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A FAIR BALANCE BETWEEN THE RIGHT TO RELIGIOUS MANIFESTATION AND THE FREEDOM TO CONDUCT A BUSINESS IN THE CASES OF HEADSCARVES BAN IN PRIVATE EMPLOYMENT? *

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Research Article

Abstract

The contribution questions the preliminary rulings given by the CJEU in Achbita and Wabe and Müller Cases that define the corporate neutrality policies banning wearing of religious clothes in private employment as indirect discrimination. The contribution argues that such corporate neutrality policies, though applied to all employees in the same way, constitute in fact direct discrimination for the devout followers of orthopraxis religions, such as Islam, Judaism and Sikhism, provide preference to employer's freedom to conduct a business and economic interests over the employee's right to religious manifestation and social rights, put the right to religious manifestation at the bottom of the hierarchy of grounds of discrimination and cause to economic and social exclusion of such minority employees, notwithstanding the European values.

***Keywords**:Corporate Neutrality Policy; Right to Religious Manifestation; Freedom to Conduct a Business; Direct or Indirect Discrimination; Social and Economic Exclusion.*

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Özel İşyerinde Başörtüsü Yasaklarına İlişkin Davalarda Dini İfade Hürriyeti ile Teşebbüs Hürriyeti Arasında Adil Bir Denge Söz Konusu mu?

Öz

Makale bazı kadın işçilerin özel işyerlerinden işyeri tarafsızlık politikası kuralları gereği başörtüsü takmaları gerekçesiyle çıkartılması neticesinde Avrupa Birliği Adalet Divanı'nın Achbita, Wabe ve Müller gibi kararları üzerinden söz konusu işyeri tarafsızlık politikasının dolaylı ayrımcılık oluşturduğuna dair içtihadını eleştirel olarak analiz etmektedir. Makale esasen sözkonusu özel işyeri politikası çerçevesinde konulan kuralların, yeknesak uygulansa bile, İslam, Yahudilik ve Sihizm gibi bazı orthopraxis din mensupları açısından doğrudan ayrımcılık teşkil ettiğini, işverenin teşebbüs hürriyeti ile economic çıkarlarını, işçilerin dini ifade hürriyeti ve sosyal haklarına tercih ettiğini, ayrımcılık kategorisi içerisinde din ifade özgürlüğünü en tabanda korunmaya layık bir ayrımcılık kategorisine sürüklediğini, AB değerlerine aykırılık teşkil edecek şekilde azınlık din mensuplarının ekonomik ve sosyal dışlanmasına yol açtığını savunmaktadır.

***Anahtar Kelimeler**: İşyeri Tarafsızlık Politikası; Din ve İnanç İfade Hürriyeti; Teşebbüs Hürriyeti; Doğrudan veya Dolaylı Ayrımcılık; Sosyal ve Ekonomik Dışlanmışlık.*

"Laws, policies, and practices prohibiting religious dress are targeted manifestations of Islamophobia that seek to exclude Muslim women from public life or render them invisible. Discrimination masquerading as 'neutrality' is the veil that actually needs to be lifted"

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Introduction

Discrimination in the workplace and while seeking employment has been a major concern in Europe for religious people, who wear religious clothes and apparels such as headscarf (Muslim), kippa (Jewish) or turban (Sikh).[1] It has evolved into legal disputes first in the European Court of Human Rights

[1] "Second European Union Minorities and Discrimination Survey: Muslims – Selected Finding*", European Union Agency for Fundamental Rights*, 2017, last visited the 12th of July, 2022, https://bit.ly/2KBABgY; Šeta Đermana, "Forgotten Women: The Impact of Islamophobia on Muslim Women", *European Network Against Racism*, 2016, last visited the 12th of July 2022, https://bit.ly/3p1PQyH.

(the ECtHR) and then in the Court of Justice of the European Union (the CJEU).

