Ibid.*, para. 79.
[378] *Ibid.*, paras. 95-100.
[379] Shadow Opinion of Advocate General Sharpston, above, para. 240.
[380] *Ibid.*
[381] *See* Judgment *WABE and Müller*, above, para. 73.
[382] *Ibid.*, para. 76.

in relation to the appropriateness and necessity of the measure. Mr Rantos had claimed that a ban prohibiting only conspicuous signs could be suitable to achieve the neutrality aim in light of the fact that a «small and discreetly worn religious symbol […] is more likely to be acceptable that a noticeable head covering»,[383] and held that also such partial ban could be pursued in a consistent and systematic manner.[384] Rejecting such an approach, the CJEU found the internal rule at issue to be both inappropriate to reach the company aim and inconsistently applied, for the wearing of any outward sign, even a small-sized one, undermine the effective pursuit of a policy of neutrality.[385] Accordingly, the Court concluded that a discriminatory prohibition which is limited to the exhibition of large-sized symbols of political, philosophical and religious conviction cannot in any event be justified under the provisions of Directive 2000/78.[386]

6. Reflections on the CJEU jurisprudence on religious symbols in the private workplace

Even though the *G4S*, *Bougnaoui* and *WABE and Müller* rulings were originated from different factual circumstances, it appears necessary to analyse them jointly so as to properly assess whether the CJEU's approach on the wearing of religious garments at work can be considered adequate to the European post-secular and pluralistic society. Notably, this section will focus on the two aspects of the rulings that have attracted the most criticism.[387] On the one hand, the CJEU has been strongly criticized for not having

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[383] Opinion of Advocate General Rantos, above, para. 76, quoting Opinion of Advocate General Kokott, above, para. 118.
[384] *Ibid*., para. 80.
[385] *See* Judgment *WABE and Müller*, above, para. 77.
[386] *Ibid*., para. 78.
[387] *See* inter alia S. HENNETTE-VAUCHEZ, *Equality and the Market: The Unhappy Fate of Religious Discrimination in Europe*, in *European Constitutional Law Review*, 13, 2017, pp. 744-758; L. SALVADEGO, *Il divieto per i dipendenti di imprese private di esibire simboli religiosi all'esame della Corte di Giustizia dell'Unione Europea*, *in Rivista di Diritto Internazionale*, 100, 2017, pp. 808-826; E. BREMS, *European Court of Justice Allows Bans on Religious Dress in the Workplace*, in *Blog of the IACL*, 26 March 2017, available at https://blog-iacl-aidc.org/test-3/2018/5/26/analysis-european-court-of-justice-allows-bans-on-religious-dress-in-the-workplace (last accessed on 31 December 2021); E. HOWARD, *Islamic Headscarves and the CJEU:* Achbita *and* Bougnaoui, in *Maastricht Journal of European and Comparative Law*, 24, 2017, pp. 348-366; S. OUAD CHAIB, V. DAVID, *European Court of Justice Keeps the Door to Religious Discrimination in the Private Workplace*, in *Strasbourg Observers*, 27 March 2017, available at https://strasbourgobservers.com/2017/03/27/european-court-of-justice-keeps-the-door-to-religious-discrimination-in-the-private-workplace-opened-the-european-court-of-human-rights-could-close-it/ (last accessed on 31 December 2021); N. COLAIANNI, *Il velo delle donne musulmane tra libertà*

recognized a directly discriminatory character to company policies that prohibit all employees from wearing any visible sign of personal convictions. On the other, the EU judges have been accused of giving excessive weight to the freedom to conduct a business, without properly assessing the appropriateness and necessity of the means used by the employer to project a neutral image *vis-à-vis* customers.

6.1. The issue of the direct discrimination

As discussed above, in *G4S*, *Bougnaoui* and *WABE*, the CJEU found that a company dress policy that prohibits all employees from exhibiting any outward sign of political, philosophical and religious beliefs does not constitute direct discrimination within the meaning of Art. 2(2)(a) Directive 2000/78.[388] However, several commentators have challenged this finding. For instance, Hennette-Vauchez affirms that the Luxembourg Court followed «a problematic line of argumentation» when it examined the issue of direct discrimination.[389] Similarly, observing that the CJEU had previously clarified that direct discrimination occurs when a measure introduces a difference of treatment which is explicitly based on a protected ground (such as religion) or a characteristic linked to a protected ground,[390] Amnesty International and the European Network Against Racism (ENAR) affirm that «it is undeniable that the measure imposed by G4S explicitly refers

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di religione e libertà d'impresa, in *Questione Giustizia*, 21 March 2017, available at https://www.questionegiustizia.it/articolo/il-velo-delle-donne-musulmane-tra-liberta-di-religione-e-liberta-d-impresa_21-03-2017.php (last accessed on 31 December 2021); R. MCCREA, *Headscarves at Work: The Court of Justice Clarifies When Employers Can Ban Them*, in *EU Law Analysis*, 17 July 2021, available at http://eulawanalysis.blogspot.com/2021/07/headscarves-at-work-court-of-justice.html (last accessed on 31 December 2021); M. VAN DEN BRINK, *Pride or Prejudice? The CJEU Judgment in* IX v Wabe *and* MH Müller Handels GmbH, in *VerfBlog*, 20 July 2021, available at Pride or Prejudice? – Verfassungsblog (last accessed on 31 December 2021); E. HOWARD, *German Headscarf Cases at the ECJ: A Glimmer of Hope?*, in *European Law Blog*, 26 July 2021, available at https://europeanlawblog.eu/2021/07/26/german-headscarf-cases-at-the-ecj-a-glimmer-of-hope/ (last accessed on 31 December 2021).

[388] *See* Judgment *G4S*, above, para. 30; Judgment *Bougnaoui*, above, paras. 31-32; Judgment *WABE and Müller*, above, para.52.

[389] *See* S. HENNETTE-VAUCHEZ, above, p. 746.

[390] *See* Amnesty International and European Network Against Racism, *Wearing the Headscarf in the Workplace: Observations on Discrimination Based on Religion in the* Achbita *and* Bougnaoui *Cases*, 2016, p. 7, available at https://www.enar-eu.org/IMG/pdf/eur0150772016english.pdf (last accessed on 31 December 2021), citing Judgment *CHEZ*, above, paras. 76 and 91.

to religion or belief and introduces a difference of treatment on that ground».[391] The reason behind such divergent opinions is that the CJEU resorted to a basis for comparison different than that used by Amnesty International and ENAR. Art. 2(2)(a) Directive 2000/78 enshrines that direct discrimination shall be taken to occur only where a person is treated less favourably than another is. In order to assess whether this was the case in *G4S* and *WABE*, the CJEU (just as Advocate Generals Kokott and Rantos) compared the applicants with the other employees that wished to give active expression to a personal conviction and concluded that, since all these workers had received the same treatment, the applicants had not been directly discriminated against.[392] In *WABE*, for instance, the Court noted that the company also required another employee wearing a Christian cross to remove that symbol and concluded that the applicant, who was ordered not to exhibit the headscarf, was no treated differently in comparison with any other colleague.[393] However, the CJEU based its reasoning on an erroneous term of comparison. As Hennette-Vauchez observes, «a situation that entails discrimination on the grounds of religious beliefs should not only be assessed by comparing it to the treatment of persons expressing other beliefs, but also to persons expressing no belief».[394] The fact that a company policy, which contains elements of discrimination on the ground of objective diversity, applies to all employees in the same manner does not deprive it of its discriminatory character. It is therefore

> «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. *Generalized hostility toward religions is apparently a manifestation of neutrality*».[395]

The Court's reasoning according to which a discrimination against all members of a group alike does not constitute discrimination is manifestly contradicting: «"more" somehow amounts to "less", […] if you discriminate against all members of a group for their

[391] *Ibid*.
[392] *See* Judgment *G4S*, above, paras. 30-31; Opinion of Advocate General Kokott, above, para.49; Judgment *WABE and Müller*, above, para. 52; Opinion of Advocate General Rantos, above, para. 55.
[393] *See* Judgment *WABE and Müller*, above, para. 54.
[394] S. HENNETTE-VAUCHEZ, above, p. 748.
[395] E. BREMS, above. [emphasis added]

religion or convictions, you discriminate against none».[396] Notably, such line of reasoning does not appear to be very convincing if one hypothesized a similar case concerning discrimination not on grounds of religion, but of disability.[397] It seems unthinkable that the CJEU would rule that a measure excluding all employees with all kind of disabilities would not be considered as directly discriminatory. The question then arises as to what, in the eyes of the EU judges, is different about religion. The Court seems to ignore that the company "neutrality" policies at issue actually are not a neutral stance. On the contrary, they express a «deformation of neutrality»[398] that is biased against religious people. The Court seems then to abide by one of the salient features of the traditional secularization theory, *i.e.* the belief that the differentiation between the temporal matters and religion must be achieved through the relegation of religious elements to the private domain. The supporters of traditional secularization indeed push for a progressive marginalization and privatization of religion, so that religious expressions «are no longer applicable in secular institutions […] to wit the so-called public, objective world; but are rather restricted to the "private sphere", the so-called secondary institutions of the subjective world».[399] By assuming that a measure prohibiting the manifestations of all religious beliefs does not constitute discrimination, the CJEU implicitly endorses that individuals might well be required to set aside their confessional convictions in public and to adapt to the "language" of non-religious people.

However, not only the Court's line of reasoning implicitly discriminates against believers whatsoever, but it could also be argued that Ms Achbita and IX, whose faith impose them to exhibit specific religious symbols, had been directly discriminated against in comparison to employees whose religion does not prescribe such requirements.[400] Even

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[396] S. HENNETTE-VAUCHEZ, above, p. 746. *See also* R. XENIDIS, *The Polysemy of Anti-Discrimination Law: The Interpretation Architecture of the Framework Employment Directive at the Court of Justice*, in *Common Market Law Review*, 58, 2021, p. 1658.

[397] Such hypothesis has been put forward by S. HENNETTE-VAUCHEZ, above, p. 747; E. HOWARD, *Islamic Headscarves…*, above, p. 354; E. BREMS, above; S. LAULOM, *Un affaiblissement de la protection européenne contre les discriminations*, in *Semaine Sociale Lamy*, 1762, 2017, p. 8.

[398] J. MARTÍNEZ-TORRÓN, above, p. 137.

[399] K. DOBBELAERE, *Secularization Theories and Sociological Paradigms: A Reformulation of the Private-Public Dichotomy and the Problem of Societal Integration*, in *Sociological Analysis*, 46, 1985, p. 380.

[400] *See also* Opinion of Advocate General Sharpston, above, paras. 88-89.

though at first sight the company policies at issue in *G4S* and *WABE* appear to cover all religions equally, closer examination reveals that they touch upon Christian believers only marginally. In contrast to Muslim women, Christians are not required to wear any particular garment and even members of the clergy are allowed (and sometimes recommended) to wear civilian clothes for particular situations.[401] In light of this, commenting on the neutrality policies in the above-mentioned cases, some argue that «il est évident qu'une telle inderdiction énoncéé par un règlement intérieur n'a d'autre but que d'interdire le port du voile islamique».[402] No doubt that the ruling in relation to *Müller* has to be welcomed insofar, by suggesting that partial bans on large-scale signs constitute direct discrimination against those whose belief require the wearing of the *hijab*, it has established a stricter control on company policies that amount to hidden targeting at one faith. Yet, although recognizing that also bans on all religious symbols «concern, statistically, almost exclusively female workers who wear a headscarf because of their Muslim faith»,[403] the CJEU did not consider such general bans as directly discriminatory in *G4S* and *WABE*. It then appears that the CJEU's rulings are likely to legitimize discrimination against Muslim women itself, as they can be read as a "how-to" for employers willing to discriminate against *hijab*-wearers: «introduce a neutrality policy that applies to all types of religious dress; apply it consistently; apply it only to front-office employees; and if you want to dismiss a person, make sure to motivate why you cannot offer that person a back-office job».[404]

The EU judges' reasoning appears to be contradictory also in connection to Art. 4(1) Directive 2000/78. As mentioned, this provision enshrines that a difference of treatment does not amount to discrimination where it is based on a characteristic related to a prohibited ground, *e.g.* religion, and such a characteristic constitutes a "genuine and determining occupational requirement" by reason of the occupational activities concerned or by the context in which they are carried out. When considering whether Art. 4(1)

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401 *See* N. COLAIANNI, above.
402 T. UFARTE, *La liberté de conscience des salariés face au culte de la liberté d'enterprise prône par la CJUE : une nouvelle guerre de religion ?*, in *La Revue des Droits de l'Homme*, 16 June 2017, available at https://journals.openedition.org/revdh/3056 (last accessed on 31 December 2021).
403 Judgment *WABE and Müller*, above, para. 59.
404 E. BREMS, above.

Directive 2000/78 could justify the directly discriminatory measure in *Bougnaoui*, the CJEU concluded that the employers' wish to take account of the desires of a client not to have services provided by a *hijab*-wearing worker could not be considered a "genuine and determining occupational requirement" within the meaning of the provision.[405] This is consistent with the necessity of a strict interpretation of Art. 4(1) Directive 2000/78.[406] A requirement can be considered as "genuine and determining" only where the characteristic related to the employee's religion objectively requires a difference of treatment due to the nature of the occupational activity, while this notion cannot cover subjective considerations, «such as the willingness of the employer to take account of the particular wishes of the customer».[407] While these are welcome findings, they seem to be contradicted in *G4S* and *WABE*. There is indeed a very thin line between affirming that the Islamic headscarves cannot be prohibited simply because customers ask so and allowing employers to ban such garments so as to anticipate customers' wishes.[408] The CJEU found the company's aim to project a neutral image to be legitimate, but questions arise as to «what other reasons, apart from anticipated or real wishes of customers, could serve to justify the creation of a brand image of neutrality».[409] It is true that, in relation to *WABE*, the European judges placed greater emphasis on the need to demonstrate on the part of the employer the genuine necessity of a neutrality policy, taking into consideration both the legitimate rights of the customers and the adverse consequences that the company would suffer in the lack of such policy.[410] However, the CJEU had previously found in *CHEZ* that, when deciding whether a practice constitutes direct discrimination, courts should take into consideration whether that practice is based on stereotypes and prejudice or not.[411] Thus, one may well ask whether the employer's will to project a neutral image

[405] *See* Judgment *Bougnaoui*, above, para. 41.
[406] *See* Opinion of Advocate General Sharpston, above, para. 95, citing Judgment *Prigge*, above, para. 72 and Court of Justice of the European Union, judgment of 13 November 2014, Case C-416/13, *Vital Pérez*, EU:C:2014:2371, para. 47.
[407] Judgment *Bougnaoui*, above, para. 40.
[408] *See also* S. PEERS, *Headscarf Bans at Work: Explaining the ECJ rulings*, in *EU Law Analysis*, 14 March 2017, available at http://eulawanalysis.blogspot.com/2017/03/headscarf-bans-at-work-explaining-ecj.html (last accessed on 31 December 2021).
[409] M. MAHLMANN, *ECJ Headscarf Series (3): The Everyday Troubles of Pluralism*, in *Strasbourg Observers*, 12 September 2016, available at https://strasbourgobservers.com/2016/09/12/ecj-headscarf-series-3-the-everyday-troubles-of-pluralism/ (last accessed on 31 December 2021).
[410] *See* Judgment *WABE and Müller*, above, para. 70.
[411] *See* Judgment *CHEZ*, above, para. 82.

in *WABE* is not based on the prejudicial views of parents (its customers) towards Muslim women wearing the headscarf. Given also that, in *Feryn*, the Court found a measure based on customers' anticipated wish not to be served by a member of an ethnic minority to be directly discriminatory because it would dissuade some candidates from applying to these employers,[412] one wonders again why presumably prejudiced views on religion are treated differently.

According to McCrea, the reason behind this contradictory reasoning is that, whereas in *G4S* and *WABE* the CJEU considered the possible justifications for indirect discrimination, the difference of treatment in *Bougnaoui* constituted direct discrimination. Accordingly, since «the test for justification of directly discriminatory measures ("genuine and determining occupational requirements") is so much more demanding than that for indirectly discriminatory measures, the reasons for the apparent contrast in the outcomes in the […] cases becomes clear».[413] However, this conclusion does not seem convincing in full. In practice, the *G4S* and *WABE and Müller* decisions recognize that a company neutrality policy may lawfully justify a selection of personnel just as neutral, *i.e.* willing to conceive religious convictions when in contact with customers. It appears clear that the shield of company neutrality lends itself to easy abuse and instrumentalization[414] and that, moreover, legitimizes the thrusts towards the marginalization of (minority) religious identities. As mentioned, the *Bougnaoui* judgment seems to call on employers to anticipate the customers' desires so as to internalize a possible solution in the form of a neutrality requirement as a matter of company policy. From this perspective, the *G4S* and *WABE and Müller* rulings offer to employers a very convenient regulatory framework, provided that the neutrality policy is achieved through appropriate and necessary means. Companies that wish to infringe upon their employees' religious freedom can achieve their aim by preventively adopting an internal policy banning any sign of religious belonging. Moreover, such policy is not even required to be

[412] *See* Judgment *Feryn*, above, para. 25.
[413] R. MCCREA, *Faith at Work: The CJEU's Headscarf Rulings*, in *EU Law Analysis*, 17 March 2021, available at http://eulawanalysis.blogspot.com/2017/03/faith-at-work-cjeus-headscarf-rulings.html (last accessed on 31 December 2021).
[414] *See also* A. GUAZZAROTTI, *Giudici e Islam. La soluzione giurisprudenziale dei «conflitti culturali»*, *in Studium Iuris*, 8, 2002, pp. 871-877.

in written form, as the only requisite for it to be valid is that it entered into force before being applied to employees.[415]

The concern that the CJEU's above-discussed decisions will give rise to a number of company policies regulating the dress code at work is well-founded. In the event that a customer complained about certain employees' clothing, and in particular about the use of the Islamic headscarf, an employer, not necessarily mischievous, could simply «adopter un règlement intérieur l'interdisant. Il ne pourra pas sanctionner la salariée pour les plaintes antérieur mais il lui interdira à l'avenir de porter son voile pour empêcher les plaintes à venir».[416] Accordingly, an employer will not fire anymore an employee in response to his/her insistence on wearing religious symbols during working hours, but will avoid hiring him/her in the first place.