For the first time, the CJEU has delivered preliminary rulings on religious discrimination under Directive 2000/78/EC[2] (the Employment Equality Directive) in the *Achbita*[3] and *Bougnaoui*[4] cases. The issue of bans of religious clothes in the private workplace has been addressed in these cases. Despite extensive practice by the ECtHR on the matter,[5] the CJEU first encountered such a concern in 2017. These rulings have received heavy criticism, since the CJEU not only revealed especially in the former case that banning religious clothes under a corporate neutrality policy with a uniform regulation was found as an indirect discrimination, but also gave the possibility for any private employer to restrict or totally ban the wearing of religious clothes at its private workplace within the context of its corporate neutrality policy on the basis of its broadly interpreted freedom to conduct a business (Article 16 of the Charter of Fundamental Rights of the European Union). A neutral image of the company has therefore been confirmed as a legitimate aim, which may justify the indirect discrimination on religious grounds, insofar as the measures taken for this aim are proportional and necessary.[6] A clash of two fundamental rights, a freedom of employee to manifest his/her religious beliefs at workplace and a freedom of employer to conduct a business, has accordingly occurred, albeit with a result in favour of the latter. Although the CJEU in *Achbita* has tried to strike a balance between those rights/freedoms, it has failed because of the fact that the economic interests of the employer have been emphasised more than the rights of the employee.

In the succeeding *Wabe* and *Müller* case,[7] the CJEU attempted to enhance the situation of employees by allowing employers to prohibit employees from wearing religious and other symbols only under particular conditions. It may

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2 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16–22.

3 Case C-157/15, *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding* v *G4S Secure Solutions NV*, EU:C:2017:203.

4 Case C-188/15, *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH)* v *Micropole SA* EU:C:2017:204.

5 For instance ECtHR *Eweida and Others* v *the United Kingdom* Appl. Nos. 48420/10, 59842/10, 51671/10 and 36516/10, 15. 01. 2013; ECtHR, *Dahlab* v *Switzerland* App. No. 42393/98, 15.02.2001.

6 *Achbita*, note 3, para. 35.

7 Joined Cases C-804/18 and C-341/19, *IX v WABE eV* and *MH Müller Handels GmbH* v *MJ* EU:C:2021:594.

be considered an improvement for the interests of employees, though an insufficient one, over the judgment in *Achbita* with two certain reservations. First, the CJEU confirmed its *Achbita* ruling, second, it has also allowed employers to a certain extent to cater to the prejudicial wishes of their customers, as they have a significant impact on the employer's freedom to conduct a business, the fact of which worsened the employees' situation than the *Bougnaoui* judgment. This judgment briefly prioritised again the economic benefits of the employer over employees' rights/interests.

This contribution will discuss some issues arising from these judgments: Has the CJEU failed to reach a fair balance between those rights/freedoms; could have been a fair (or fairer) balance reached between these rights/freedoms; does the division between *forum internum* and *forum externum* in fact fit to orthopraxis religions; does a corporate neutrality policy indeed signify a neutrality towards employees who are the followers of orthopraxis religions and thus constitute an indirect discrimination?

I. Freedom of Religion - The Question of *Forum Internum* and *Forum Externum*

In *Achbita*, *Bougnaoui*, *Wabe* and *Müller* cases, the main issue was the dismissal from private undertakings of Muslim women employees because of their insistence on wearing Islamic headscarves at private workplace. The reasoning of dismissal was the corporate neutrality policy towards the clients of the employers. These cases have raised significant questions, such as the place of religious attire in the freedom of religion and its impact on determining the form and justification of discrimination.

Both the European Convention of Human Rights (the ECHR) and the Charter of Fundamental Rights of the European Union (the Charter) provide the right to religious freedom and the Employment Equality Directive also guarantees protection from religious discrimination at work. Under Article 9 of the ECHR, everyone has the right to freedom of thought, conscience and religion including 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. According to Article 10(1) of the Charter, everyone has the right to freedom of thought, conscience and religion, including 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.

The Charter and the Directive do not specify the scope of religious freedom, nor do they define the terms "religion" and "belief". The CJEU, on the other hand, stated that it has the same meaning as the right enshrined in Article 9 of the ECHR, since the EU respects the fundamental rights guaranteed by the ECHR, as the sources arising from the constitutional traditions and international obligations common to the Member States as confirmed in Article 6 of the TEU (Treaty on European Union) and reaffirmed in the preamble of the Charter.[8] The ECtHR already noted that a scope of freedom of religion should be interpreted broadly, as including both conceptions of *forum internum*, which implies having a belief, and *forum externum*, which is the manifestation of religious faith outside.[9] Having taken the ECtHR jurisprudence into consideration as an inspirational resource, Advocates General (AG) and the CJEU in *Achbita* and *Bougnaoui* rulings have agreed with this interpretation and included wearing religious clothes into the concept of *forum externum*, which, in contrast to the *forum internum*, might be subject to limitations.[10] In other words, whereas freedom of religion, as the matter of *forum internum*, is an absolute right, freedom to religious manifestation, as the matter of *forum externum*, is a qualified right subject to limitations justified.

According to Article 9(2) of the Convention, freedom of religious manifestation shall be subject only to such limitations that are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. Similar provision can be found in Article 52(1) of the Charter as well, according to which any restriction on the exercise of the rights and freedoms recognised by this Charter must be provided for by law, and restrictions may be imposed only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights of others. The latter is closely related with the concept of legitimate aim, accepted by the CJEU as a ground of justification of indirect discrimination.

Placing wearing of religious clothing, such as headscarf, turban and kippa into a specific dimension of freedom of religion, whether *forum internum* or *forum externum*, is significant to consider it within the context of a right

[8] *Achbita*, note 3, para. 27.
[9] *Eweida*, note 5, para 80.
[10] *Achbita*, note 3, para. 28; *Bougnaoui*, note 4, para. 30.

subject to limitations. However, such a consideration might be problematic and challenging, since this canonic division might be appropriate for orthodoxic religions such as Christianity, but might not be so for orthopraxis faiths such as Islam, Judaism and Sikhism. That is because, orthopraxy considers religion as a way of life and thus where the correct religious practice shown externally via particular behaviours or rituals is regarded vital and compulsory. Orthopraxis religions therefore place higher emphasis on norms of conduct pertaining to clothes, diet and prayers than orthodoxy religions. In Christianity, religion is founded on what an individual thinks rather than what he or she does. Precisely it concentrates on religion as a belief system and clothing rules or prayer routines are not regarded as prominent or evident in religious observance.[11] As a result, it became easier to accommodate secularism within Christianity and to put restrictions on the outer expression of religious beliefs, which are considered not affecting their followers. A religion based on orthopraxy, on the other hand, does not distinguish between action and thought the fact of which makes in their understanding the distinction between *forum internum* and *forum externum* irrelevant.

Another key concern is that religiously oriented apparel is frequently referred to as religious symbols in the academic literature.[12] The term symbol indicates its non-obligatory nature, which also questions why limits on them might be considered easily justified than other discriminatory scenarios, such as the cases of disability or race discrimination, creating the possibility of hierarchy in the grounds of non-discrimination. The same kind of conception might be noticed in the Opinion of AG Kokott in the *Achbita* case, where she has taken a different stance on religious discrimination than AG Sharpston in the *Bougnaoui* case. According to AG Kokott, the employee is supposed to regulate his/her religious practice in the workplace and religion cannot be equated to disability or race, both of which are immutable.[13] In this way, she also has distinguished the discrimination ground of religion from other

[11] Lucy Vickers, "Religious Freedom: Expressing Religion, Attire, and Public Spaces", *Journal of Law and Policy* 22, Iss. 2 (2014): 599.

[12] Sarah Havercort- Speekenbrink, *European Non-Discrimination Law – A Comparison of EU law and the ECHR in the Field of NonDiscrimination and Freedom of Religion in Public Employment with an Emphasis on the Islamic Headscarf Issue* (Cambridge: Intersentia, 2012), 76; Peter Petkoff "Religious symbols between forum internum and forum externum" in *Law and Religion in the 21st century: Relations between States and Religious Communities*, ed. Rinaldo Cristofori, Silvio Ferrari (London: Routledge, 2010), 297 - 304.

[13] Opinion of Advocate General Kokott, Case C-157/15 *Achbita* EU:C:2016:382, para. 116.

discrimination grounds. In the *Bougnaoui* case, however, AG Sharpston opposed this approach, stating that different standards of protection should not be applied to various equality grounds. That is because, religion, according to her, is a component of a person's identity and accompanies him/her everywhere and wearing specific garments by reason of religious views should be regarded part of the person himself.[14] This viewpoint seems quite similar to orthopraxis ideas. However, the CJEU has not entered into debates on the question by merely uttering that wearing of religious clothes, as a part of manifestation of religious beliefs might be restricted in favour of employer's freedom to conduct a business.[15]

II. Freedom to Conduct A Business – On the Other End of the Scale

The CJEU's position that the employer's freedom to conduct a business outweighs the employee's religious freedom might be observed via the justification of restrictions on religious freedom in the aforementioned landmark rulings. The attempt to reach the fair balance between two competing fundamental rights/freedoms has been challenging, since one of the rights/freedoms has to prevail. However, depending on the nature of the rights/freedoms mentioned, the question remains whether the freedom to conduct a business is indeed more significant than religious freedom.