6.2. The issue of the justification for indirect discrimination

After ruling that an internal policy prohibiting all employees from wearing any visible sign of religious beliefs does not constitute direct discrimination, the CJEU proceeded to assess whether such a policy could be considered as indirectly discriminatory. Recalling Art. 2(2)(b) Directive 2000/78, the Court noted that the company policies in *G4S, Bougnaoui* and *WABE*, although being apparently neutral, put employees having a certain religion at a particular disadvantage.[417] However, it also stressed that such disadvantage would have not constituted indirect discrimination if the internal policy was to be found justified by a legitimate aim and pursued through appropriate and necessary means.[418] Accordingly, the CJEU proceeded to assess whether the company's measure aimed at a

[415] In *G4S*, the applicant was dismissed on 12 June 2006, on account of her insistence that she wished to wear the *hijab* during working hours. The internal rule prohibiting all employees from wearing any outward sign of political, philosophical or religious beliefs was added to the workplace regulations only on 13 June 2006. *See* Judgment *G4S*, above, paras. 15-16.
[416] T. UFARTE, above, para. 55.
[417] *See* Judgment *G4S*, above, para. 34; Judgment *WABE and Müller*, above, para. 39.
[418] *See* Judgment *G4S*, above, para. 35; Judgment *WABE and Müller*, above, para. 39. In *Bougnaoui*, the CJEU noted that, if the national judges had to ascertain the existence of a general ban on religious symbols, also such ban would introduce a difference of treatment indirectly based on religion or belief. However, the CJEU proceeded to assess whether this difference of treatment could be justified in light of Art. 4(1) Directive 2000/78 and, therefore, did not assess the ban's legitimacy nor its proportionality.

legitimate aim and respected the proportionality principle, *i.e.* was adequate, necessary and proportional *stricto sensu*.

6.2.1. The legitimacy of the aim

As mentioned above, the Court ruled in *G4S* that

> «the desire to display, in relation with both public and private sector customers, a policy of political, philosophical or religious neutrality must be considered legitimate. [Indeed it] relates to the freedom to conduct a business that is recognised in Article 16 of the Charter and 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».[419]

The EU judges argued that also the Strasbourg jurisprudence confirmed this finding, since, in *Eweida*, the ECtHR had ruled that the employees' freedom of religion could be restricted to pursue a neutrality policy. However, such mention to the ECtHR's case-law not only is excessively simplistic,[420] but it is also the only argument brough to support the legitimacy of G4S' neutrality aim. Moreover, the CJEU focused exclusively on the freedom to carry on a business under Art. 16 Charter, while it neglected Art. 31(1) Charter, which enshrines that «every worker has the right to working conditions which respect his or her […] dignity».[421] In contrast to Art. 52(3) Charter,[422] the Court seems then to have raised the number of possible exceptions to the freedom of manifesting one's religious beliefs beyond what laid down in European human rights protection instruments and – what is more – did not explain the reasons for this choice. In this regard, Hennette-Vauchez argues that the CJEU referred to the Charter «only to interpret the "legitimate

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[419] Judgment *G4S*, above, paras. 37-38.
[420] As will be discussed below, the CJEU recalled only a small part of the ECtHR's line of reasoning, while it wilfully ignored the bigger picture of the *Eweida* judgment.
[421] On the matter, *see also* M. STEIJNS, Achbita *and* Bougnaoui: *Raising More Questions Than Answers*, in *Eutopia Law*, 18 March 2017, available at https://eutopialaw.wordpress.com/2017/03/18/achbita-and-bougnaoui-raising-more-questions-than-answers/ (last accessed on 31 December 2021).
[422] «In so fa this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights hall be the same as those laid down by said Convention. This provision shall not prevent Union law providing more extensive protection».

aim" that would allow a company to indirectly discriminate, and only with respect to the fundamental rights of private undertakings (in particular, their freedom to conduct a business) rather than those of individuals».[423] The Court's approach in *G4S* subordinates Union's anti-discrimination law to business considerations and to freedom of private initiative. The recognition that the wish to project a neutral image is a legitimate aim that justifies a difference of treatment «reverses the hierarchy between the principle of Directive's Article 2 (a principle of non-discrimination) and exceptions thereto (except if/when the discrimination – differential treatment – pursues a legitimate aim)».[424] Ufarte even compares *G4S* to the *The International Transport Workers' Federation and Finnish Seamen's Union*[425] and *Laval un Partneri*[426] judgments, noting that in all these rulings the CJEU declared its intention to protect fundamental freedoms (of collective action in *Viking* and *Laval*, of religion in *G4S*), but then clarified that such freedoms cannot undermine freedom to conduct a business by any means.[427] It is true that, in relation to *WABE*, the EU Court qualified what it held previously in relation to the legitimate aim by adding that the mere wish of an employer to pursue a neutrality policy is not sufficient in itself to justify indirect discrimination and that the employer must demonstrate that there is a genuine need.[428] Notably, the CJEU mentioned that the rights of clients, such as parents' right to ensure the education of their children in accordance with their own beliefs as recognized in Art. 14(3) Charter, must be considered. The European judges themselves distinguished this from the situation in *Bougnaoui*, where the applicant was dismissed in the absence of a general policy prohibiting all outward signs of political, philosophical and religious beliefs, and from that in *Feryn*, where direct discrimination on grounds of ethnic origin arose from the discriminatory requirements of clients.[429] Yet, once again, questions arise as to what differentiates customers in *Feryn* refusing to have the work done by immigrants and parents in *WABE* not wanting professional services

[423] S. HENNETTE-VAUCHEZ, above, p. 749.
[424] *Ibid*.
[425] *See* Court of Justice of the European Union, judgment of 11 December 2007, Case C-438/05, *The International Transport Workers' Federation and Finnish Seamen's Union*, EU:C:2007:772.
[426] *See* Court of Justice of the European Union, judgment of 18 December 2007, Case C-341/05, *Laval un Partneri*, EU:C:2007:809.
[427] *See* T. UFARTE, above, para. 9.
[428] *See* Judgment *WABE and Müller*, above, para. 64.
[429] *Ibid*., paras. 65-66.

provided by a *hijab*-wearing carer. In fact, it seems that the Court distinguishes between discrimination grounds prohibited by Directive 2000/43, *i.e.* racial or ethnic origin, and those covered by Directive 2000/78, at least as regards religion. In contrast to the former grounds of discrimination, protection of religious freedom seems to be assigned a second-class status, one that can be easily sacrificed in the name of customer's wishes, provided that such wishes result in a general ban apparently neutral and not, as in case of *Bougnaoui*, in a measure *ad personam*. Thus, freedom of religion becomes a secondary right, held within the neutrality requirements of the public sphere. Such an approach endorses the preservation of an outdated wall of separation between religion and the public domain, and appears to abide once again by the traditional theories of secularization, which advocate for the straightforward relegation of religion to the private sphere.

It should also be noted that the CJEU did not address the question of the difference between the private and public sector, even though, in *G4S* and *Bougnaoui*, France and Belgium themselves sided with the applicants, submitting in their written observations that the State duty of neutrality cannot be extended to private parties.[430] The EU judges accepted without the least degree of scrutiny the expansion of the neutrality principle into the private sphere. Yet, even assuming that some restrictions on the freedom to manifest one's religion might be justified in relation to those individuals who act on behalf of the State so as to project an image of neutrality towards society's different beliefs,[431] the same certainly does not apply to the private sector. As previously noted, it is the duty of the State – and not of the individual private citizens - to adopt an authentically secular attitude. Even the ECtHR, when considering company policies that could restrict the employees' freedom to manifest their religion, set precise boundaries to such internal measures. As mentioned, the judges of the EU pointed out that the ECtHR, in *Eweida*, had recognized a certain level of protection to a company's image. However, they did not mention that the Strasbourg Court had explicitly ruled that «the domestic courts accorded

[430] *See* Opinion of Advocate General Kokott, above, paras. 41 and 63; Opinion of Advocate General Sharpston, above, paras. 79-80.
[431] *See* S.E. 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*, 37, 2018, pp. 674-675; L. SAVADEGO, above, p. 818.

[the employer's wish to project a certain corporate image] too much weight».[432] In particular, the ECtHR held that the British authorities had breached their positive obligation under Art. 9 ECHR to adequately protect the employees' right to manifest their religious beliefs and, furthermore, argued that private employers do have some leeway to restrict their workers' freedom to wear religious symbols, but that such leeway is limited. On the contrary, the CJEU seems to have allowed for an *a priori* expansion of the neutrality principle into the private sector, basically turning such principle into «an easy cover-up for prejudice».[433] Whereas post-secular societies should promote the dialogue among individuals with different religious (and non-religious) feelings, the CJEU endorses the vision that the social and public sphere should be presided by a traditional secularism that allows only for the presence of those believers willing to set aside their *forum externum* rights.

In conclusion, it would have been reasonable to expect that the Court of the EU delved more deeply into the reasons why the company neutrality is to be considered as a legitimate aim. In *G4S*, the CJEU simply endorsed Advocate General Kokott's Opinion, where it was argued that a policy of neutrality is absolutely crucial to avoid that a political, philosophical or religious belief expressed by an employee through his/her clothing could be associated with the company itself or with one of its clients.[434] However, Ms Kokott (just as the CJEU) did not present any argument in support of this conclusion. In this connection, noting that the EU Court held that the neutrality policy is necessary especially when the employee comes into contact with customers,[435] Jolly provocatively wondered whether this means that «[the] other employees of *G4S* do not believe that *G4S*'s religious neutrality is compromised by the fact of an employee wearing a *hijab* (…) but that other members of society (whom the employee would meet in their outward-facing role) are unable to make that distinction», and concluded that «this is really quite an extraordinary

[432] Judgment *Eweida*, above, para. 94.
[433] E. BREMS, above. On the CJEU's superficial reference to *Eweida*, *see also* A. SANTINI, *La religione nell'ordinamento dell'Unione Europea: il modello pluralistico alla prova della giurisprudenza della Corte di giustizia*, in A. SANTINI, M. SPATTI (eds.), *La libertà di religione in un contesto pluriculturale*, Libreria Editrice Vaticana, 2021, pp. 140-141.
[434] *See* Opinion of Advocate General Kokott, above, para. 94.
[435] *See* Judgment *G4S*, above, para. 41.

assumption in a modern, diverse and plural society».[436] In *WABE*, the CJEU tried to partially right this, adding that employers are required to demonstrate the necessity of a neutrality policy. On the one hand, it held that national courts should take into consideration whether the employer has proved that, in the absence of such a policy, they would suffer adverse consequences. On the other, it argued that the rights and legitimate wishes of consumers must be considered. While the imposition of a higher burden of proof on the part of employers is to be welcomed, it is argued that the Court should have also assessed whether stereotypes and prejudice about Muslim women were behind the parents' wishes. The CJEU has shown itself to be keen to do so in relation to discriminatory measures on grounds of ethnic origin, encouraging the public co-existence of individuals with different ethnic backgrounds. The fact that the EU judges have not paid the same attention to potential discrimination on religious grounds suggests that they consider religion as a second-league element of society or, at least, that they refuse to actively promote the public dialogue among individuals with different religious and non-religious beliefs.

6.2.2. The appropriateness of the measure

Once ascertained that the aim is legitimate, the next step for ruling out indirect discrimination is to assess whether the aim was pursued through appropriate and necessary means. It should be preliminarily noted, however, that some scholars question the effectiveness of these requirements in setting the boundaries of the exemption to indirect discrimination under Art. 2(2)(b)(i) Directive 2000/78. Whereas some commentators argue that the appropriateness and necessity requirements are to be understood to mean that not all policies are to be considered admissible under EU anti-discrimination law,[437] others stress the ambiguity of such criteria and question their

[436] S. JOLLY, Achbita & Bougnaoui*: A Strange Kind of Equality*, in *Cloisters*, 15 March 2017, available at https://www.cloisters.com/achbita-bougnaoui-a-strange-kind-of-equality/ (last accessed on 31 December 2021).
[437] *See* inter alia G. CALVES, *Religion au travail: que nous enseigne la CJUE?*, in *Feuillet Rapide Social*, 8, 2017, p. 21.

capacity to contain the concept of indirect discrimination.[438]

As to the requirement of appropriateness, the CJEU ruled that the ban of any visible symbol of political, philosophical and religious belief constitutes an appropriate measure to reach the legitimate aim, provided that such ban is genuinely pursued «in a consistent and systematic manner».[439] In support of this, the Court referred to its previous *Hartlauer*[440] and *Petersen*[441] decisions. However, as Howard points out, both these rulings concerned rules laid down in national legislation rather than in an individual company's work regulation and neither of them contained any issue of religion.[442] Furthermore, the precise meaning of the phrase "in a consistent and systematic manner" remains unclear. Whereas, in relation to *Müller*, the CJEU ruled that a partial ban prohibiting exclusively large-scale symbols calls into question the consistency of a company policy of neutrality,[443] in *G4S* and *WABE* it held that a general ban prohibiting all symbols of personal belief denotes, even prior to its formalization in the internal rules, that a neutrality policy is pursued "in a consistent and systematic manner".[444] Yet, other cases could arise that question the scope of these criteria. Hennettee-Vauchez, for instance wonders whether, if a supermarket chose to sell *halal*, *kosher* or otherwise religiously-connoted products, the requirement of employees' religious neutrality could be considered as "consistent and systematic".[445] Arguably, «both the choice of what one sells and who interacts with customers for the purpose of selling it can be framed as pertaining to a business's "image"».[446]

6.2.3. The necessity of the measure

As regards the condition of necessity, the CJEU ruled that as long as internal neutrality rules cover exclusively those employees who interact with clients, they are to be deemed

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[438] *See* inter alia S. HENNETTE-VAUCHEZ, above, pp. 750-751.
[439] *See* Judgment *G4S*, above, para. 40; Judgment *WABE and Müller*, above, paras. 68 and 71.
[440] *See* Court of Justice of the European Union, judgment of 10 March 2009, Case C-169/07, *Hartlauer*, EU:C:2009:141, para. 55.
[441] *See* Court of Justice of the European Union, judgment of 12 January 2010, Case C-341/08, *Petersen*, EU:C:2010:4, para. 53.
[442] *See* E. HOWARD, *Islamic Headscarves*…above, p. 360.
[443] *See* Judgment *WABE and Müller*, above, para. 77.
[444] *See* Judgment *G4S*, above, paras. 40-41; Judgment *WABE and Müller*, above, para. 70.
[445] *See* S. HENNETTE-VAUCHEZ, above, p. 750.
[446] *Ibid*.

necessary.[447] However, this criterion appears to be tautological with regards to the legitimate aim requirement, since «the reasoning of the Court does indeed amount to saying that a policy of neutrality must be considered to pursue a legitimate aim if and when it is necessary to require neutrality from workers to convey a policy of neutrality».[448] In other words, the requirement of the legitimate aim ends up coinciding with that of the necessity of the measure. Moreover, the term "necessary" is once again ambiguous and leaves national courts with wide discretionary powers to determine when employees are to be considered as working "in contact" with customers. Not only it is unclear whether only desk personnel or also workers who operate on premises that are accessible to clients should be considered so, but one might also ask whether any worker category that never comes into contact with customers actually exists. Notably, the increasingly common phenomena of outsourcing of labour cause companies to frequently hire external maintenance, technical and catering personnel. In addition, nowadays «dans un bâtiment (…) beaucoup de travailleurs ne sont plus des collègues mais des partenaires, des clients ou des concurrents».[449] This raises a number of practical questions. For instance, one might wonder whether, in case a business partner visited a company, the employer could lawfully conceal for the time of the visit those employees who wear the Islamic headscarf or the *kippah*, so as to protect the external collaborator's sensitivity. As emerged above, a general ban concerning employees who come into contact with customers substantially require such employees to set aside their confessional convictions when in public and to renounce their *forum externum* rights during working hours. Yet, it is argued that the vague nature of the phrase "into contact with customers" implies that all employees can potentially be required to do so, further hindering the dialogue between believers and non-believers which should characterize contemporary European post-secular societies. As Ufarte argues, this could indeed lead to a situation where «pour préserver l'image de la société en interne, par exemple pour attirer des "talents" ou "protéger" ses salariés, l'employeur [pourra] interdire le port de tout signe religieux tant

[447] *See* Judgment *G4S*, above, para. 42; Judgment *WABE and Müller*, above, paras. 63 and 77.
[448] S. HENNETTE-VAUCHEZ, above, p. 750.
[449] T. UFARTE, above, para. 42.

que le salarié ne reste pas cloitré dans son bureau».[450]

6.2.4. The proportionality stricto sensu *of the measure*

As observed by Advocate General Sharpston, Art. 2(2)(b)(i) Directive 2000/78 implicitly establishes that the means used to reach the legitimate aim must also be proportionate, *i.e.* a fair balance must be struck between the various rights at play.[451] As Weiler observes, such step is «the most crucial from a normative and social perspective», as it allows courts to articulate why the values reflected in the legitimate aim of the measure necessary to achieve such aim outweigh the values reflected in the fundamental freedom that is compromised by that measure.[452] Accordingly, in *G4S* and *WABE*, the CJEU was expected to take into consideration both the employer's right to project a neutral image and the employees' right to wear a religious symbol and manifest their belief. However, in *G4S*, such step was left out as the Court totally neglected the applicant's freedom of religion and the importance to manifest her religion through the wearing of the Islamic veil. Even though the CJEU referred to *Eweida* in its decision, such an approach stood at odds with the line of reasoning followed by the Strasbourg judges.[453] As mentioned in Section 1, while recognizing a certain level of protection to a company's image, the ECtHR ruled that the national courts had accorded this too much weight when balancing the interests at play in *Eweida*. According to the Strasbourg judges, employers have a small room for manoeuvre to limit their employees' freedom to exhibit religious symbols and the fact that the applicant had been offered a new post without customer contact, despite mitigating the gravity of the restrictive measure, did not automatically make it proportional.[454] The ECtHR assessed the proportionality of the measure also in light of the actual harm suffered by the parties and, in this connection, observed that there was no proof that «the wearing of other, previously authorised, items of religious clothing, such as turbans and *hijabs*, by other employees had any negative impact on *British Airways*'

[450] *Ibid*., para. 44.
[451] *See* Opinion of Advocate General Sharpston, above, paras. 120-121.
[452] J.H.H. WEILER, *Je suis Achbita!*, in *European Journal of International Law*, 28, 2017, p. 996.
[453] *See also Ibid.*, p. 998; A. SANTINI, above, pp. 140-141.
[454] *See* Judgment *Eweida*, above, paras. 93-95.

brand or image».[455]

On the contrary, in *G4S*, the CJEU carried out a superficial balancing exercise, neglecting the importance of the applicant's freedom of religion. Interestingly, such an approach was inconsistent also with the previous case-law of the Court of the EU itself, where it was constantly held that restrictions to the enjoyment of fundamental human rights must be interpreted strictly.[456] In *G4S*, the Luxembourg judges assessed the proportionality of the restrictive measure exclusively in light of the employer's possibility to offer the applicant a new post not involving any visual contact with the customers and they left to the domestic courts to take into consideration the interests involved in the case.[457] Such an approach mirrors that developed in the Opinion of Advocate General Kokott, who called for «a measure of discretion» to be left to national judges.[458] This discretion echoes the margin of appreciation left to signatory States by the ECtHR and causes concern among certain commentators. Vickers for instance claims that the recognition of a discretionary margin is worrisome especially

> «in the context of equality law, because equality has usually been developed to eradicate entrenched inequality. Given that it would seem inconceivable that a court would allow a state to argue that national traditions should be allowed to justify sex or race discrimination in employment, it is questionable whether such reasoning should be accepted in the different context of religion».[459]

Questions again arise as to why, in *G4S*, the CJEU did not carry on a proportionality test

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[455] *Ibid*., para. 94.