The freedom to conduct a business has been put against the religious freedom on the other end of the scales of rights protection. The freedom to conduct a business on the one hand constitutes a general principle of EU law,[16] on the other hand is specifically recognised in Article 16 of the Charter. The latter reference in the Charter is exceptional, since neither the ECHR nor the other international agreements list the freedom to conduct a business as a fundamental right. Although, it has elements of the right to property, stated in Article 1 of the Protocol No. 1 to the ECHR and is acknowledged by the ECtHR as deriving from the freedom of commercial expression, the freedom to conduct a business may not have as much weight as other fundamental rights, such as freedom of religion, which are directly enshrined in ECHR or other international instruments on human rights protection.

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[14] Opinion of Advocate General Sharpston, Case C-188/15 *Bougnaou*i EU:C:2016:553, para. 118.

[15] *Achbita*, note 3, para. 38; Joined Cases C-804/18 and C-341/19 *Wabe and Müller*, note 7, paras. 37, 63.

[16] Case C-4/73 *Nold* EU:C:1974:51, paras. 13-14; Case C-1/11 *Interseroh Scrap and Metals Trading* EU:C:2012:194, para. 43.

An idea of running a business itself comprises any valid type of profitmaking activity carried out by one or more persons "in company" meaning, the right involves all stages of such activities from establishing a company to operating one, through insolvency or terminating a business. Furthermore, according to the CJEU, the freedom to conduct a business contains as its aspects the freedom to exercise an economic or commercial activity, free competition and the freedom of contract.[17] In cross-border instances, the freedom to run a business has frequently been invoked with the freedom to establish a business, since the company to be set up first in order to function or then to establish branches and subsidiaries in the other Member States, the CJEU used to consider them as inextricably linked.[18] However, this does not imply that those rights are identical, as evidenced by the Charter, which distinguishes them. In contrast to the freedom to conduct a business, the freedom of establishment requires a cross-border element to be asserted, namely the freedom to move within the EU with the intention of establishing a business in another Member State. In the Treaty on the Functioning of the European Union (the TFEU) this freedom is also linked to and therefore is regarded as part of the free movement of persons, services and capital, wherein the limitations could be imposed just in particular cases, such as security, public interest, health.

Like the right to religious manifestation, this freedom is also a qualified right and must be considered in relation to its social function and is subject to certain limits justified by the objectives of general interest insofar as those restrictions do not form disproportionate and intolerable interference impairing the very substance or essence of the right guaranteed.[19] In other words, despite the EU is predicated on a free market economy, implying that businesses are allowed to conduct their activities as they see appropriate,[20] and the main aim is to safeguard the right of each person in the EU to pursue a business without being subject to either discrimination or disproportionate restrictions, this freedom, however, is not absolute, can be limited and must be balanced against other Charter rights.

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[17] Case C-283/11 *Sky Österreich* EU:C:2013:28, para. 42.

[18] Opinion of the Advocate General Trstenjak, Case C-316/09 *MSD Sharp & Dohme GmbH* v *Merckle GmbH* EU:C:2010:712, para. 34.

[19] Case C-44/94 *R* v *Minister of Agriculture, Fisheries and Food, ex parte Fishermen's Organisations and Others* EU:C:1995:325, para. 55; Case C-729/18 P *VTB Bank* v *Council* EU:C:2020:499, para. 80.

[20] Opinion of Advocate General Wahl, Case C-201/15 *AGET Iraklis* EU:C:2016:429, para 1.

The (apparent) weakness of this freedom could be seen from the wording of Article 16 of the Charter, as there is no clarity whether the freedom to conduct a business, in its essence, is a right or a principle at appearance. On that ground, some legal scholars regard it as a principle[21] in the sense of Article 52(5) of the Charter, some as more akin to right[22] or as an enforceable (quasi-)subjective individual right.[23] In the same line, for Article 16 of the Charter certain recent judgments are argued by some legal scholars establishing not only a potential for a subjective individual right by in fact and de jure elevating it at least to a private obligation or quasi-subjective right to be enforced between private parties, but also a form of quasi-horizontal effect.[24]

Nonetheless, freedom to conduct a business signifies an escalation of significance and potential in certain European case law. Having ignored the social function of the freedom to conduct a business and the respect of the essence of social rights, some cases[25] given by the CJEU on that freedom constitute the sign of elevated right/freedom, even as a horizontally directly effective right,[26] and carry it to almost an absolute right protected no matter what despite the wording of Article 16 of the Charter. As a result, economic freedoms, in particular employers' freedoms/rights are fortified by the Charter and by certain European case law to the detriment of social rights of employees.[27] This case law therefore enables employers a broad authority over employees in very profound ways.[28]

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[21] Klaus Lörcher, "Interpretation and Minimum Level of Protection" in *The Charter of Fundamental Rights of the European Union and the Employment Relation*, ed. Filip Dorssemont, Klaus Lörcher, Stefan Clauwaert and Mélanie Schmitt (Oxford: Hart Publishing, 2019), 149; Bruno Veneziani, "Article 16 – Freedom to Conduct a Business" in *The Charter of Fundamental Rights of the European Union and the Employment Relation*, ed. Filip Dorssemont, Klaus Lörcher, Stefan Clauwaert and Mélanie Schmitt (Oxford: Hart Publishing, 2019), 364.

[22] Opinion of AG Szpunar, Case C-261/20 *Thelen Technopark Berlin* EU:C:2021:620, paras. 80 and 89.

[23] Peter Oliver, "Companies and Their Fundamental Rights: A Comparative Perspective", *64 International and Comparative Law Quarterly* (2015): 661; Michele Everson and Rui Correia Gonçalves, "Article 16 Freedom to Conduct a Business" in *The EU Charter of Fundamental Rights: A Commentary*, ed. Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (Oxford: Hart Publishing, 2021), 477 and 480.

[24] Everson, "Article 16", note 23.

[25] Case C-426/11 *Alemo-Herron and Others* EU:C:2013:521; Case C-201/15 *AGET Iraklis* EU:C:2016:972 ; Achbita, note 3.

[26] Everson, "Article 16", note 23, 477.

[27] Sophie Robin-Olivier, "Fundamental Rights as a New Frame: Displacing the Acquis", *European Constitutional Law Review* 14, Iss. 1 (2018): 96.

[28] Eduardo Gill-Pedro, "Whose Freedom is it Anyway? The Fundamental Rights of Companies in EU Law", *European Constitutional Law Review* 18, Iss. 2 (2022): 183.

III. Direct or Indirect Discrimination

The definition of concepts of direct and indirect discrimination with their differentiation is one of the most difficult issues in human rights law. The distinction between direct and indirect discrimination on the basis of religion is critical for both employers and employees, as the form of discrimination affects the justification of it. Whereas direct discrimination is subject to very narrow exemptions, indirect discrimination could be justified on various grounds. Nevertheless, there is still much uncertainty concerning the concepts, since national courts continue to seek guidance from the CJEU on the subject. As occurred in the criticised case law, for instance prioritising the interests of employer may also affect the (improper) choice of type of discrimination, which may have a detrimental impact on the protection of employees' rights.

According to Directive 2000/78/EC, whereas the direct discrimination occurs when one individual is treated less favourably than another on the basis of one of the protected characteristics, indirect discrimination refers to "an apparently neutral provision, criterion or practice" which puts individuals of certain protected characteristics at a particular disadvantage compared with other persons".[29] The presence of a negative effect of an apparently neutral provision, criterion or practice and objective justification for such a measure are required to claim indirect discrimination.[30] Direct discrimination based on religion or belief, in contrast to indirect discrimination, which has an open justification regime,[31] cannot be justified unless the components for a "genuine occupational requirement" and the legitimacy of the aim with the proportionality of the requirement are achieved.[32] In other words, it is far more difficult to justify direct discrimination.

The controversial question is whether the corporate neutrality policy prohibiting all employees to wear religious, philosophical and political signs at workplace constitutes indeed a direct or indirect discrimination. Because of the justifiable scope of discrimination, the definition of the situation as either direct or indirect discrimination impacts on whether the employer's or the

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[29] Article 2 of Council Directive 2000/78/EC.

[30] Dagmar Schiek, "Indirect Discrimination" in *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, ed. Dagmar Schiek, Lisa Waddington, and Mark Bell, (Oxford : Hart Publishing, 2007), 372.

[31] For example, the measure can be justified by showing that there is a legitimate goal and the means of achieving this goal are appropriate and necessary.

[32] Article 2.2 (b)(i) of Council Directive 2000/78/EC.

employee's rights/freedoms prevail, as well as, the religious employee's opportunities to be included or to remain in the labour market.