[456] *See for instance* Court of Justice of the European Communities, judgment of 15 May 1986, Case C-222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, EU:C:1985:206, para. 36; Court of Justice of the European Union, judgment of 26 October 1999, Case C-273/97, *Sirdar*, EU:C:1999:523, para. 23; Court of Justice of the European Union, judgment of 11 January 2000, Case C-285/98, *Kreil*, EU:C:2000:2, para.20; (three such rulings concerned discrimination on grounds of sex); Judgment *Petersen*, above, para. 60; Judgment *Prigge*, above, paras. 56 and 72; (two such rulings concerned discrimination on grounds of age). On the matter, *see also* E. HOWARD, *Protecting Freedom to Manifest One's Religion or Belief: Strasbourg or Luxembourg?*, in *Netherlands Quarterly of Human Rights*, 32, 2014, pp. 159-182.

[457] *See* Judgment *G4S*, above, para. 43.

[458] Opinion of Advocate General Kokott, above, para. 99.

[459] L. VICKERS, *ECJ Headscarf Series (2): The Role of Choice; and the Margin of Appreciation*, in *Strasbourg Observers*, 8 September 2016, available at https://strasbourgobservers.com/2016/09/08/blog-series-the-role-of-choice-and-the-margin-of-appreciation/ (last accessed on 31 December 2021). On the matter, *see also* S. JOLLY, *Islamic Headscarves and the Workplace Reach the CJEU: The Battle for Substantive Equality, in European Human Rights Law Review*, 6, 2016, pp. 677-678.

as rigorous as that previously undertaken in relation to discrimination on grounds of sex or age. It has been argued that the Court of the EU should «respect and build on its case law in other fields of discrimination to avoid serious impacts on protection from discrimination on grounds such as ethnicity, sexual orientation and sex».[460] A superficial undertaking of the proportionality test of those measures that discriminate on grounds of religion or personal belief could trigger a perverse mechanism of the same superficiality being used also in connection to other prohibited grounds of discrimination. Furthermore, as previously held in relation to the legitimacy of the aim, such an approach seems to imply that freedom of religion is a secondary right, that needs a lower level of protection than that recognized to other fundamental rights.

In *G4S*, the CJEU held that the offer of a new post not requiring the visual contact with customers represents a suitable alternative to the dismissal of those employees who insist on wearing religious symbols during working hours. In practice, this line of reasoning amounts to justify the potential demotion in the private sector of the workers belonging to certain minority religions and, consequently, to strip them of their legitimate career aspirations.[461] The imposition of dressing rules such as those at issue indeed constitutes an actual barrier to the access to certain professional positions for the members of certain minority faiths, unless they accept to fit the dominant standards. As Alidadi writes, the endorsement of these internal "neutral" policies means that

> «for Muslim women and for other relevant individuals and groups, an important segment of the labour market becomes off-guard: there is a structural – quantitatively and qualitatively – obstacle to participation which fishes through the nets of anti-discrimination law and reinforces their social exclusion from the mainstream».[462]

Moreover, Ghumman and Jackson argue that these restrictions lower stigmatized minority groups' expectations about the potential offers of employment and, therefore, impact the

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[460] Open Society Justice Initiative, *Briefing paper: employer's bar on religious clothing and European Union discrimination law*, available at https://www.opensocietyfoundations.org/sites/default/files/briefing-cjeu-headscarves-20160712.pdf (last accessed on 31 December 2021), para. 4.
[461] *See* L. SALVADEGO, above; K. ALIDADI, *Out of Sight, Out of Mind? Implication of Routing Religiously Dressed Employees Away From Front-Office Positions in Europe*, in *Quaderni di Diritto e Politica Ecclesiastica*, 16, 2013, pp. 87-106; T. UFARTE, above; E. BREMS, above; S. OUALD CHAIB, V. DAVID, above.
[462] K. ALIDADI, *Out of Sight*…above, p. 90.

behaviour of the members of such groups when searching for a job: «the risk of a self-fulfilling prophecy behaviour is real, since stigmatized groups will in response act in ways that decrease the possibility that they will get a job».[463] Ufarte compares this solution to the duty of requalification that arises in case of economic layoffs or when occupational medicine claims that an employee cannot continue to do his/her job.[464] In this regard, Ufarte observes that the employer's good faith «est déjà toute relative» when the employees' state of health is at stake.[465] Thus, there is much room to doubt the employer's commitment when it comes to finding an alternative job for an employee who refuses to abide by a rule of the company policy.

One might also ask whether the employees' religious convictions are such a source of shame that their concealment is lawfully justified or whether customers, on the contrary, should be required to judge workers in light of their professional qualities and not of their religious sentiment. Moreover, the concealment of those employees that manifestly hold religious convictions not only contributes to the stigma and hinders their entry into the labor market, but is also scarcely helpful to fix the «perceived problem of diversity and otherness».[466] Such an approach aims to handle contemporary religious pluralism by making it superficially invisible and hides the real stakes in society by dismissing both the relevance and the legitimacy of employees' religious sentiment in the workplace. This echoes what Galeotti calls "simple secularism", *i.e.* an institutional setting that, by silencing religious voices in the public domain, precludes the recognition of today's pluralism. The result of this approach can be described as a «mutilated pluralism»,[467] where not the religious identity of all, but only of those who identify themselves with strictly secularist positions is protected. From this perspective, the relegation of certain workers to posts that do not involve the visual contact with customers also jeopardize the values of inclusion and tolerance that should characterize European democratic societies. The requalification solution stands indeed at odds with the EU anti-discrimination law's

[463] S. GHUMMAN, L. JACKSON, *The Downside of Religious Attire: The Muslim Headscarf and Expectations of Obtaining Employmen*t, in *Journal of Organizational Behavior*, 31, 2010, p. 18.
[464] *See* T. UFARTE, above, para. 47.
[465] *Ibid*., para. 48.
[466] K. ALIDADI, *Out of Sight*…above, p. 91.
[467] J. MARTÍNEZ-TORRÓN, above, p. 137.

objective of dismantling prejudice and mitigating the social exclusion of stigmatized minorities.

It should be however noted that *WABE* has partially remedied this. In relation to this case, the CJEU stated that when several fundamental rights are at play (*e.g.*, in *WABE*, the right not to be discriminated against under Art. 21 Charter, the right to religious freedom under Art. 10 Charter, the parents' right under Art. 14(3) Charter and the freedom to carry on a business under Art. 16 Charter), national courts must carry on a proportionality test trying to strike a fair balance between all of these rights.[468] The EU judges then introduced a stricter proportionality test than that carried out in *G4S*, where the importance of the employee's religious freedom did not appear to play any role. Moreover, in relation to *WABE*, the CJEU did not mention the employer's possibility to offer the applicant a new back-office post not involving any visual contact with children or parents. This could be well due to the applicants' different professional qualification in *G4S* and *WABE*: while the former was employed as a receptionist, the latter was a child carer and, therefore, she could not perform her job without coming into contact with children. However, the introduction of a stricter proportionality test for indirect discrimination in relation to employers' neutrality rules is a welcome development, potentially signifying that the CJEU is moving towards a little more recognition of the legitimacy of religious convictions in the public domain and towards more protection of employees who want to manifest their religion in the workplace.

[468] *See* Judgment *WABE and Müller*, above, para. 84.

Chapter 3. The autonomy of European churches and religious organizations in the occupational field

1. Introduction

Even though conflicts of competence between the Union and the Member States have been traditionally a highly contentious issue,[469] the religious sphere and, in particular, the State-church relations have been exempted from these controversies until very recently. Yet, in the last years, the CJEU has issued three judgments which fundamentally challenge the traditional understanding of the EU as a mere neutral observer of State-church relationships. In the first two judgments, *i.e. Egenberger* and *IR*, the Court tried to balance the autonomy of religious organizations with the right of employees not to be discriminated against. In the latter case, *i.e. Cresco Investigation*, the CJEU addressed the question of whether to entitle small churches with certain privileges could lawfully result in an imbalance between minority confessional communities and the majority. These rulings have clearly indicated that the obligation to respect the religious status of organizations enshrined in Art. 17(1) TFEU must be reconciled with those EU norms which, aiming to strengthen the protection of individuals, may affect the national political-ecclesiastical arrangement.

The present chapter aims to investigate how, in the above-mentioned rulings, the Court has balanced the autonomy rights of Member States to regulate national churches under Art. 17(1) TFEU and the Union's commitment to protect individuals from discrimination on grounds of religion or belief. This balancing exercise brings along with it fundamental questions: to what degree individual fundamental rights can lawfully be surrendered in favour of churches' identity and autonomy? How strong can be the loyalty commitment demanded by confessional bodies? And, above all, who is ultimately responsible to sort the issue out? The answer to such questions is of crucial importance. An approach

[469] *See* H. FARREKK, A. HERITIER, *Contested Competences in the European Union*, in *West European Politics*, 30, 2007, pp. 227-243; G. CONWAY, *Conflicts of Competence Norms in EU Law and the Legal Reasoning of the ECJ*, in *German Law Journal*, 11, 2010, pp. 966-1005; A. TISCHBIREK, *A Double Conflict of Laws: The Emergence of an EU "*Staatskirchenrecht*"*, in *German Law Journal*, 20, 2019, pp. 1066-1078.

excessively supportive for confessional organizations' autonomy at the national level may allow religious employers to introduce undue differences of treatment, exceeding what is justified by the nature of the work-activities or the context in which they are carried out. Conversely, an overly prescriptive approach in relation to the substance of acceptable measures adopted by confessional organizations would strip churches' right to autonomy and self-determination of its meaning, infringing the position of "principled distance" that should characterize post-secular societies.

Before turning to the analysis of the CJEU decisions, it is nonetheless useful to examine the jurisprudence developed by the ECtHR on the issue of confessional organizations' autonomy in the occupational field. Since 1989, the Strasbourg Court has addressed numerous cases on the relation between religious autonomy and employment, even though such cases have generally been brought under Articles 8 and 10 ECHR, which enshrine the right to private life and freedom of expression, respectively. However, the next subsection will not address the entire Strasbourg jurisprudence on the matter. Since all the three above-mentioned cases brought before the Court of the EU concerned lay workers, the focus will be exclusively on those ECtHR rulings that concerned laymen employed by confessional organizations – thus excluding controversies involving religious ministers and members of the clergy.[470]

SECTION 1. Religious employer's autonomy before the ECtHR

2. The possible co-existence between collective religious rights and individual human rights

Even though freedom of religion is primarily a matter of individual conscience, it also encompasses freedom to manifest one's religion, either alone or in community with

[470] For a general overview of the ECtHR's case-law involving also religious ministers, *see* G. RAGONE, *Enti confessionali e licenziamento ideologico. Uno sguardo alla giurisprudenza della Corte di Strasburgo*, in *Ephemerides Iuris Canonici*, 54, 2014, pp. 199-224; F. ARLETTAZ, *State Neutrality and Legal Status of Religious Groups in the European Court of Human Rights Case-law*, in *Religion & Human Rights*, 11, 2016, pp. 189-223.

others. Thereby, religious freedom implies the possibility of establishing confessional organizations capable of living by their own religiously-inspired norms. From this perspective, it is commonly recognized that religious institutions should enjoy a certain degree of autonomy in deciding upon and administering their own internal ecclesiastical affairs without interference by public institutions.[471]

In the Strasbourg system, such autonomy is safeguarded by the right to manifest religion or belief under Art. 9(1) ECHR,[472] interpreted also in the light of Art. 11 ECHR, which protects associative life against undue State interference.[473] In its case-law the ECtHR has further developed some principles underlying the rights of confessional groups and, notably, religious autonomy. One important justification is the preservation of pluralism in a democratic society. In *Kokkinakis v. Greece*, the ECtHR held for instance that the «pluralism indissociable from a democratic society, which has been dearly won over centuries, depends on [freedom of thought, conscience and religion]».[474] In this regard, Nieuwenhuis claims that the Strasbourg judges link «the freedom to associate with others with the same religion or philosophy of life as an essential feature of a democratic society».[475] The ECtHR also affirmed in *Hasan and Chaush v. Bulgaria* that religious organizations' autonomous existence is indispensable for pluralism in a democratic society.[476] This suggests that religious communities play a key role in a democratic society and, as Langlaude Doné observes, that to some extent they provide an alternative

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[471] *See* M. CHOPKO, *Constitutional Protection for Church Autonomy: A Practitioner's View*, in G. ROBBERS (ed.), *Church Autonomy: A Comparative Perspective*, Peter Lang, 2001, pp. 95-116.
[472] « *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom* to change his religion or belief and freedom, *either alone or in community with others and in public or private, to manifest his religion or belief*, in worship, teaching, practice and observance». [emphasis added]
[473] «1. *Everyone has the right to freedom of peaceful assembly and to freedom of association with others*, including the right to form and to join trade unions for the protection of his interests. 2. *No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society* in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State». [emphasis added]
[474] Judgment *Kokkinakis*, above, para. 31.
[475] A. NIEUWENHUIS, *The Concept of Pluralism in the Case-Law of the European Court of Human Rights*, in *European Constitutional Law Review*, 3, 2007, p. 372.
[476] *See* Judgment *Hasan and Chaush*, above, para. 62.

to the State.[477] In *Hasan and Chaush*, the Strasbourg Court further held that individuals' freedom of religion would be jeopardized if the autonomy of the confessional organization to which they belong were not protected.[478] In other words, since the individual religious life depends also upon the vitality of one's own religious community, it is of crucial importance that the community itself has some rights of its own, including independence and autonomy.

In its case-law, the ECtHR has frequently addressed the rights of religious organizations[479] and, notably, has recognized numerous dimensions of their right to autonomy. For instance, it protected the capacity of these organizations to select their leadership, by claiming that public authorities may interfere only if such nomination clashes with a pressing social need.[480] Furthermore, the Strasbourg judges gave protection to the autonomy of confessional groups in establishing their places of worship, by ruling that the refusal to grant an authorization to set up a place of worship interferes with religious freedom and cannot be justified when it is aimed at imposing rigid conditions on the practice of religious beliefs.[481] The ECtHR also addressed the capacity of confessional organizations to operate autonomously from the State, by specifying that, when legal recognition is necessary for these organizations to operate, the refusal to grant such recognition constitutes an interference with the freedom to manifest religious beliefs.[482]

Whereas the Strasbourg judges thus ruled that the autonomy of religious communities should be respected for instance in determining their leadership, meaning that the imposition of religious requirements on priests or other religious leaders is to be

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[477] *See* S. LANGLAUDE DONÉ, *Religious Organizations, Internal Autonomy and Other Religious Rights Before the European Court of Human Rights and the OSCE*, in *Netherlands Quarterly of Human Rights*, 34, 2016, p. 10.
[478] *See* Judgment *Hasan and Chaush*, above, para. 62.
[479] For a general overview of the ECtHR's case-law on the issue, *see* C. MORINI, *La tutela dei gruppi religiosi nel quadro della CEDU*, in A. SANTINI, M. SPATTI (eds.), *La libertà di religione in un contesto pluriculturale*, Libreria Editrice Vaticana, 2021, pp. 63-96.
[480] *See* European Court of Human Rights, judgment of 14 December 1999, App. no. 38178/97, *Serif v. Greece*, paras. 51-53; Judgment *Hasan and Chaush*, above, para. 82.
[481] *See* European Court of Human Rights, judgment of 26 September 1996, App. no. 18748/91, *Manoussakis v. Greece*, paras. 48-53.
[482] *See* Judgment *Church of Bessarabia*, above, para. 105.

considered lawful, they have been less clear about the degree to which confessional organizations' autonomy should prevail when it comes to the imposition of religious requirements on laymen employees.[483] The ECtHR never excluded *a priori* the possibility of restraining religious organizations' autonomy and, as stressed by Gatti, «the relative nature of this protection was confirmed by the [ECtHR] jurisprudence concerning the employment within religious organizations, which introduced [a] 'balancing approach' in order to square religious autonomy with the rights of others».[484] Nevertheless, as will be discussed, the controversies brought before the Strasbourg Court have indicated that measures adopted by confessional employers to dismiss or discipline laymen staff for failing to comply with religious requirements can be justified, provided that all relevant elements are taken into consideration when undertaking the assessment of proportionality. Notably, it will be argued that the balancing approach adopted by the ECtHR takes into appropriate consideration both religious and equality rights, matching the position of "principled distance" that should characterize today's post-secular societies.