In the *Achbita* case, the CJEU followed the AG Kokott opinion to some extent, finding that the corporate neutrality policy did not represent direct discrimination because the policy was applied to all workers, treating them equally. An internal rule prohibiting the wearing of any visible religious, political or philosophical signs has been interpreted as not directly discriminating on the basis of religion or belief, but rather as creating disadvantages for religious employees wearing headscarves, implying indirect discrimination, which may be justified by the measures' legitimate aim provided that proportionality and necessity requirements are met.[33] In that respect, persuading the company's neutral image has been acknowledged as a legitimate aim, however justifying it under certain conditions, such as consistent and systematic application, is limited to employees, who come into contact with customers.[34]

In *Bougnaoui* case, having considered the dismissal of a Muslim design engineer for wearing a headscarf due to the customer's desire not to receive service from her, AG Sharpston delivered a different approach. AG Sharpston determined that there was direct discrimination on religion. The same conclusion was attained by the CJEU in this case, since the Court held that the wish of a customer not to be served by someone wearing a headscarf was a direct discrimination and cannot form a genuine and determining occupational requirement under Article 4(1) of Directive 2000/78/EC, which is the only justification ground for direct discrimination. The client's wish is not a genuine occupational requirement, because it is not objectively dictated by the nature of the occupational activities concerned or by the context in which they are carried out, but is just a subjective idea.[35]

More disagreement over the type of discrimination may be observed in the joint *Wabe* and *Müller* cases, since the preliminary findings of the Court were different, despite the fact that the same matter was involved. In *Wabe* case, the CJEU has followed the approach of the *Achbita* judgment, stating that the neutrality rule in *Wabe* does not constitute direct discrimination on the ground of religion or belief under Article 2(2)(a) of Directive 2000/78/EC, since the ban covers any manifestation of such beliefs without distinction and

[33] *Achbita*, note 3, paras. 34-35.
[34] Ibid, para. 40.
[35] *Bougnaoui*, note 4, para. 40.

treats all workers of the undertaking in the same way. According to the Court, the rule is not linked to religion or belief. It was explicitly acknowledged by the CJEU that this kind of neutrality policy however can cause some disadvantages for those employees, who wear religious clothes.[36]

In contrast to *Wabe*, the CJEU found direct discrimination in the *Müller* case, since the company's neutrality policy merely prohibits the wearing of conspicuous, large-scale signs, implying that some employees will be regarded less favourably than others based on their religion or belief.[37] This judgment seems to be given under the influence of *Dahlab* v *Switzerland* case, in which headscarf is regarded by the ECtHR as a powerful external religious symbol of allegiance imposing a conspicuous sign of identity.[38] The CJEU also mentions the European Commission's assessment that the rule in this case is likely to have a higher impact on those with religious, philosophical or non-denominational convictions that demand the wearing of a large-sized symbol, such as a head covering.[39] This implies that the CJEU and the ECtHR both regard an Islamic headscarf as a visible and large-scale symbol of the wearer's religion or belief. Furthermore, AG Rantos has deduced that Müller's neutrality constituted indirect discrimination, yet he also noted that an Islamic headscarf is not a small- scale religious sign.[40] The same view had already been expressed by AG Kokott, in her Opinion in *Achbita* case, by stating that a "small and discreetly worn religious symbol – in the form of an earring, necklace or pin, for example – is more likely to be acceptable than a noticeable head covering such as a hat, turban or headscarf".[41]

The specific definition of "discreet" is also debatable, since, despite being frequently associated with the notion "small", this is not always the case. Depending on what is displayed on them, even small symbols might be quite indiscreet.[42] Similarly, pieces of clothing such as a headscarf or turban may

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[36] *Wabe and Müller*, note 7, para. 53.

[37] Ibid., para. 72.

[38] "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.". See ECtHR *Dahlab* note 5.

[39] *Wabe and Müller*, note 7, para. 72.

[40] Opinion of Advocate General Rantos, Joined Cases C-804/18 and C-341/19, *IX v WABE eV* and *MH Müller Handels GmbH v MJ* EU:C:2021:144, para. 76.

[41] Opinion of Advocate General Kokott, *Achbita*, note 13, para. 118.

[42] *Boychuck v Symons* [1977] IRLR 395 - an employee was dismissed for wearing the (then) very indiscreet slogan 'Lesbians Ignite' on a small lapel badge; *Wilson v US West*

be classified as "discreet" too despite their size if they are simple or correspond to an organisational uniform.[43] In her opinion, AG Sharpston explicitly separated the full-face veil from the headscarf. Considering the inconsistency of face covering and face-to-face communication social norms, it would be challenging to claim that the full face veil can be "discreet" or "inconspicuous".[44] According to AG Sharpston, the connotation of the phrase "discreet" as "small" is irrelevant to the wearer, as "discreet" appears to indicate some self-control that the religious person may or may not apply, however, because of restrictions, he/she may not feel that he/she has such a choice at all. This is especially the case for followers of specific religions, such as Islam, Judaism or Sikhism, where many feel obligated to wear clothing that others may deem less discreet than other religious symbols. [45] It could imply that the seemingly neutral apparel rule may create more difficulties for some religious employees than others, which raises the question of discrimination between the religions.[46]

Considering religious headscarves as larger-scale visible external symbols has two-sided effect towards the protection of rights of religious employees. From one side, it helps to evaluate neutrality policies as direct discrimination, since the discriminatory impact of these restrictions would be more seen on employees wearing large religious clothes than small, concealable symbols. On the other hand, it has negative effect, because the ECtHR accepted in the *Dahlab* case that headscarves were not just conspicuous external religious symbols, but also had some kind of proselytising effect.[47] While the forms of proselytism, intentionally targeting vulnerable individuals, is illegitimate, the action itself, when done in good faith, should not be considered like that.[48] It does not imply that there should be no limits, but it is preferable to question the employer's legitimate goal in

Communications, 58 F.3d 1337 (8th Cir. 1995) - Roman Catholic challenged her employer's prohibition on displaying a graphic depiction of an aborted fetus on a little lapel emblem.

43 Andrew Hambler, "Neutrality and Workplace Restrictions on Headscarves and Religious Dress: Lessons from Achbita and Bougnaoui", *Industrial Law Journal 47*, Iss.1 (2018)(1), 149–164.

44 Opinion of Advocate General Sharpston, *Bougnaoui*, note 14, para. 130.

45 Hambler "*Neutrality and Workplace Restrictions"*, note 43.

46 Opinion of Advocate General Kokott, *Achbita*, note 13, para 49.

47 *Dahlab*, note 5. However, the Court held that the effect was on young children, which cannot be same on the mature workers of the company.

48 ECtHR *Kokkinakis v Greece*, App no 14307/88, judgment of 25 May 1993, para 48.

applying restrictions rather than denying the religious manifestation in general.

Moreover, the approach of considering headscarves as proselytising religious symbols contradicts another ECtHR judgment, *Lautsi* in which the exhibition of extremely obvious religious symbols, i.e. crucifixes, in all state-school classrooms was not recognised as having an indoctrinating impact on young minds, and the Court by applying double standard allowed these religious symbols.[49] Such a reasoning is inconsistent and prompts the issue of why headscarves are acknowledged as having a proselytising impact yet whereas crucifixes are not. This approach provides the impression of a discriminatory attitude towards Islamic headwear in comparison to Christian religious symbols. Besides, there is somehow a contradiction, since whereas the situation where the employer fully discriminates employees who are followers of the orthopraxis religions from other employees will not be defined as direct discrimination, the situation where the employer discriminates partially the employees who wear conspicuous religious clothes will be defined as such.

Referring to the *Wabe* and *Müller* cases, observed inconsistency may be noticed through the evaluation of the effect of the company's neutral rule on the employees who wear headscarves as a part of their religious convictions. Namely, it is questionable if the outcome that there is no direct discrimination in *Wabe* case is not contradictory to *Müller* case. In *Wabe* the corporate neutrality rule may also have greater impact on people with beliefs, requiring to wear certain clothes than on those who do not have a religion or those whose religion does not ask to wear particular attire. This shows that the CJEU evaluating the possibility of direct or indirect discrimination in the mentioned cases has chosen limited number of comparators. However according to the Sharpston's shadow opinion in *Wabe* and *Müller* cases, a total ban on all religious signs discriminate against all religious groups that believe that they are obligated to wear mandatory religious attire in comparison to members of faiths where particular apparel is not compulsory and employees who are atheist or agnostic.[50] Furthermore, Sharpston claims that a partial prohibition (as in the *Müller* case) results in a more specific discrimination: intra-group discrimination within the "religious" group, because it does not impact

[49] ECtHR *Lautsi and Others v. Italy*, no. 30814/06, 18 March 2011, para. 66.