2.1. The introduction of the balancing approach in religious employment controversies: the German cases

A number of cases brought against Germany show that the ECtHR is willing to uphold the religious autonomy rights of confessional employers, provided that the interests of the employees have been properly addressed. The European Commission of Human Rights originally addressed the relation between religious autonomy and employment of lay workers in 1989, in the *Rommelfanger v. The Federal Republic of Germany* case,[485] concerning a German medical doctor employed by a Roman Catholic affiliated hospital. In the early 1980, first in a letter sent to a magazine and then in a television interview, Dr

[483] *See also* L. VICKERS, *Freedom of Religion or Belief and Employment Law: The Evolving Approach of the European Court of Human Rights*, in J. TEMPERMAN, T.J. GUNN, M. EVANS (eds.), *The European Court of Human Rights and the Freedom of Religion or Belief*, *Brill Nijhoff*, 2019, p. 236.
[484] M. GATTI, *Autonomy of Religious Organizations in the European Convention on Human Rights and in the European Union Law*, in L.S. ROSSI, G. DI FEDERICO (eds.), *Fundamental Rights in Europe and China. Regional Identities and Universalism*, Editoriale Scientifica, 2013, p. 134.
[485] European Commission of Human Rights, decision of 6 September 1989, App. no. 12242/86, *Rommelfanger v. The Federal Republic of Germany*.

Rommelfanger implicitly opposed the official teaching of the Catholic Church on abortion, by criticizing the wording of the German law criminalizing abortion and attacking statements where such procedure was compared to the extermination of the holocaust. After he was given notice of termination of employment by the hospital, Dr Rommelfanger brought his claim before the Labour Court in Essen, which ruled in favour of the applicant. Both the Higher and Federal Labour Courts confirmed this position and concluded that, while there had been an actual breach of obligations on the side of the doctor, the dismissal was not proportionate. The employer appealed against this decision before the Federal Constitutional Court, invoking the importance of religious freedom and churches' autonomy in Germany, as recognized in the German Basic Law and the Constitution of the German Reich of 1919. The Federal Constitutional Court agreed that the principles of church autonomy and self-determination had not been sufficiently taken into account and concluded that religious organizations are entitled to decide what services should exist in their institutions, in what legal form they are to be performed and what are the employees' loyalty obligations. Finally, Dr Rommelfanger's case reached the European Commission.

Whereas the Federal Constitutional Court had based its decision on the freedom of religion, the Strasbourg judges based theirs on the interpretation of freedom of speech, protected under Art. 10 ECHR. They held that Dr Rommelfanger's free expression rights had to be properly balanced against the rights of the employer and the Catholic Church. Since the words and actions of the doctor had compromised the religious teaching at stake and the Church considered the exercise of medical care as one of its core tasks, the Commission suggested that the rights of the religious organization had to prevail.[486] Moreover, it also found that Art. 10 ECHR could only be breached if there had been an unjustified State interference with the applicant's right under that provision. As Germany could not be held responsible for acts of the Catholic Church or its affiliated institutions, the Commission then declared Dr Rommelfanger's application to be manifestly ill-founded and inadmissible.[487] However, it must be noted that the Strasbourg judges found

[486] *Ibid.*, p. 9.
[487] *Ibid.*

that the Convention allows for the stipulation of contractual obligations whereby a lay party renounces freedom of speech to some extent, on the ground that an employer whose activities are founded on certain religious convictions could not effectively exercise its own freedoms without demanding certain duties of loyalty from its employees.[488] In addition, it is worth stressing that in *Rommelfanger* the European Commission extended the protection of churches' autonomy to those denominational entities which, though not being part of the organic structure of a church, are run in accordance with the same dogmatic principles.[489] Such entities are entitled to dismiss those employees who overly express ideas contrary to the official religious doctrine in question, even if the quality of their work is unaffected.

The Strasbourg position that, as long that all relevant factors are weighed in the assessment of proportionality, a confessional employer is able to set requirements on laymen staff that they comply with the employer's religious ethos was followed also in later cases from Germany. In the joined cases *Obst v. Germany*[490] and *Schüth v. Germany*,[491] which also concerned decisions by religious organizations to dismiss laymen personnel for failing to comply with their religious teachings, the ECtHR, despite reaching different decisions based on procedural aspects of the controversies, did recognize as legitimate the imposition of religious life-style norms on employees.

The former case was originated by the dismissal of the Director of European Public Relations for the Mormon Church, following his admission that he was having an extra-marital relation. Once the case had been brought before the German Federal Labour Court, the national judges held that the Mormon Church was entitled to administer its affairs by itself and, for the sake of its credibility, also to impose on its workers the duty to respect the primary principles of its doctrine and deontology.[492] In particular, despite recognizing that adultery does not constitute a cause for the termination of the

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[488] *See also* M. GATTI, above, p. 135.
[489] *See also* J. MARTÍNEZ-TORRÓN, *Limitations on Religious Freedom in the Case Law of the European Court of Human Rights*, in *Emory International Law Review*, 19, 2005, p. 620.
[490] European Court of Human Rights, judgment of 23 September 2010, App. no. 425/03, *Obst v. Germany*.
[491] European Court of Human Rights, judgment of 23 September 2010, App. no. 1620/03, *Schüth v. Germany*.
[492] *See* Judgment *Obst*, above, para. 17.

employment of the Mormon Church's employees under every circumstance, the German court noted that Mormons consider adultery as a particularly grave misconduct and that the applicant, given his position in the church, had more stringent duties of loyalty towards his community.[493] Thus, after observing both that the employee's damage would have been limited because of his relatively young age and that he knew or must have known that his conduct would have been considered a grave delinquency by his employer, the judges concluded that the Mormon Church could lawfully demand marital fidelity from its lay workers.[494] The ECtHR confirmed this conclusion. The Strasbourg Court stressed that the churches' right to impose duties of loyalty on their employees does not conflict with the Convention, because the domestic judges are not bound by the churches' norms absolutely. Rather, they must consider whether churches impose unacceptable duties of loyalty on their workers.[495] To this end, the ECtHR upheld the German court's conclusion that the Mormon rule on marital fidelity did not breach the basic principles of the legal system and, in light of the importance of such rule within the Mormon Church, the dismissal had been necessary to protect the credibility of the community.[496] According to the ECtHR, it was crucial that the national judges did consider all the relevant factors in the case and did balance all the conflicting interests at stake.[497]

The importance of an effective balancing exercise on the part of the domestic courts clearly emerged also in *Schüth*. The case concerned a lay organist and choirmaster employed by a Catholic parish, who left his wife and started living with a new woman, who later became pregnant by him. Accused not only of committing adultery but also bigamy due to the sanctity of marriage professed by the Roman Catholic Church, he was later dismissed. The organist then brought a claim before the German Federal Labour Court, which stated that, in light of the churches' right to self-determination, the application of public labour laws could not question the characteristics of the ecclesiastical employment, unless such characteristics ran counter the concepts of

[493] *Ibid*.
[494] *Ibid*., para. 18.
[495] *Ibid*., para. 49.
[496] *Ibid*., paras. 51-52.
[497] *Ibid*., para. 48.

"morality" and "public order".[498] Having observed that the duty of marital fidelity did not contradict these basic principles, the German court further held that a confessional community is entitled to base its employer-employee relationships on its religious teachings and, accordingly, it ruled that the Catholic Church could demand its lay employees to conform with the Catholic doctrine and deontology even in their private life.[499] Finally, just as in *Obst*, the German judges concluded that the interests of the Church outweighed those of the applicant, since the parish could not keep employing him without undermining its credibility.[500]

When the applicant alleged before the Strasbourg Court an infringement of its right to a private life under Art. 8 ECHR, the ECtHR reiterated that an extra-marital affair could be considered as a grave violation of the duty of loyalty justifying in principle the termination of the employment.[501] Nevertheless, it also observed that, unlike in *Obst*, the domestic judges had not properly taken into account the rights and interests of the applicant, notably by subscribing without scrutiny to the employer's opinion that Mr Schüth's tasks were linked that closely to the teaching function of the Catholic Church that it could no longer employ him without undermining its credibility.[502] According to the ECtHR, the fact that the dismissal followed a decision that was taken within the scope of the applicant's private life protected by Art. 8 ECHR necessitated a more careful examination so as to balance the conflicting rights at stake. Yet, the German courts did not engage in an actual balancing exercise nor even mentioned private life in their reasoning, but only considered the applicant's interest in maintaining his employment. Whereas the ECtHR recognized that religious employers do have the right to demand the respect of certain key norms from their employees, it also stressed that this does not mean that «the legal status of [the] employees is "clericalised" or that the employment relationship based on civil law acquires a special ecclesiastical status which subsumes the employee and dominates his entire private life».[503] It is true that, by signing the contract,

[498] *See* Judgment *Schüth*, above, para. 22.
[499] *Ibid*., para. 20.
[500] *Ibid*., para. 25.
[501] *Ibid*., para. 64.
[502] *Ibid*., para. 69.
[503] *Ibid*., para. 70.

the applicant had accepted a duty of loyalty *vis-à-vis* the employer limiting his right for a private life to a certain extent. However, this could not be interpreted as a conclusive undertaking to conduct a life of abstinence in the case of separation or divorce, especially because Mr Schüth was not bound by heightened duties of loyalty. Lastly, the ECtHR noted that the mere German judges' statement that they did not misjudge the consequences of the dismissal, without indicating what they actually considered while balancing the interests at play constituted a deficiency in the appropriate fair balance.[504] Accordingly, it concluded that the domestic authorities had failed in providing the applicant with the necessary protection and that there had been an infringement of Art. 8 ECHR.[505]

Although the outcomes in *Obst* and *Schüth* differed, both cases have confirmed that decisions by confessional employers to dismiss or discipline lay personnel for failing to comply with religious norms can be justified, provided that all relevant elements are taken into consideration when undertaking the proportionality assessment. Such an approach has been further confirmed in *Siebenhaar v. Germany*,[506] concerning a teacher working at a kindergarten run by a Protestant parish. After she revealed to be an active member of the Universal Church, whose doctrine differs notably from the Protestant one, the teacher was accused of having infringed upon the duty of loyalty *vis-à-vis* her employer and was therefore dismissed. The German Federal Labour Court once again upheld the decision of the religious organization, claiming that, since the applicant did not only belong to a different faith but even offered introductory lectures on the teaching of the Universal Church, her work in the kindergarten critically undermined the Protestant Church's credibility.[507] Moreover, while attempting to strike a fair balance between the interests at stake, the domestic judges noted that the applicant's dismissal was proportionate also in light of her relatively short job tenure.[508] Just as in the previous rulings, the ECtHR held that the pivotal issue in such case was reaching a fair balance of the employer's and

[504] *Ibid*., para. 73.
[505] *Ibid*., para. 75.
[506] European Court of Human Rights, judgment of 3 February 2011, App. no. 18136/02, *Siebenhaar v. Germany*.
[507] *Ibid*., para. 16.
[508] *Ibid*.

employee's interests. Thus, having affirmed that the domestic courts had properly considered all the relevant factors and had thoroughly balanced all interests at stake, the ECtHR concluded that the decision rendered by the German judges was reasonable.[509]

Regardless of the different outcomes, a common thread throughout the *Rommelfanger*, *Obst*, *Schüth* and *Siebenhaar* rulings emerges, namely that the Strasbourg organs require that the national courts properly balance both parties' rights. This approach is captured in the following affirmation in *Schüth*:

> «Whilst it is true that, under the Convention, an employer whose ethos is based on religion or on a philosophical belief may impose specific duties of loyalty on its employees, a decision to dismiss based on a breach of such duty [should be scrutinized] having regard to the nature of the post in question and […] properly balancing the interests involved in accordance with the principle of proportionality».[510]

Accordingly, in *Schüth*, the Strasbourg judges found an infringement of the organist's right to private life primarily because the domestic authorities failed in undertaking a real balancing exercise between the Church's rights under Articles 9 and 11 ECHR – enshrining freedom of religion and of association, respectively – and those of the applicant under Art. 8 ECHR. On the contrary, in *Rommelfanger*, *Obst* and *Siebenhaar*, the Strasbourg organs deemed that the national judges had undertaken an adequate balancing exercise and, as a consequence, concluded that the applicants' rights had not been violated. As observed also by Brems and Peroni, the above-mentioned judgements address conflicts between collective religious rights and individual human rights in a way that gives both parties their due, allowing for their co-existence.[511] On the one hand, in exercising religious self-determination and autonomy, confessional employers are entitled to demand adherence to certain religious precepts from their employees. On the other, if religious organizations dismiss their employees for a shortcoming in following such precepts, they cannot do it without taking into proper consideration the employees'

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[509] *Ibid*., paras. 46-47.
[510] Judgment *Schüth*, above, para. 69.
[511] *See* E. BREMS, L. PERONI, *Religion and Human Rights: Deconstructing and Navigating Tensions*, in S. FERRARI (ed.), *Routledge Handbook of Law and Religion*, Routledge, 2015, p. 153.

rights.

It must be noted also that, in its rulings, the Strasbourg Court has narrowed the scope of the traditional European national approach to the religious autonomy issue, which Evans and Hood call «a jurisdictional approach».[512] As will be further discussed in the following subsection, the "jurisdictional approach" was for instance that used by the domestic judges in the *Lombardi Vallauri v. Italy* case,[513] where they claimed not to have jurisdiction to review the processes and the actual decisions taken by an agency of the Roman Catholic Church within the area covered by religious self-determination and autonomy. In other words, when adopting the "jurisdictional approach", judges neither approve nor disapprove of employment decisions taken by confessional organizations. Rather, they claim not to have jurisdiction on them and, accordingly, leave the outcomes to be ultimately decided by the confessional employer.[514] Such an approach attaches primary importance to autonomous internal organization as an element of religious self-determination and, thus, is strongly protective of the collective religious freedom. Following the "jurisdictional approach", confessional employers must be entitled to authoritatively determine who to hire, the conditions under which they are employed and the reasons for terminating that employment. Indeed, as claimed by Professor Robbers, siding with the Mormon Church in *Obst*:

> «If the Church could not further make fulfilling worthiness and loyalty of its employees a condition of employment, the ability of the Church to carry out its mission in accordance with its beliefs and doctrines would be seriously undermined. The Church's ability to preach its message and carry out its mission with authenticity and without compromise would be subjected to the vicissitudes of the beliefs and practices of individual employees of secular powers».[515]

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[512] *See* C. EVANS, A. HOOD, *Religious Autonomy and Labour Law: A Comparison of Jurisprudence of the United States and the European Court of Human Rights*, in *Oxford Journal of Law and Religion*, 1, 2012, p. 95.
[513] European Court of Human Rights, judgment of 20 October 2009, App. no. 39128/05, *Lombardi Vallauri v. Italy*.
[514] *See also* C. EVANS, A. HOOD, above, pp. 95-97.
[515] Professor Gerhard Robbers on behalf of the Church of Jesus Christ of Latter-Day Saints, *Third Party Intervention in* Obst v. Germany, 13 June 2008, para. 3, available at https://www.strasbourgconsortium.org/common/document.view.php?docId=3956 (last accessed on 9 November 2021).

While endorsing the "jurisdictional approach" as regards certain aspects of its decision-making, the ECtHR has narrowed it scope. On the one hand, it has confirmed that issues of religious significance, doctrine and teaching fall under the exclusive domain of the religious institutions. In *Obst*, for instance, the European judges acknowledged that the Mormon Church considered adultery as a grave delinquency. While stressing that it was not implying that all employers (even the religious ones) could lawfully dismiss their adulterous employees, the ECtHR recognized that the specific employer at stake had clearly demonstrated the significance of conjugal fidelity within its own doctrine and added that it was not for secular authorities to question this.[516] Such position was further encapsulated in *Schüth*:

> «[T]he autonomy of [religious] communities [is] indispensable for pluralism in a democratic society [and] is at the heart of the protection afforded by Article 9. The Court further recalls that, except in very exceptional cases, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State over the legitimacy of religious beliefs, or the methods of the expression of these».[517]

On the other hand, the ECtHR ruled that the national courts were required to take into real and adequate account the employees' rights when examining whether to endorse a dismissal in particular cases. In *Schüth*, the German judges were criticized for focusing exclusively on the rights of the religious employer and for failing to give proper consideration to the applicant's arguments in connection to the right to privacy and family life. By contrast, in *Obst* and *Siebenhaar*, the ECtHR upheld the decisions taken at the domestic level precisely because it deemed that the German courts had taken these elements into adequate consideration. The Strasbourg judges have then sought to find a middle ground between the different interests at stake, by providing protection for employees without merely requiring confessional institutions to follow the very same norms as secular employers.

Such an approach appears to be consistent with the post-secular theory. As emerged in

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[516] *See* Judgment *Obst*, above, para. 51.
[517] Judgment *Schüth*, above, para. 58, with reference to Judgment *Hasan and Chaush*, above, paras. 62 and 78.

Chapter 1, contemporary secularism cannot be anymore understood from a separatist perspective, which is likely to exclude religious voices, nor can be merely associated with the need to protect individual human rights. On the contrary, secularism must be regarded today also as an active form of governance of religious pluralism, whose function is to strike the optimal balance between equality rights and freedom of religion. Commenting on the above-discussed Strasbourg rulings, Evans and Hood claim that the approach developed by the ECtHR is appropriate «to navigate the complexities of a world in which both religious and equality rights are taken seriously and given their due».[518] Notably, the rulings match the position of "principled distance" that, according to Bhargava and Buckley, should be a feature of contemporary societies. As discussed, following this position, secular institutions are allowed to question the autonomous decisions of religious entities only to the extent necessary to ensure that the principle of religious autonomy does not turn into differential treatment in disguise. In their rulings, the Strasbourg judges have clearly indicated that religious groups are entitled to authoritatively decide upon their own teaching, morality and orthodoxy and, accordingly, have ruled that any intrusion of the judicial authorities into this constitutes a serious threat to the freedom of religion of such groups. At the same time, the ECtHR has not provided a blanket immunity to religious institutions. Rather, it has sought a reasonable balance between the employees' rights and the confessional groups, by ruling that domestic courts must give fair consideration to all interests at stake.

It should be however noted that, while narrowing the scope of the "jurisdictional approach", the Strasbourg Court «has sought not to become too entangled in ensuring the same outcomes in all cases – European diversity on these contentious issues is only to be expected».[519] While setting requirements aimed at providing some procedural fairness for employees who are being dismissed by confessional employers, the ECtHR has indeed refrained from imposing uniform substantive legal employment requirements applicable to all religious institutions. By doing so, the European judges have abided by one of the core principles of "principled distance", allowing domestic authorities to adopt context-

[518] C. EVANS, A. HOOD, above, p. 107.
[519] *Ibid.*, p. 106.

specific decisions, provided that the full range of rights and legitimate interests at play have been properly considered.

2.2. A procedural approach: the Lombardi Vallauri v. Italy *and* Sindicatul "Păstorul cel Bun" v. Romania *cases*

The procedural limitations to religious communities' autonomy were best delineated by the ECtHR in *Lombardi Vallauri*. This case concerned Professor Lombardi Vallauri, a lecturer in jurisprudence at the Università Cattolica del Sacro Cuore in Milan, whose employment was terminated as a consequence of the withdrawal of the necessary approval by the Congregation of Catholic Education, an agency of the Holy See. Renewed annually, in 1998 the approval was indeed refused due to unspecified concerns that some of the Professor's positions «clearly go against Catholic doctrine».[520] No further reason was communicated and Professor Lombardi Vallauri did not have a chance to enter into a contradictory debate. He thus brought an action before the Italian judges, which, adopting the above-discussed "jurisdictional approach", rejected his application by claiming that «no authority of the Republic can evaluate Church authority, […] it is outside of their scope of jurisdiction».[521] Once exhausted the internal remedies, the applicant decided to complain before the ECtHR of the breach of several rights of the Convention, including religious freedom under Art. 9.

The Strasbourg Court straightforwardly recognized the importance of protecting the religious orientation of the confessional organization.[522] However, it also stressed that evidence had to be provided that there was a tight and effective relationship between the applicant's personal views and his teaching activity.[523] Whereas a limitation of individual conscience and freedom of expression was found to be compatible with the Convention in order to protect a denominational organization's ideology, the actual link between the contested opinion taken by the Professor and his occupational activity had to be

[520] Judgment *Lombardi Vallauri*, above, para. 11.
[521] *Ibid*., para. 18.
[522] *Ibid*., para. 41.
[523] *Ibid*., para. 46.

demonstrated. Just as in the German rulings, the Strasbourg judges thus acknowledged in *Lombardi Vallauri* that it is for confessional institutions to authoritatively decide upon their own orthodoxy and possibly discipline lay employees who deviate from it. Notably, they clearly ruled that judicial authorities cannot analyse the substance of the decisions adopted by confessional employers or take sides in doctrinal debates.[524] However, on the other hand, the ECtHR also reiterated that secular courts may still play a role in cases of these kinds, holding that they must exercise a supervisory function so as to ensure a certain degree of procedural fairness. As the European judges affirmed:

> «[T]he national judges have refused to question the fact that the Faculty Council has not provided the complainant with the opinions of which he was accused. *Far from implying that the judicial authorities engage themselves to judge the compatibility between the positions of the applicant and the Catholic doctrine*, *the disclosure of such elements would have allowed him to* know, and therefore *contest*, the connection between his opinions and his teaching activities».[525]

The ECtHR thus found that the domestic authorities had not proven that «the University's interest in providing education based on Catholic doctrine could extend to undermining the essence of the procedural safeguards»[526] to which Professor Lombardi Vallauri was entitled before his rights under Art. 10 ECHR were limited. Analogously, the European Court found a breach to the right to a fair hearing on the grounds that the Italian judges had not allowed for a dispute to the lack of information on the claims against the applicant or the connection between such claims and his teaching activity.[527] Despite the fact that Italy had claimed that domestic courts could not probe the reasoning of the Congregation of Catholic Education due to the fact that the decision directly came by the Holy See, *i.e.* a religious authority, the ECtHR attached little importance to this and ruled that religious autonomy is not breached if national judges demand some respect to basic procedural

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[524] « […] it is not for the national authorities to examine the substance of the decision from the Congregation». *Ibid.*, para. 50.
[525] *Ibid.*, para. 52. [emphasis added] Please note that no official English translation of the *Lombardi Vallauri v. Italy* ruling exists. The citations of this ruling come from an unofficial translation from Strasbourg Consortium, available at https://www.strasbourgconsortium.org/common/document.view.php?docId=5423 (last accessed on 31 December 2021).
[526] *Ibid.*, para. 55.
[527] *Ibid.*, paras. 71-72.

requirements. Even though such procedural approach does partially limit religious autonomy, it nonetheless represents a reasonable balance between lay employees' rights and those of religious employers. As Evans and Hood note, while being respectful of the substance of the confessional organization's autonomous choices, the minimalist requirement that employees know the case against them and have the opportunity to rebut indeed «provides employees with a degree of protection from malice, unsubstantiated rumour and baseless accusations».[528]

The approach of the ECtHR that frictions between confessional organizations and their employees must involve a balancing exercise by the national judges of the different interests at play, taking into particular consideration the importance of the autonomy of such organizations, has been confirmed also in *Sindicatul "Păstorul cel Bun" v. Romania*[529](hereinafter, "*Sindicatul*"). The case concerned a group of priests and lay employees in the Romanian Orthodox Church that wanted to set up a trade union to defend their rights and interests. The archdiocese opposed such initiative, claiming that the clergy could establish an association only with the prior consent of the Church. Even though national authorities had initially endorsed the union, it was then denied local registration on the ground that the law recognized religious organization's freedom to organize themselves. Nonetheless, the Romanian public prosecutor's offices endorsed the employees' application, expressing the view that the statutory requirements for setting up a trade union were fulfilled. The archdiocese then appealed against this, pointing out that the Constitution guaranteed the religious freedom of confessional organizations and that the national judges, by recognizing the existing of the trade union, had interfered with the autonomy of the Church. The appeal was allowed the trade union, whose registration was finally denied, brought a claim before the ECtHR.

On 2012, the Third Section of the ECtHR did find a violation of Art. 11 ECHR, which provides for freedom of association. The European judges firstly noted that both priests and lay employees carried out their duties under individual employment contracts,

[528] C. EVANS, A. HOOD, above, p. 107.
[529] European Court of Human Rights, judgment of 9 July 2013, App. no. 2330/09, *Sindicatul "Păstorul cel Bun" v. Romania* (hereinafter "*Sindicatul GC*" means the judgment of 9 July 2013).

received wages mainly funded from the State budget and were covered by social-insurance schemes.[530] Accordingly, the Third Section found that such employees could not be exempted *de plano* from all rules of civil law and held that they fell within the scope of Art. 11 ECHR.[531] On the other side, the judges recognized that the domestic courts could lawfully limit some of the rights enjoyed by the Church employees so as to preserve public order and the autonomy of religious organizations.[532] Yet, while recognizing that the refusal to register the trade union was a measure prescribed by law and pursued a legitimate aim, the Third Section finally found a breach of Art. 11 ECHR. In particular, it claimed that such a measure could not be considered necessary within the meaning of Art. 11(2) ECHR[533] and held that the domestic judges had not taken into proper consideration the employees' interests, the distinction between members of the clergy and lay workers, and the compatibility of ecclesiastical norms prohibiting unions with the national and international rules providing for the employees' right to belong to a trade union.[534]

The Romanian government appealed against this judgment and, on July 2012, its request to refer the case to the Grand Chamber was accepted. Just as the Third Section, also the Grand Chamber considered that the Church's employees fulfilled their mission in the context of an employment relationship falling within the scope of Art. 11 ECHR and that the refusal to register the union thus amounted to interference with such provision.[535] It then confirmed that the issue was whether or not this interference was prescribed by law, pursued a legitimate aim and was necessary in a democratic society. As regards whether or not the prohibition of setting up the union was "prescribed by law", the Grand Chamber noted that neither the Constitution nor the Statute of the Church prohibited priests and lay

[530] European Court of Human Rights, judgment of 31 January 2012, App. no. 2330/09, *Sindicatul "Păstorul cel Bun" v. Romania*, (hereinafter "*Sindicatul 3rd* s." means the judgment of 31 January 2012), para. 64
[531] *Ibid*., para. 65.
[532] *Ibid*., para. 67.
[533] «No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others».
[534] *See* Judgment *Sindicatul 3rd*, above, para. 78.
[535] Judgment *Sindicatul GC*, above, para. 140.

employees from forming unions.[536] The national judges had indeed inferred such prohibition from the provisions of the Statute by which the archbishop's permission was necessary for priests to participate in any form of association whatsoever. In this case, the archbishop had refused such permission and it had not been disputed that the union's members were aware that, as a consequence, the Church would oppose their request for registration.[537] Thus, also the Grand Chamber accepted that the prohibition did have a legal basis in the relevant provisions of the Statute and, in addition, found that it pursued the "legitimate aim" of protecting the rights of others, namely those of the Romanian Orthodox Church.[538] However, in contrast to the Third Section, the Grand Chamber took a non-interventionist stance as regards whether or not the prohibition was "necessary in a democratic society". Stressing the importance of religious communities' autonomy, the judges held:

> «the Court […] has frequently emphasized the *State's role as the neutral and impartial organizer of the practice of religions*, faiths and beliefs, and has stated that this role is conducive to public order, religious harmony and tolerance in a democratic society […]. It can only confirm this position in the present case. *Respect for the autonomy of religious communities* recognized by the State *implies*, in particular*, that the State should accept the right of such communities to react, in accordance with their own rules and interests, to any dissident movements emerging within them* […]. *It is* […] *not the task of the national authorities to act as the arbiter* between religious communities and the various dissident factions that exist or may emerge within them».[539]

Accordingly, the Grand Chamber found that, by declining to register the trade union, the State was only refusing to interfere with the Church's internal organization and was therefore observing its duty of neutrality under Art. 9 ECHR.[540] The Strasbourg judges also noted that the members of the union had not respected the formal procedure for setting up an association and that other associations had been successfully established within the Romanian Orthodox Church.[541] Lastly, they observed the wide variety of

[536] *Ibid*., para. 154.
[537] *Ibid*., para. 155
[538] *Ibid*., paras. 157-158.
[539] *Ibid*., para. 165. [emphasis added]
[540] *Ibid*., para. 166.
[541] *Ibid*., para. 170.

constitutional models of State-church relationships in Europe and, therefore, allowed States to dispose of certain margin of appreciation in deciding whether or not to register trade unions that operate within religion communities.[542] The Grand Chamber thus overruled the Third Section's judgment, holding by eleven votes to six that there had been no violation of Art. 11 ECHR.[543]

The main difference between the reasonings developed by the Third Section and the Grand Chamber consisted in whether the refusal to register the applicant trade union could be considered "necessary in a democratic society" within the meaning of Art. 11(2) ECHR. The Third Section held that the adjective "necessary" implied the existence of a "pressing social need", which had to be ascertained in light of whether there was plausible evidence that the establishment of the union could represent an imminent threat to the Church. Claiming that the union only aimed at defending the employees' economic and social rights, the Third Section then found that «the recognition of the union would […] not have undermined either the legitimacy of religious beliefs or the means used to express them»[544] and concluded that the refusal to register it was disproportionate to the aim pursued and unnecessary. On the other hand, refusing to take sides in what considered an internal dispute, the Grand Chamber accepted that the threat to the religious community was real and did not question the Church's decision not to endorse the registration of the union. It must be noted, however, that the Grand Chamber did not agree with the Romanian government that the Church's employees could make no case under Art. 11 ECHR because they answered directly to the archbishop and thus were not covered by civil labour law. Rejecting the "jurisdictional approach", the Grand Chamber indeed observed that many characteristics of an employment relationship *de facto* existed alongside duties of a more particular spiritual nature and thus recognized that there had been an interference with the employees' rights under Art. 11 ECHR.

The judgment of the Grand Chamber is consistent with the previous ECtHR's jurisprudence. In the German cases, similarly to the non-interventionist stance taken in

[542] *Ibid.*, para. 171.
[543] *Ibid.*, para. 173.
[544] *See* Judgment *Sindicatul 3rd*, above, para. 75.

Sindicatul on the issue of the necessity of the measure, the Court firmly held that religious groups are entitled to authoritatively decide upon their own teaching, morality and orthodoxy and, accordingly, ruled that any intrusion of the judicial authorities into this constitutes a serious threat to the freedom of religion of such groups. In *Obst*, for instance, the ECtHR acknowledged that the Mormon Church considered adultery as a grave delinquency and added that it is not for secular authorities to question this. Likewise, in *Lombardi Vallauri*, it held that judges cannot analyse the substance of confessional employers' decision, ruling that religious organization can autonomously decide upon their own orthodoxy and discipline employees who deviate from it. On the other hand, just as in its previous case-law, the Grand Chamber held that secular judicial authorities still play a role in cases of these kinds, notably exercising a supervisory function and undertaking a balancing approach. In *Sindicatul*, the Grand Chamber found that the domestic judges had done this and struck a fair balance, as they had considered both that the applicants had not followed the right procedure to form a trade union and that there were other existent unions within the Church that the applicants could join. Also in *Sindicatul* the Grand Chamber has then sought to find a middle ground between the different interests at stake: while questioning the autonomous decisions of the confessional organization, it did so only to the extent necessary to ensure that the principle of religious autonomy did not arbitrarily strip employees of their rights.

The *Lombardi Vallauri* and *Sindicatul* rulings have thus confirmed that the approach developed by the ECtHR on the autonomy of confessional employers matches the position of "principled distance" and is adequate to the contemporary post-secular scenario. On the one hand, the Strasbourg judges have refused to impose uniform substantive legal employment requirements applicable to all confessional employers. In the former judgment, it was held that courts cannot question the substance of the decisions adopted by religious organizations nor can take sides in doctrinal debates; in the latter, the Grand Chamber uncritically accepted that the registration of the union would undermine the Church's credibility. Furthermore, acknowledging that the relationship between the State and religions is context-specific to each State, the Grand Chamber, in *Sindicatul*, recognized a margin of appreciation to national authorities. On the other hand, the ECtHR again has not provided a blanket immunity to religious employers. The Court

has indeed confirmed that national judges can lawfully demand some respect to basic procedural requirements from religious organizations (*Lombardi Vallauri*) and can undertake a balancing exercise between the employers' and employees' rights (*Sindicatul*). As discussed, post-secularism aims to be equally distant from religious and non-religious perspectives, while simultaneously promoting mutual understanding and looking for a practical compromise between such different constituencies. By recognizing the conflicts between group religious rights and other individual rights and by allowing for a balancing of such competing claims, the ECtHR has encouraged post-secular accommodation, meant «not [as] the giving up of one value for the sake of another, but [as] their reconciliation and possible harmonisations so that apparently incompatible concepts and values may operate without changes to their basic content».[545]

SECTION 2. Religious organizations' autonomy in the workplace: the CJEU jurisprudence

3. The case-law of the CJEU on the autonomy recognized to religious organizations in the occupational field

To this day, the Court of Justice of the EU has issued three rulings concerning the actual degree of autonomy left to Member States in organizing their relations with religious organizations in the occupational field.[546] In the first two judgments, namely *Egenberger* and *IR*, the European judges ruled on the reconciliation of the autonomy rights of confessional organizations with the right not to be discriminated against of the employees

[545] R. BHARGAVA, *Reimagining Secularism: Respect, Domination and Principled Distance*, in *Economic and Political Weekly*, 48, 2013, p. 87.

[546] For a comment on these rulings, *see* L. LOURENÇO, *Religion, Discrimination and the EU General Principles' Gospel:* Egenberger, in *Common Market Law Review*, 56, 2019, pp. 193-208; F. CROCI, I*nterazioni tra principi (e tra fonti) nel diritto dell'Unione europea: la sentenza* Egenberger *e i successivi sviluppi*, in *Stato, Chiese e Pluralismo Confessionale*, 29, 2019, pp. 86-110; G. CASSANO, *The Freedom of Religion in the Workplace in the Latest Case Law of the Court of Justice of the European Union: the* Cresco Investigation *Case and Religious Holidays*, in *Variazioni su temi di Diritto del lavoro*, 5, 2019, pp. 1379-1390; L. CECCHETTI, *Gli strumenti del giudizio di eguaglianza della Corte di giustizia alla prova del divieto di discriminazione sulla base della religione: il caso* Cresco Investigation, in *Il diritto dell'Unione Europea*, 2, 2020, pp. 317-360; D. STRAZZARI, *EU Anti-Discrimination Law and Domestic Negotiated Law as Legal Instruments to Protect Religious Freedom at Work in Europe: Concurring or Conflicting?*, in *DPCE Online*, 47, 2021, pp. 1881-1913.

of these organizations. Indeed, although Directive 2000/78/EC generally prohibits discrimination on grounds of religion in the workplace, it also accepts some limited derogations. In line with art. 17(1) TFEU, Art. 4(2) of the directive allows Member States to

> «maintain national legislation […] pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion […] shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitutes a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos».

In *Cresco Investigation*, the CJEU considered whether the recognition of certain privileges to small churches could lawfully justify a different treatment towards the followers of minority confessions.

Although originating from different factual circumstances, the three judgments have to be collectively considered in order to fully comprehend the way the CJEU has balanced the autonomy left to Member States in organizing their relations with religious organizations under Art. 17(1) TFEU and the Union's commitment to protect individuals from discrimination.[547] In this perspective, following the analysis of the rulings, reference will be made to the scholar contribution of Floris De Witte, who has proposed a categorization of the possible solutions for the CJEU to balance thrusts towards European harmonization and pushes towards Member States' autonomy in those areas in which cultural and ethical values matter. Based on De Witte's model, it will emerge that the

[547] Although in *Egenberger, IR* and *Cresco Investigation* the CJEU has also affirmed that the general principles of Union's law are to be considered horizontally and directly applicable and that fundamental rights are enforceable under the Charter, such aspect of the rulings will not be discussed, as it falls outside the scope of the present work. For further details on this, *see* A. COLOMBI CIACCHI, *The Direct Horizontal Effect of EU Fundamental Rights*, in *European Constitutional Law Review*, 15, 2019, pp. 294-305; N. LAZZERINI, *The Horizontal Application of the General Principles of EU Law: Nothing Less than Direct Effect*, Max Planck Institute for Comparative Public Law & International Law Research Paper No. 2020-38, 28 October 2020, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3720138 (last accessed on 31 December 2021); E. FRANTZIOU, *The Horizontal Effect of the Charter: Towards an Understanding of Horizontality as a Structural Constitutional Principle*, in *Cambridge Yearbook of European Legal Studies*, 22, 2020, pp. 208-232.

Court has used in its case-law a "substantial" proportionality test and, consequently, has adopted an extremely narrow approach towards the scope of Art. 17(1) TFEU and religious autonomy. Notably, it will then be argued that the three rulings under examination run counter to the position of "principled distance" that should characterize post-secular societies.

3.1. The Egenberger *case*

In November 2012, the Evangelisches Werk, an organization associated to the German Protestant Church, advertised a position concerning the redaction of a report on the compliance of Germany with the UN Convention on the elimination of all forms of racial discrimination. The advertisement specified that one of the requirements for the candidates was their belonging to the Protestant Church. Ms Vera Egenberger applied for the position, but she did not receive an invitation to the interviews due to her lack of confessional denomination. Consequently, Ms Egenberger claimed before the German Labour Court that such decision constituted a discrimination on religious grounds. In particular, the applicant affirmed that the Evangelisches Werk violated Art. 21 Charter, which establishes a general prohibition of discrimination, as well as Articles 1 and 2 of Directive 2000/78. Conversely, the religious organization justified its decision in light of both churches' right to self-determination and the German law implementing Art. 4 (2) Directive 2000/78, specifically Art. 9 (1) of the General Law on equal treatment (*Allgemeine Geichbehandlungsgesetz*, hereinafter the "AGG"), which allows confessional associations to consider the candidate's religious denomination during the employment process. Furthermore, pointing out the facts of the matter, the national judges noted that the German case-law on the matter allowed only «a review of plausibility on the basis of the church's self-perception» of whether the activities at issue were linked to the organization's ethos to such an extent that religious affiliation was required of the employees.[548] Nonetheless, on the one hand, the German Court observed that the wording of Art. 4(2) Directive 2000/78 speaks in favour of the domestic authorities having the

[548] Judgment *Egenberger*, above, para. 31.

jurisdiction and the obligation to carry out a review on the "genuine, legitimate and justified occupational requirement" beyond a «mere review of plausibility».[549] On the other, it acknowledged that, in the opinion of some German jurists, such provision has to be interpreted in light of Art. 17(1) TFEU, leaving a wide margin of discretion to confessional organizations. The German judges thus decided to stay the proceedings and to refer to the CJEU for a preliminary ruling.

The Court straightforwardly acknowledged that Ms Egenberger's dismissal by virtue of her lack of faith denomination constituted undoubtedly a difference of treatment on religious grounds, as she was treated less favourably than another person would be due to her belief.[550] The CJEU then considered whether Art. 4(2) Directive 2000/78 may allow churches or religious organizations to authoritatively determine «the occupational activities for which religion, by reason of the nature of the activity concerned or the context in which it is carried out, constitutes a genuine, legitimate and justified occupational requirement».[551] While recognizing that confessional employers are allowed to lay down occupational requirements linked to their ethos, the CJEU argued that the assessment of whether such criteria could be considered as "genuine, legitimate and justified" cannot be entrusted to the religious organization intending to put in place a difference of treatment. Rather, for this assessment to be effective, it must be amenable to scrutiny by an independent authority, such as a court.[552] Art. 4(2) Directive 2000/78 indeed necessitates a balancing exercise between, on the one hand, the employees' right not to be discriminated on the ground of religion and, on the other, churches' right to autonomy. Art. 17(1) TFEU cannot be interpreted as entirely «exempt[ing] compliance with the criteria set out in Article 4(2) of Directive 2000/78 from effective judicial review».[553] Rather, as affirmed by Advocate General Tanchev, this provision should be seen as the reflection of the Union's "value pluralism" and, therefore, as allowing for States' discretion.[554] The Court therefore concluded that the criteria to be taken into

[549] *Ibid*., para. 32.
[550] *Ibid*., para. 43.
[551] *Ibid*., para. 42.
[552] *Ibid*., para. 46.
[553] *Ibid*., para. 58.
[554] *See* Opinion of Advocate General E. Tanchev delivered on 9 November 2017, case C-414-16, *Egenberger*, para. 100.

account for the balancing exercise must be «the subject of […] review by an independent authority, and ultimately by a national court».[555]

The CJEU then clarified what criteria constitute the scope of such national judicial review. First of all, the Court provided the widest margin of discretion to confessional bodies in relation to the determination of their ethos, affirming that «Member States and their authorities […] must, except in very exceptional cases, refrain from assessing whether the actual ethos of the church or organisation concerned is legitimate».[556] Second, the Court noted that a difference of treatment on religious grounds can be lawful only in case of an «objectively verifiable existence of a direct link between the occupational requirement imposed […] and the activity», *i.e.* when the nature of the job activity implicates the determination or proclamation of the employer's ethos, or when the context involves a credible presentation of the organization to the outside world.[557] Lastly, in contrast with the review of plausibility suggested by German case-law, the CJEU specified how national courts should decide whether a requirement can be considered "genuine, legitimate and justified". First, in order to ascertain its genuineness, judges shall verify whether the employer's belonging to the same faith upon which the ethos of the religious organization is based appears necessary with regard to the manifestation of the organization's ethos.[558] Second, a requirement can be considered legitimate only if it is ascertained that it pursues an aim that «has […] connection with that ethos or with the exercise by the […] organisation of its right of autonomy».[559] Third, the adjective 'justified' entails both that the requirement complies with the criteria set out by Art. 4(2) Directive 2000/78 and that the confessional employer is able to demonstrate that the absence of such a requirement would cause a probable and substantial harm to its ethos or right of autonomy.[560] Fourth, the Court added that national judges must also ascertain the respect of the principle of proportionality, assessing whether the requirement at issue

[555] Judgment *Egenberger*, above, para. 53.
[556] *Ibid.*, para. 61.
[557] *Ibid.*, para. 63.
[558] *Ibid.*, para. 65.
[559] *Ibid.*, para. 66.
[560] *Ibid.*, para. 67.

is appropriate and does not exceed what is necessary for the achievement of the aim pursued.[561]

3.2. The IR *case*

The second ruling under examination concerned IR, a non-profit society under the supervision of the Archbishop of Cologne, which runs numerous hospitals as part of an «expression of the life and nature of the Roman Catholic Church».[562] JQ, a Roman Catholic doctor, was employed as Head of the Internal Medicine Department on one of IR hospitals. After having contracted a Catholic marriage, he divorced in 2008 and re-married with a civil ceremony. The hospital thus dismissed him on the ground that he had breached the duty to act in good faith and with loyalty to the ethos of the organization, therefore violating his employment contract.

JQ then brough an action before the German Labour Court, claiming that his dismissal amounted to impermissible discrimination on religious grounds. In particular, the applicant argued that, pursuant to Art. 4 GrO,[563] the second marriage of a head of department of Protestant denomination or no belief would not have had any consequences on the employment contract and that, consequently, his dismissal had violated the principle of equal treatment. Conversely, IR claimed that the dismissal was justified under paragraphs 2 and 3 of Art. 5 GrO, which establish that employees occupying managerial positions can be lawfully fired if they enter a marriage that is not valid under canon law. Furthermore, IR noted that Art. 9(2) AGG protects the «right of the religious communities […] to require their employees to act in good faith and with loyalty in accordance with their self-perception». The Labour Court then decided to make a request for a preliminary ruling to the CJEU. In particular, the national judges asked whether as a private limited company owned by the Catholic Church active in the healthcare sector and applying market practices, IR could fall within the scope of Art. 4(2) Directive 2000/78. In addition, they wondered whether churches or other public or private religious organizations could

[561] *Ibid*., para. 68.
[562] Judgment *IR*, above, para. 23.
[563] *Grundordnung des kirchlichen Dienstes im Rahmen kirchlicher Arbeitsverhältnisse*, 22 September 1993.

not only determine authoritatively what constitutes acting in good faith and with loyalty within the meaning of Art. 4(2) Directive 2000/78, but also autonomously impose a scale of loyalty requirements for the same managerial positions taking into account solely the religious affiliation of the employees.

The European judges firstly addressed the question of whether IR could fall within the scope *ratione personae* of Art. 4(2) Directive 2000/78. In this regard, it is interesting to notice that the Court's line of reasoning differed considerably from that of AG Wathelet. The latter indeed argued that, in order to determine whether IR's ethos is based on religion and is thus covered by the Directive, it has to be ascertained whether the hospital's practices are consistent with the Catholic doctrine. Notably, according to Wathelet, services must clearly diverge from those provided by public hospitals, notably in relation to «abortion, euthanasia, contraception and other measures to regulate procreation».[564] On the contrary, the CJEU noted that the wording of Art. 4(2) Directive 2000/78 generally refers to «churches and other public or private organizations the ethos of which is based on religion or belief». Thus, the European judges concluded that a situation such as that in the main proceedings falls within the scope of the provision, for it explicitly covers organizations that are established under private law.[565]

As regards the second question, the CJEU, recalling the *Egenberger* ruling, reiterated that a religious organization's decision to put in place a difference of treatment must be subject to an effective judicial review.[566] Consequently, the Court dismissed IR's claim that the phrase «acting in conformity with national constitutions and laws» contained in Art. 4(2) Directive 2000/78 suggested that the legality of a requirement for good faith and loyalty should be examined solely with reference to domestic law. Such conclusion cannot be invalidated by reference to Art. 17(1) TFEU. Not only Declaration No. 11 is expressly mentioned in recital 24 of the Directive 2000/78,[567] indicating that the Union's legislator

[564] Opinion of Advocate General M. Wathelet, 31 May 2018, Case C-68/17, *IR*, § 48.
[565] Judgment *IR*, above, para. 40.
[566] *Ibid*., para. 43.
[567] «The European Union in its Declaration No 11 on the status of churches and non-confessional organisations, annexed to the Final Act of the Amsterdam Treaty, has explicitly recognised that it respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States and that it equally respects the status of philosophical and non-confessional organisations. With this in view, Member States may maintain or lay down specific

had taken it into account when adopting the Directive, but also Art. 17(1) TFEU has to be interpreted as merely expressing the EU neutrality towards the way Member States and Churches organize their relationship and not, conversely, as exempting these actors from compliance to Art. 4(2) Directive 2000/78.[568] Accordingly, it is for the national judges to verify whether imposing to act in good faith and with loyalty only to employees in managerial positions who belong to the same faith of the employer constitutes a «genuine, legitimate and justified occupational requirement» pursuant to Art. 4(2) Directive 2000/78.[569] The CJEU nevertheless provided guidance to the German court on the proceedings at issue. In particular, given that the applicant's occupational activity only involved administrative tasks and the provision of healthcare services, the CJEU affirmed that «adherence to the notion of marriage» as «sacred and indissoluble […] does not appear to be necessary for the promotion of IR's ethos».[570] According to the Court, this conclusion is also corroborated by the fact that IR allows non-Catholic employees in managerial positions, similar to that occupied by JQ, not to be subject to the same requirement to act in good faith and with loyalty to the organization's ethos.[571]

3.3. The Cresco Investigation *case*

Paragraph 7 of the Austrian law on rest periods (*Arbeitsruhegeset*, hereinafter the "ARG") provides the list of the public holidays that all Austrian employees are entitled to. In particular, the case involved a challenge to paragraph 7(3) of the labor legislation, which classifies Good Friday as an additional festive day for the members of four small Christian minority Churches, *i.e.* the Evangelical Churches of the Ausburg and Helvetic Confessions, the Old Catholic Church and the United Methodist Church. Accordingly, members of these minority churches are entitled to a 24-hour rest period or to additional

provisions on genuine, legitimate and justified occupational requirements which might be required for carrying out an occupational activity».

[568] Judgment *IR,* above, para. 48.

[569] *Ibid*., para. 56.

[570] *Ibid*., paras. 57-58.

[571] *Ibid*., para. 58.

holiday pay if they worked on that day, whereas other employees do not have any such entitlement.

The case concerned Mr Markus Achatzi, an employee of the private detective agency Cresco who was not a member of any of the Churches covered by paragraph 7(3) ARG. When his employer refused to pay the holiday allowance for the work he carried out on Good Friday 2015, he went to Court complaining a violation of Art. 21 Charter and Directive 2000/78. On the matter, the national court noted that paragraph 7(3) ARG explicitly aims to allow believers of one of the protected Churches to practice their faith on a religious holiday that is particularly significant for them without taking a day's leave for that purpose. The national judges also pointed out that workers who are members of the Roman Catholic Church – *i.e.* the majority of the Austrian population – already benefit from this possibility, because the Catholic public holiday listed in Para. 7(2) ARG are days off for all employees. Lastly, the Austrian Court observed that the ARG does not take into consideration the religious needs of some employees. Even though some collective agreements provide for the protection of certain Jewish and Protestant festive days, «in the absence of any such provision» the concession of these holidays is nevertheless «largely dependent on the goodwill of the employer».[572] While recognizing that the special regime of paragraph 7(3) ARG «constitutes, in principle, less favourable treatment on grounds of religion» for the workers who do not belong any of the four minority churches,[573] the national judges thus wondered whether such workers are in a situation comparable to that of employees with different beliefs or no faith, pursuant to the definition of direct discrimination laid down by Art. 2(2)(a) Directive 2000/78.[574] In this regard, the national court also wondered whether the difference of treatment at issue could be considered either as a necessary measure in a democratic society to protect the rights and freedoms of others, under Art. 2(5) Directive 2000/78,[575] or as a positive action specifically aimed at compensating for existing disadvantages within the meaning of Art.

[572] Judgment *Cresco Investigation*, above, para. 20.
[573] *Ibid*., para. 17.
[574] «[D]irect discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1».
[575] «This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others».

7(1) Directive 2000/78.[576] The national judges thus decided to stay the proceedings and to refer to the CJEU for a preliminary ruling.

Before getting to the heart of the ruling, it is necessary to focus briefly on the argument raised by the Polish government, as it provided the CJEU with the chance to specify the scope of its judicial review. In relation to the case at issue, the Polish government opposed to such preliminary referral, claiming that the CJEU, under Art. 17(1) TFEU, lacked jurisdiction on the issue of the concession by a Member State of a public holiday for the celebration of a religious festival. In this respect, the European judges pointed out that «the fact that Declaration No. 11 is expressly mentioned in recital 24 of Directive 2000/78 shows that the EU legislature must have taken that declaration into account when adopting the directive».[577] In addition, even recognizing that art. 17(1) TFEU expresses EU neutrality towards the way Member States organize their relations with churches and religious associations and communities, the Court argued that the Austrian provisions at issue do not concern the organization of such relations, but only the grant of an additional public holiday to those employees who are members of certain religious communities.[578] Consequently, the CJEU rejected the Polish claim alleging lack of jurisdiction and proceeded to answer the preliminary questions referred by the Austrian judges.

In the first place, the CJEU noted that, in order to answer the first preliminary question and to assess whether the national disposition which grants Good Friday as a public holiday only to those workers who are member of the churches listed in the ARG constituted direct discrimination, it was necessary to determine both whether the ARG gave rise to a difference in treatment between workers on the basis of their faith and, if that had been the case, whether such a difference related to categories of employees who were in a comparable situation. On the first issue, the Court stated that Austrian law did establish a difference of treatment because «the test used by legislation in order to differentiate is based directly on whether an employee belongs to a particular religion».[579]

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[576] «With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1».
[577] Judgment *Cresco Investigation*, above, para. 32.
[578] *Ibid.*, para. 33.
[579] *Ibid.*, para. 40.

On the second, it found that paragraph 7(3) ARG «had the effect of treating comparable situations differently» and therefore constituted direct discrimination on grounds of religion within the meaning of Art. 2(2)(a) Directive 2000/78.[580]

On the matter, it is interesting to note that the Court's reasoning diverged considerably from that of Advocate General Bobek, who defined comparability «the most complex question in this case».[581] While both the CJEU and the AG reached the same conclusion of the situations being comparable, the former merely pointed out that the granting of additional public holiday was not subject to any condition that the worker must carry out a religion duty on that day, meaning that members of the minority churches listed in the ARG were no different from other employees who wanted to have a leisure day on Good Friday.[582] Conversely, the AG indicated the granting of the additional pay as the decisive factor on deciding the proper point of reference to use in the case. Given that the aim of the ARG is to allow the members of the four minority churches to participate in the religious festival of Good Friday, thus respecting their freedom of religion, Mr Bobek argued that «the right to double pay […] constitutes an economic incentive not to use that day for worship» and therefore hinders the purse of that aim.[583] The Advocate General thus rejected the Commission's position – *i.e.* that the comparison had to be conducted with reference to employees for whom there was a particularly special religious festival not recognized as a public holiday under Austrian law – and indicated that the applicant was in a similar situation to the members of the churches covered by the ARG because, due to the additional pay, they were all likely to work on Good Friday.

The CJEU then excluded that such direct discrimination could be justified under Art. 2(5) of Directive 2000/78. In particular, the Court noted not only that this article allows difference of treatment just if strictly necessary to the functioning of a society,[584] but also that, the disposition being an exception to the general principle of equal treatment, it must

[580] *Ibid.*, para. 51.
[581] Opinion of Advocate General M. Bobek delivered on 25 July 2018, Case C-193/17, *Cresco Investigation*, para. 35.
[582] Judgment *Cresco Investigation*, above, para. 50.
[583] Opinion of AG Bobek, *Cresco Investigation*, above, para. 69.
[584] Judgment *Cresco Investigation*, above, para. 54. In this regard, *see also* Judgment *Prigge*, above, para 55.

be interpreted narrowly.[585] From this perspective, the argument that the Austrian law could be seen as necessary to protect the rights and freedoms of others was rejected on the basis that employees not belonging to the churches covered by the ARG who want to celebrate their own religious festivals are not entitled to a 24-hour rest period. Indeed, their «right to be absent from […] work for the amount necessary to perform certain religious rites» mainly depends on «a duty of care on employers *vis-à-vis* their employees» as opposed to workers of the privileged religions.[586]

Similarly, the CJEU held that a directly discriminatory norm could not be justified under Art. 7(1) Directive 2000/78. The Court observed that this disposition allows only for those measures that, respecting the principle of proportionality, are taken to compensate for actual inequality.[587] Yet, the European judges held that Austrian law was disproportionate as it went beyond the necessary to allow workers of the minority religions covered by the ARG to carry out any religious obligation on Good Friday, as «the provisions at issue […] grant a 24-hour rest period […] to employees who are members of one of the [protected] churches, while employees belonging to other religions […] can, in principle, be absent from work in order to perform their religious duties […] only if they are so authorized by their employer in accordance with the duty of care».[588]

4. Reflections on the CJEU jurisprudence on religious organizations' autonomy in the workplace: a "substantial" proportionality test

As emerged, according to Advocate General Tanchev, Art. 17(1) TFEU should be seen as the reflection of the Union's "value pluralism", under which conflicts between different rights and approaches are considered to be normal and are resolved through balancing conflicting elements rather than prioritizing one over another in a hierarchical fashion.[589] In order to better understand this European approach, it is useful to resort to Floris De

[585] *Ibid.*, para. 55. In this regard, *see also* Judgment *Prigge*, above, para 56.
[586] *Ibid.*, para. 60.
[587] *Ibid.*, para. 64.
[588] *Ibid.*, para. 67.
[589] Opinion of AG Tanchev, *Egenberger*, above, para. 100, citing J. BENGOETXEA, N. MACCORMICK, L. MORAL SORIANO, above, p. 64.

Witte's work. This scholar has indeed proposed a categorization of the possible solutions for the CJEU to balance thrusts towards European harmonization and pushes towards Member States' autonomy in those areas in which cultural and ethical values matter.

De Witte holds that two opposite arguments simultaneously inform the European approach on the interaction of Union's law with domestic norms that express a certain moral, ethical or cultural value.[590] On the one hand, the "argument from self-determination" calls for the protection of both the expression of certain ethical values and the autonomy of the political forums through which such values are articulated. This argument recognizes that, due to specific historical connection between the political process and the territorial unit of the nation State, each Member State has institutionalized their particular and unique ideological, religious and cultural idiosyncrasies. On the other, the "argument from containment" posits that self-determination is likely to create and perpetuate certain normative deficiencies and thus aims to prevent «parochial biases and sovereign violence» in adopting certain ethical and religious standards.[591] This argument is given legal shape through the adoption of norms of free movement and, particularly relevant for the present analysis, non-discrimination.

The challenge posed by «the apparent incommensurability» of these arguments can be addressed in three ways.[592] First, prioritizing the argument from containment, Union's legal order could directly intervene and elevate the moral or ethical question at issue beyond the national level either through harmonization or the creation of autonomous concepts of EU law. Yet, this approach tends to reject the most basic commitment to self-determination. Second, giving particular weight to the argument from self-determination, the EU could do the opposite and insulate national policy choices in defiance of the transnational rights which may be derived from the Union's legal order. In this perspective, Member States would be free to decide and impose whichever national moral, ethical or cultural norm they prefer on their citizens. Third, the EU could attempt to balance the two conflicting arguments and resort to proportionality, which «serves to

[590] *See* F. DE WITTE, *Sex, Drugs & EU Law: The Recognition of Moral and Ethical Diversity in EU Law*, in *Common Market Law Review*, 50, 2013, p. 1545.
[591] *Ibid.*, p. 1555.
[592] *Ibid.*, p. 1556.

ensure the reasonableness of limits on individual rights by way of national policy».[593]

In relation to the latter solution, De Witte affirms that two different approaches can be distinguished in the CJEU's case-law. The first is a "substantial" proportionality test, which aims to regulate the interaction between national measures and non-discrimination provisions.[594] This test consists of three prongs as the Court assesses whether the national measure at issue is suitable to achieve the aim pursued, is necessary - *i.e.* the least restrictive measure available given the aim – and does not impose an excessive burden on the individuals. The application of this approach is highly prescriptive on the merit of acceptable national measures and, although States formally remain in charge of autonomously developing their moral and ethical standards, is therefore likely to critically weaken national self-determination. In particular, it risks framing acceptable standards in relation to those favored by external actors or other Member States, significantly shifting the locus of self-determination away from national processes towards European-wide majoritarian preferences. The second is a "procedural" proportionality test, which seeks to rationalize the process of national legislation and, according to De Witte, «is more respectful of the normative policy aims of Member States».[595] Indeed, this test does not aim to assess a national measure's necessity and suitability, but imposes instead requirements of coherence, consistency and transparency. This approach thus focuses on teasing out policy inconsistencies that betray discriminatory intentions and is more respectful of the substance of the moral or ethical national choices.

Applying De Witte's categorization to the *Egenberger*, *IR* and *Cresco Investigation* judgments, it appears clear that the European judges have interpreted Art. 17(1) TFEU as allowing a balancing exercise between religious organizations' requests for self-determination and Union's arguments from containment. Although the wording of Art. 17(1) TFEU seems to suggest that the regulation of the status of churches and religious organizations is completely detached from the EU legal order, the CJEU has nevertheless resorted to the principle of proportionality to assess whether religious organizations'

[593] *Ibid.*, p. 1565.
[594] *Ibid.*, p. 1566.
[595] *Ibid.*

standards adopted at the national level were consistent with European non-discrimination norms.

In doing so, the Court applied what De Witte calls a "substantial" proportionality test. In *Egenberger* and *IR,* the European judges explicitly rejected the approach followed in German case-law, according to which «where the church's self-perception itself distinguishes between activities 'close to' and activities 'remote from' proclamation of the church's message, the courts should not review whether and to what extent that distinction is justified».[596] The German jurisprudence has indeed affirmed that the standards adopted by churches or religious organizations under the national law implementing Art. 4(2) Directive 2000/78 could be subject only to a plausibility assessment. The German approach seems to be similar to that developed by ECtHR and matches the "procedural" proportionality test theorized by De Witte. As discussed, the "procedural" version of the test of proportionality does not aim to assess the appropriateness and substance of the moral or ethical choice made. Rather, the purpose of this test is to assess the reasonability – or, in other words, the plausibility – of such choice, trying to tease out inconsistencies that betray underlying discriminatory purposes. Both the Strasbourg Court and the German judges have claimed that judicial authorities cannot analyse the substance of confessional employers' decision. However, their position has not merely amounted to a "jurisdictional approach", which wholly surrenders the judicial review of any of the decisions taken by a religious institution. Both the ECtHR and the German judges have indeed highlighted that judicial authorities must exercise a supervisory function, undertaking a balancing approach to the extent necessary to ensure that the principle of religious autonomy does not turn into differential treatment in disguise. It then emerges that, in accordance with the "procedural" proportionality test, the Strasbourg and German courts have not tried to question or re-orient the content of the religious organizations' measures, but have rather aimed at rationalizing their implementation and ensuring the absence of arbitrary discrimination.

The CJEU has adopted a less deferential approach. It indeed held that Art. 17(1) TFEU could not be interpreted as allowing confessional employers neither to autonomously

[596] Judgment *Egenberger*, above, para. 31.

determine whether a particular faith could be considered a genuine, legitimate and justified occupational requirement within the meaning of Art. 4(2) Directive 2000/78[597] nor to authoritatively impose a scale of loyalty based exclusively on the religious affiliation of the employees.[598] The CJEU conversely claimed that, in order to properly balance the workers' right to non-discrimination and the confessional employer's right to self-determination, the criteria used to determine whether a particular faith could be considered a genuine, legitimate and justified occupational requirement must be amenable to scrutiny by an independent court.[599] According to the Luxembourg judges, this conclusion could not be invalidated by reference to Art. 17(1) TFEU, as recital 24 of Directive 2000/78 explicitly mentions Declaration No. 11, meaning that the European legislator had already taken into consideration that provision when adopting the Directive.[600]

The "substantial" nature of the proportionality test used by the CJEU is even more apparent when considering the criteria that the European judges indicated to national courts to ascertain whether religion or belief constitutes, in view of the of the nature of the activity in question or the context in which it is carried out, a genuine, legitimate and justified occupational requirement within the meaning of Art. 4(2) Directive 2000/78. Such criteria perfectly correspond to the three prongs that comprise De Witte's "substantial" proportionality test – *i.e.* suitability, necessity and not being an excessive burden for individuals. The CJEU held that, first, a measure imposed by a confessional employer can be considered genuine when it appears *necessary* in light of the importance of the manifestation of the religious organization's ethos;[601] second, that a measure is legitimate when it is used to pursue an aim that has connection with the organization's ethos, meaning that it is *suitable* to achieve that aim;[602] third, that a measure is to be considered justified when the supposed risk of causing harm to the organization's ethos is

[597] *See* Judgment *Egenberger*, above, para. 59.
[598] *See* Judgment *IR,* above, para. 47.
[599] *See* Judgment *Egenberger*, above, para. 53 and Judgment *IR*, above, para. 47.
[600] *See* Judgment *Egenberger*, above, para. 57.
[601] *See* Judgment *Egenberger*, above, para. 65 and Judgment *IR*, above, para. 51.
[602] *See* Judgment *Egenberger*, above, para. 66 and Judgment *IR*, above, para. 52.

probable and substantial, so as *not to create an unnecessary burden* for the employees.[603]

As emerged in Chapter 1, the wording of Art. 17(1) TFEU seems to endorse the position of "principled distance", as it enshrines that Union law cannot undermine the historical institutional role of confessional bodies at Member State level. In this perspective, it was held that Art. 17(1) TFEU represent the EU commitment to give greater weight to those religious perspectives that are culturally and institutionally rooted at the level of Member States. However, from the analysis above, it has clearly emerged that the CJEU has developed a highly prescriptive approach on the substance of acceptable measures and standards adopted by churches and religious organizations.[604] As Advocate General Tanchev held, the EU has adopted under Art. 17(1) TFEU a neutral position with respect to the discretion in which States conduct their relationship with confessional actors, but this neutrality has not been expanded to «all conceivable circumstances, […] particularly if the status furnished to such organizations under Member States law fails to guarantee […] fundamental rights».[605]

On the one side, the CJEU has recognized that Art. 17(1) TFEU establishes an exclusive domestic competence in relation to the determination of religious actors' ethos, which is a matter of ecclesiastical law. Indeed, whereas Advocate General Wathelet argued in *IR* that the practices of a confessional organization have to be reviewed in order to determine whether the ethos of that organization is truly based on a specific religion,[606] the European judges held that judicial authorities must «refrain from assessing whether the actual ethos of the church or organization concerned is legitimate».[607] On the other, the CJEU has affirmed that national norms with religious implications are to be subject to European judicial review in all those areas which are not intrinsically linked to ecclesiastical law. Replying to the argument raised by the Polish government in relation to *Cresco Investigation*, the Court has therefore claimed that Art. 17(1) TFEU expresses the neutrality of the Union only towards the way Member States organize their relationship

[603] *See* Judgment *Egenberger*, above, para. 67 and Judgment *IR*, above, para. 53.
[604] *See also* D. STRAZZARI, above, pp- 1910-1911.
[605] Opinion of AG Tanchev, *Egenberger*, above, para. 89.
[606] *See* Opinion of AG Wathelet, *IR*, above, para. 48.
[607] Judgment *Egenberger*, above, para. 61.

with churches and religious associations, thus excluding the Austrian legislation at issue from the scope of the provision. Indeed, according to the CJEU, those national norms «do not seek to organize the relations between [Austria] and churches, but seek only to give employees who are members of certain churches an additional public holiday to coincide with an important religious festival for those churches».[608]

This line of reasoning raises several questions. It is true that, under Art. 17(1) TFEU, Member States are legitimized to autonomously regulate the status that religious bodies enjoy within the national territory only as long as due consideration is given to the equality principle. From this perspective, it has been argued that the individual dimension of religious freedom fundamentally differs from the associative-institutional one: the former is protected by EU law and Member States' constitutions; the latter is subject to independent regulation at the domestic level. Notwithstanding the above, the "principled distance" approach requires to address conflicts between collective religious rights and individual human rights in a way that gives both parties their due, allowing for their co-existence. However, in *Egenberg*, *IR* and *Cresco Investigation*, the CJEU seems not to have taken into proper consideration the religious organizations' autonomy rights. In particular, if the notion of "organizing relations" between a Member State and a specific church does not comprise even the very basic decision of granting a public holiday to the members of that faith, how does the CJEU define such notion? Does not this approach risk «making a mockery of autonomy or self-determination» by interpreting this concept – and, consequently, the scope of Art. 17(1) TFEU itself - so narrowly?[609] Despite the poignancy of these questions, the Court has not explored the matter nor supported its conclusions with any further explanation.

The Court not only has imposed substantive limits on what churches and religious organizations are allowed to decide, but it seems also to have adopted a prescriptive approach on what religious beliefs should entail, as emerges from the analysis of the *Cresco Investigation* judgment. Advocate General Bobek rightly argued that «the most complex question in this case» was the determination of whether the workers who

[608] Judgment *Cresco Investigation*, above, para. 33.
[609] F. DE WITTE, above, p. 1569.

belonged to the minority churches covered by the ARG – and thus entitled either to celebrate the religious festival of Good Friday with a 24-hour rest period or to receive additional pay if they worked on that day - and those who had different beliefs were in a comparable situation.[610] Accordingly, Mr Bobek devoted many paragraphs to the issue. In particular, he argued that the workers of every faith were in a comparable situation as the granting of an additional pay «constitutes an economic incentive *not* to use that day for worship», making all employees likely to work on Good Friday.[611] Conversely, the CJEU briefly analyzed the matter and focused exclusively on the way employees belonging to the four minority churches would celebrate the religious festival at issue. The Austrian legislation entitles such workers to «an interrupted rest period of at least 24 hours» on Good Friday, leaving individual believers free to choose as to how celebrate that day. Yet, the European judges argued that the very fact that the national norm does not require those employees to perform a «particular religious duty» on Good Friday makes them no different from other workers who merely «wish to have a rest or leisure period» on that day.[612] The CJEU thus appears not to have taken into consideration the possibility that not going to work could be considered itself a way to celebrate a religious holiday, just as happens for instance in relation to the Jewish *Shabbat*. Given also that the Court has not explored this argument but accepted it as a matter of fact, this reasoning lays itself open to criticism by not adopting a neutral approach.

It then emerges that, aside from purely ecclesiastical matters, the CJEU has interpreted Art. 17(1) TFEU only as a «statement of principle» and an «interpretative tool».[613] The Court has indeed established that States' freedom to organize their relations with confessional bodies is ultimately subject to the principle of non-discrimination, which applies irrespective of both the relationship model adopted and the content of national norms which regulate the activities of such institutions. This approach could be consistent with that adopted by the ECtHR. As discussed, in *Rommelfanger*, *Obst*, *Schüth*, *Siebenhaar* and *Sindicatul*, the Strasbourg clearly ruled that judicial authorities had to

[610] *See* Opinion of AG Bobek, *Cresco Investigation*, above, para. 35.
[611] *Ibid.*, para. 69.
[612] *Ibid.*
[613] Opinion of AG Bobek, *Cresco Investigation*, above, para. 25.

undertake a balancing exercise, properly considering the employees' rights. Moreover, in *Lombardi Vallauri*, they set requirements aimed at providing some procedural fairness for employees who were being dismissed by confessional employers. Nonetheless, by resorting to the "substantial" proportionality test, the CJEU has gone further. It has not focused exclusively on teasing out discriminatory consequences that could arise from the adoption of specific standards by churches or religious organizations, but adopted also a highly prescriptive approach towards the merits of national choices. Yet, this approach stands in stark contrast to the position of "principled distance", which requires the autonomy of State-church relationships so as to allow for flexible decisions in terms of management of religion on grounds of context-specific historical and social conditions.

Conclusions

The present work aimed at investigating whether the approach that the institutions of the European Union have developed so far with regards to the management of religion could be considered adequate to the contemporary post-secular and pluralistic context. In particular, attention has been paid to the CJEU recent case-law concerning discrimination on religious grounds in the private workplace. Whereas religious freedom and religious discrimination concerns have been virtually absent from the Luxembourg case-law until 2017, since then the EU judges have indeed had numerous opportunities to rule on the concrete interpretation of EU regulatory instruments in matters of religious discrimination, *i.e.* Article 17(1) TFEU and Directive 2000/78. In order to properly assess these judgments, they have been examined in light of the three key features that should characterize secularism in today's post-secular context. Firstly, contemporary societies are required to adopt normative instruments aimed at protecting the "ethical core" of secularism, comprising both religious freedom for all and the prohibition of discrimination on grounds of religion. Secondly, post-secular institutions must ensure a differentiation between the temporal and spiritual dimensions while simultaneously promoting active cooperation between religion and State in the public arena. Post-secular pluralistic States are then required to move beyond the traditional rigid separation between the political and religious spheres and allow, instead, for the participation of religious worldviews in the public discourse. Lastly, relations between public institutions and religious communities are to be characterized by "principled distance". This approach assumes legal meaning through the adoption of norms enshrining the autonomy of religious bodies in order to permit flexibility with respect to church-State relationships, allowing States to adopt context-specific decisions on the management of religion.

The Union respects the first among the above-mentioned features. It is indeed unquestionable that the EU regulatory instruments protect the "ethical core" of secularism: on the one hand, the Charter enshrines both religious freedom (Art.10) and the prohibition of discrimination based on *inter alia* religion (Art. 21); on the other, Directive 2000/78 lays down the prohibition of discrimination on different grounds, including religion, in the field of employment. Nonetheless, from the analysis of the CJEU case-law, it has emerged that the Luxembourg judges fail in respecting the other two features of a post-secular society.

The approach developed by the CJEU in relation to cases concerning religious symbols in the private workplace stands at odds with the second feature, *i.e.* actively enhancing the participation of both religious and non-religious citizens in the public discourse. In its rulings, the Court noted that, pursuant to Art. 2(2)(a) Directive 2000/78, direct discrimination shall be taken to occur only where a person is treated less favourably than another is. It then found that the company policies at stake in the main proceedings could not be considered as directly discriminatory, since they treated all employees that wished to give expression to their religious beliefs alike.[614] However, this reasoning, according to which a difference of treatment against all members of a group alike does not constitute discrimination, is not convincing. It is indeed evident that the company "neutrality" policies at issue do not express an authentically neutral view but, rather, are biased against religious people. By not recognizing this, the CJEU seems then to abide by the traditional belief that the differentiation between the temporal and spiritual spheres must be achieved through the privatization of religion, *i.e*. the relegation of religious elements to the private domain. The EU judges seem indeed to suggest that, for the sake of neutrality, individuals holding religious beliefs may well need to set them aside in public, so as to adapt to the "language" of non-religious people.

This interpretation of neutrality echoes that developed by the ECtHR jurisprudence concerning religious apparel in public. In *Bulut-Karaduman*, *Dahlab* and *Şahin*, the Strasbourg Court understood State neutrality as justifying the prohibition of public expressions of religious sentiment. Yet, as discussed in Chapter 2, Section 2, the actual enjoyment of the right to religious freedom, in both its *forum internum* and *forum externum* dimensions, is the precondition for the concrete realization of neutrality. Secular institutions are required to provide for the most favourable conditions for individual expressions while adopting a neutral stance towards individuals' different convictions. Citizens should indeed have equal opportunities to participate in the public discourse (and in the job market) according to their own worldviews and in line with their deep-identities, that comprise also religious beliefs. As Bader writes, «to treat people fairly, we must regard them concretely, with as much knowledge as we can obtain about

[614] *See* Judgment *G4S*, above, paras. 30-32; Judgment *WABE and Müller*, above, paras. 52-55.

who they are and what they care about».[615] Accordingly, only when avoiding to oblige society to embrace a strictly secularist ideology and allowing individuals to freely manifest their preferred confessional option, secular institutions can be considered as truly neutral.

The CJEU seems to have dismissed the importance of the *forum externum* of religious freedom also when, examining whether the company dress policies at stake could be considered indirectly discriminatory, it assessed the legitimacy of the neutrality aim. Focusing exclusively on the freedom to carry on a business under Art. 16 Charter, in *G4S* the Court ruled that «the desire to display, in relation with both public and private customers, a policy of […] religious neutrality must be considered legitimate».[616] The CJEU has then subordinated EU anti-discrimination law to business considerations, reversing the hierarchy between the equality principle and exceptions thereto.[617] Surely, in *WABE*, the Luxembourg judges noted that the employer's wish to pursue a neutrality policy does not automatically justify indirectly discriminatory measures and added that the employer must demonstrate that such measures are genuinely needed.[618] Notably, the CJEU mentioned that customers' rights – *e.g.*, parents' right to ensure the education of their children in accordance with their own convictions under Art. 14(3) Charter – must be considered.[619] However, in its previous case-law, the Court had ruled that discrimination on grounds of racial or ethnic origin motivated by concern about the response of customers is still unlawful.[620] In contrast to these grounds of discrimination, freedom of religion seems then to be considered as a secondary right, one that could be easily sacrificed in the name of the customer's wishes and enjoyable exclusively within the neutrality requirements of the public sphere.

This approach confirms both the EU judges' implicit endorsement of the preservation of an outdated wall of separation between religion and the public domain, and an exclusive

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[615] V. BADER, *Secularism or Democracy? Associational Governance of Religious Diversity*, Amsterdam University Press, 2007, p. 82.
[616] Judgment *G4S*, above, para. 37.
[617] *See also* S. HENNETTE-VAUCHEZ, above, p. 749.
[618] *See* Judgment *WABE and Müller*, above, para. 64.
[619] *Ibid*.
[620] *See* Judgment *Feryn*, above.

interpretation of the notion of neutrality. In this regard, it is also worth stressing that the CJEU blindly accepted the expansion of the neutrality principle into the private sphere. As mentioned, also the ECtHR interpreted neutrality as justifying the prohibition of religious apparel in the public sector. Yet, when ruling on company policies that could restrict employees' freedom to manifest their religion in the private workplace, the Strasbourg judges set precise boundaries to such policies and, ultimately, found them to be unlawful.[621] On the contrary, the CJEU allowed without the least degree of scrutiny for the expansion of the principle of neutrality into the private sector, further hindering the dialogue among individuals with different religious and non-religious convictions.

The CJEU's superficial approach towards the relevance and the legitimacy of employees' religious sentiment was however epitomized in its assessment of whether the means used to reach the employer's legitimate aim of projecting a neutral image could be considered proportional *stricto sensu*. Although this step could have represented an opportunity for the EU judges to articulate why the values reflected in such legitimate aim outweighed the employees' right to manifest their religious beliefs, in *G4S* and *WABE* the Court totally neglected the significance for the applicants to manifest their faith through the exhibition of the Islamic headscarf. Notably, in *G4S*, the Luxembourg Court assessed the proportionality of the restrictive measure only in light of the employer's possibility to offer the applicant a new post not involving any visual contact with clients.[622] On the one hand, questions again arise as to why the EU judges did not undertake a proportionality test as rigorous as that carried out in relation to discrimination on other grounds, such as sex or age. One cannot help but wonder if the answer is that the CJEU considers religious freedom as a secondary right, one that does not deserve the same level of protection as that recognized to other fundamental rights and freedoms. On the other, the CJEU's claim that the offer of a new post not involving any visual contact with customers constitutes a suitable alternative to the dismissal of employees wishing to exhibit religious symbols at work clearly undermines the values of inclusion and tolerance that characterize European democratic and pluralistic societies. Indeed, not only the concealment of employees

[621] *See* Judgment *Eweida*, above, para. 95.
[622] *See* Judgment *G4S*, above, para. 43.

wishing to manifest their religious sentiment contributes to the social exclusion of stigmatized minorities, but also indicates that the CJEU aims to manage today's religious pluralism by making it superficially invisible and by protecting the religious identity only of those who hold strictly secularist positions.

Although the wording of Art. 17(1) TFEU, enshrining the Union's commitment to recognize greater weight to religious worldviews that are culturally and institutionally rooted at the level of Member States, was consistent with the "principled distance" approach, the analysis of the case-law concerning the concrete interpretation to give to such disposition has indicated that the CJEU does not even respect the third feature of a post-secular society. In *Egenberger*, *IR* and *Cresco Investigation*, the CJEU has indeed adopted an extremely narrow approach towards the scope of Art. 17(1) TFEU, providing national churches with the widest margin of discretion only in relation to the determination of their ethos. As discussed, "principled distance" cannot be considered as a *laissez-passer* for differential treatment in disguise of special exemptions for religious bodies and, therefore, it does not exempt judicial authorities from supervising the respect of the principle of proportionality on the part of such bodies. Insofar as the EU judges have allowed national norms with religious implications to be subject to European judicial review, they have therefore conformed to the post-secular "principled distance". However, by resorting to what De Witte calls a "substantial" proportionality test, the CJEU has gone further.

Under "principled distance", judicial authorities are indeed allowed to question confessional entities' autonomous decisions, but only to the extent necessary to ensure that the principle of religious autonomy does not arbitrarily strip other persons of their rights. In this regard, the Strasbourg case-law concerning confessional employers' autonomy rights matches the third feature of a post-secular society. While ruling that religious organizations are entitled to authoritatively decide upon their orthodoxy, in *Rommelfanger*, *Obst*, *Schüth*, *Siebenhaar*, *Lombardi Vallauri* and *Sindicatul*, the ECtHR did not provide a blanket immunity to such organizations. Rather, it ruled that national judicial authorities must take into real account the employees' rights when examining

whether to endorse a confessional employer's restrictive measure.[623] At the same time, the ECtHR refrained from imposing uniform substantive legal occupational requirements applicable to all religious employers and firmly held that judges cannot question the substance of the decisions adopted by confessional bodies. In *Rommelfanger*, the Strasbourg organs found that a confessional employer would not be able to effectively exercise religious freedom without imposing some duties of loyalty on its employees.[624] In *Obst*, noting that the Mormon employer at stake considered adultery as a grave delinquency, it was held that judicial authorities could not question this.[625] Analogously, in *Lombardi Vallauri*, the Strasbourg judges affirmed that national authorities could not examine the substance of the decision adopted by the Congregation of Catholic Education.[626] Lastly, in *Sindicatul*, the ECtHR did not question the Romanian Orthodox Church's view that the workers' union could represent a threat to the religious community.[627]

For the above reasons, in Chapter 3 it was held that, in relation to religious employers' autonomy, the Strasbourg Court has undertaken a "procedural" proportionality test, *i.e.* a test aimed at assessing the reasonability of the decisions adopted by confessional bodies only to the extent necessary to ensure the lack of arbitrary discrimination. On the contrary, the CJEU has adopted a highly prescriptive approach towards the substance of such decisions. In *Egenberger* and *IR*, it claimed that Art. 17(1) TFEU could not be interpreted as allowing confessional employers neither to autonomously determine whether a particular religious option could be considered a genuine, legitimate and justified occupational requirement within the meaning of Art. 4(2) Directive 2000/78[628] nor to authoritatively impose a scale of loyalty based exclusively on the faith of the employees.[629] The CJEU then subjected the criteria used to determine whether a certain religious option could be considered as a genuine, legitimate and justified occupational

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[623] *See* Decision *Rommelfanger*, p. 9; Judgment *Obst*, above, para. 49; Judgment *Schüth*, above, paras. 70-73; Judgment *Siebenhaar*, above, paras. 46-47; Judgment *Lombardi Vallauri*, above, paras. 52-55; Judgment *Sindicatul GC*, above, para. 140.
[624] *See* Decision *Rommelfanger*, above, p.9.
[625] *See* Judgment *Obst*, above, para. 51.
[626] *See* Judgment *Lombardi Vallauri*, above, para. 50.
[627] *See* Judgment *Sindicatul GC*, above, para. 165.
[628] *See* Judgment *Egenberger*, above, para. 59.
[629] *See* Judgment *IR*, above, para. 47.

requirement to a "substantial" proportionality test, *i.e.* a test aimed at assessing the suitability, necessity and proportionality *stricto sensu* of a confessional employer's decision.[630] Moreover, in *Cresco Investigation*, the EU judges excluded that Art. 17(1) TFEU applies to national norms that recognize public holidays to the members of certain churches, further narrowing the scope of such provision.[631] Although the Union is formally committed under Art. 17(1) TFEU to the respect of States' autonomy in relation to religious issues, the three judgments seem then to indicate that the Luxembourg Court is progressively adopting the approach of curtailing extensive privileges for both religious bodies and certain minority groups in favor of the protection of individual fundamental rights. This approach strips religious organizations' right to autonomy and self-determination of its meaning and, therefore, clearly infringes upon the position of "principled distance" that should characterize post-secular societies.

From the analysis of the CJEU case-law on religious discrimination in the workplace, it has then emerged that the Union's secular approach is not adequate to the contemporary post-secular and pluralistic context. Surely, in *WABE* the EU Court introduced a stricter proportionality test for indirect discrimination in relation to employers' neutrality rules,[632] providing «a small glimmer of hope» that the CJEU is moving towards a greater recognition of the legitimacy of the expression of religious beliefs in the public arena.[633] In addition, one relevant case, which concerns the compatibility of an Italian norm regarding Catholic religious education teachers' employment contracts with Art. 21 Charter and Directive 2000/78, is currently pending before the CJEU and might well represent an opportunity for the EU judges to provide Member States with a greater degree of autonomy in organizing their relations with religious bodies.[634] Yet, to this day,

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[630] *Ibid*., paras. 51-53; Judgment *Egenberger*, above, paras. 65-67.
[631] *See* Judgment *Cresco Investigation*, above, para. 33.
[632] *See* Judgment *WABE and Müller*, above, para. 84.
[633] E. HOWARD, *German Headscarf Cases*…above.
[634] On 13 January 2022, after the submission of the present work, the CJEU ruled on the preliminary question concerning whether the prohibition of discrimination on grounds of religion within the meaning of Directive 2000/78 and Article 21 Charter as well as Clause 5 of the Italian framework agreement on fixed-term work could be interpreted as precluding national legislation excluding Catholic religious education teachers in public education establishments from the scope of the rules intended to penalise abuse arising from the use of successive fixed-term contracts. In its ruling the CJEU exclusively considered Clause 5 of the above-mentioned framework agreement, concluding that such provision does preclude national legislation which excludes Catholic religious education teachers from the application of the rules

the overall Luxembourg jurisprudence on the issue indicates that the Union still abides by the traditional (and outdated) model of secularism, according to which the separation of the political and religious spheres must be achieved through the exclusion of religious elements from the public discourse.

However, as Casanova affirms, one «cannot find a compelling reason, on either democratic or liberal grounds, to banish in principle religion from the public democratic sphere».[635] Whereas it could be rightly argued that there must be a political distance in the relationship between religious bodies and the State, the establishment of an *a priori* wall of separation between religion and the public sphere is neither a necessary consequence of modernization nor an imperative feature of secular democracies. On the contrary, such wall is probably counterproductive for democracy itself. As discussed, under traditional secularism, individuals are required to set aside their religious convictions in order to participate in the public discourse. However, in a democratic system, all citizens must enjoy equal rights to engage with State institutions and advance their interests without being arbitrarily excluded, provided that they do not use violence, infringe upon the rights of others and abide by the rules of the democratic game.[636] The arbitrary limitation of the free exercise of the *forum externum* of religious freedom then leads «to curtailing the free exercise of the civil and political rights of religious citizens and will ultimately infringe on the vitality of a democratic civil society».[637] Certain religious arguments or certain religious practices might be questionable and even susceptible to legal interdiction on some democratic ground, but not because they are "religious" *per se*.

Even assuming that the Union endorses a strict separation between the State and religion and the exclusion of religious perspectives from the public domain for the sake of

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intended to penalise abuse arising from the use of successive fixed-term contracts where there is no other effective measure in the domestic legal system penalising that abuse. Art. 21 Charter and Directive 2000/78 were thus only tangentially discussed in the ruling. See Court of Justice of the European Union, judgment of 13 January 2022, Case C-282-19, *MIUR and Ufficio Scolastico Regionale per la Campania*, EU:C:2022:3.

635 J. CASANOVA, *Rethinking Secularization*….above, p. 20.

636 *See* A. STEPAN, *Religion, Democracy, and the "Twin Tolerations"*, in *Journal of Democracy*, 11, 2000, p. 39; R. BHARGAVA, *The Distinctiveness of Indian Secularism*, in T.N. SRINIVASAN (ed.), *The Future of Secularism*, Oxford University Press, 2006, p. 31.

637 J. CASANOVA, *Rethinking Secularization*….above, p. 20.

ensuring the democratic principles of equal participation and neutrality, it nonetheless violates the former by imposing additional burdens upon religious individuals than secular individuals. Religious citizens are indeed forced to abandon their religious views while participating in the public arena and, therefore, they are forced to "split" their public identities from their private ones.[638] This approach has serious exclusionary effects and does not prevent but rather deepens resentment, at the expense of stability and mostly of the ideal of equal democratic right to participation in the public sphere.

Rigid separationism is also inconsistent with the democratic ideal of State neutrality. As discussed, this approach equates the privatization of religion with neutrality, privileging secular perspectives over religious arguments and implicitly imposing a certain conception of the good upon individuals. Far from being neutral, rigid separationism is then perceived by many believers as an ordering of life in accordance with the non-religious values of some in the society, at the expense of their spiritual values.[639] Rather than promoting «free-ranging pluralism» in order to «reconcile competing claims to ultimate authority»,[640] the CJEU appears then to be implicitly biased against religion. This is even more problematic when considering the European increasing religious diversity and the related demands of confessional groups that aim to take an active place in the public discourse. As Silvestri notes:

> «At a time when Europe is short of big ideal and existing conflict and demographic transformations indicate we need to pay more, not less, attention to freedom of religion and of expression, it does not help that such a prominent international court is unwilling to be bolder in dealing with these fundamental freedoms and the idea of tolerance».[641]

In conclusion, the analysis of the CJEU case-law on religious discrimination in the workplace indicates that, by ignoring today's post-secular realm, the traditional

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[638] *See also* M. YATES, *Rawls and Habermas on Religion in the Public Sphere*, in *Philosophy Social Criticism*, 33, 2007, p. 883.
[639] *See* R. AHDAR, *Is Secularism Neutral?*, in *Ratio Juris*, 26, 2013, p. 416.
[640] B. BERGER, *"The Limits of Belief": Freedom of Religion, Secularism, and the Liberal State*, in *Canadian Journal of Law and Society*, 17, 2002, p. 49.
[641] S. SILVESTRI, *Freedom of religion under threat across Europe after EU Court rules employers can ban headscarves*, in *The Conversation*, 16 March 2017, available at http://theconversation.com/freedom-of-religion-under-threat-across-europe-after-eu-court-rules-employers-can-ban-headscarves-74583 (last accessed on 31 December 2021).

separationist model retained by the EU judges is unable to foster mutual understanding and to create an appropriate framework of coexistence for the whole society, especially in light of the growing ethno-religious pluralism and multiculturalism in the European continent.

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