[50] Elanor Sharpston, "Shadow Opinion of former Advocate-General Sharpston: headscarves at work (Cases C-804/18 and C-341/19)", para. 122. Last visited: the 7th of July, 2022, http://eulawanalysis.blogspot.com/2021/03/shadow-opinion-of-former-advocate.html.

individuals whose obligatory religious attire is not judged "large" or "prominent", but constitutes discrimination against religiously devout members who believe themselves religiously obligated to wear larger or more visible mandatory religious apparel.[51] Accordingly, it could be concluded with van den Brink's words that "[i]f the CJEU is of the view that a policy amounts to direct discrimination if it is liable to have a greater effect on some religious people, one has to wonder why it does not classify all neutrality policies as directly discriminatory".[52]

According to the CJEU, a corporate neutrality policy covering a ban on wearing of any visible signs of political, philosophical or religious beliefs without distinction does not introduce a differential treatment on the ground of religion or belief and must be considered treating all workers of the undertaking equally and forming indirect discrimination.[53] Even though there are some scholars supporting this approach with the understanding that neutrality rules introducing a generally applicable dress code does not constitute direct discrimination,[54] we are in the group of the scholars, who consider a corporate neutrality policy as directly discriminatory provided that the comparator is correctly chosen and this policy having the effect of causing the employee concerned under comparison as a less favourable treatment on the ground of religion.[55] Such employees should have been compared to employees who have not the same characteristic, who do not manifest any religion or belief or whose religion, belief or personal understanding does not imply the use of any signs or symbols instead of the employees who have a different religion requiring an outward religious manifestation.[56]

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[51] Ibid. para. 45.

[52] Martijn van den Brink, "Pride or Prejudice?: The CJEU Judgment in IX v Wabe and MH Müller Handels GmbH", *Verfassungsblog*, 20 July 2021, last visited: the 7th of August, 2022, https://verfassungsblog.de/pride-or-prejudice/.

[53] *Achbita*, note 3, paras. 30-32.

[54] Lucy Vickers, "Direct discrimination and indirect discrimination: Headscarves and the CJEU ", *OxHRH Blog*, 15 March 2017, last visited: the 7th of September, 2022, http://ohrh.law.ox.ac.uk/direct-discrimination-and-indirect-discrimination-headscarves-and-the-cjeu.

[55] Emmanuelle Bribosia et Isabelle Rorive, "Affaires *Achbita* et *Bougnaoui*: entre neutralité et préjugés", Revue trimestrielle des droits de l'homme (2017): 1017.

[56] Opinion of AG Sharpston, *Bougnaoui*, note 14, para. 88; Amnesty International and European Network against Racism (ENAR), "Wearing the Headscarf in the Workplace Observations on Discrimination Based on Religion in the *Achbita* and *Bougnaoui* Cases", October 2016, last visited: the 12th of September, 2022, https://www.amnesty.org/download/Documents/EUR0150772016ENGLISH.PDF; Saila Ouald-Chaib and Valeska David, "European Court of Justice keeps the door to religious

Orthopraxis religions such as Islam, Judaism or Sikhism do not fit into the strict separation of the Canonic *forum internum* and *forum externum*[57] and for devout adherents of orthopraxis religions donning of religious symbols or clothes in public suggests part and parcel of belief, identity and social life, as an integral part of one's very being to be accompanied everywhere not to be discarded during working hours and even as acts of worship, which cannot be confined to the realm of *forum externum*.[58] In that regard, Weiler correctly separates the situation of devout followers who observe a faith or religion with the purpose of complying with divinely ordained legal norms from the cases of employees who wish to manifest a faith or religious identity.[59] That is why a corporate neutrality policy banning signs of political, philosophical or religious beliefs may constitute an unjust burden on devout observants of orthopraxis religions, whereas non-believers or followers of religions or beliefs which do not require such a manifestation cannot be bothered by such a policy, and a less favourable treatment for the former employees, which amounts to direct discrimination. The employees in *Achbita* and *Wabe* cases were dismissed from the private employment because of their insistence on wearing headscarves. The approach of the separation between *forum internum* and *forum externum* thus not only privileges a certain secular and western way of life and religion at the expense of others and marginalises certain minority

discrimination in the private workplace opened. The European Court of Human Rights could close it", 27 March 2017, last visited: the 12th of September, 2022, 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/; Stéphanie Hennette-Vauchez, "Equality and the Market: the unhappy fate of religious discrimination in Europe", *European Constitutional Law Review*13, Iss.4 (2017): 744; Elke Cloots, "Safe harbour or open sea for corporate headscarf bans? Achbita and Bougnaoui", *Common Market Law Review* 55, Iss.2 (2018): 589; Eva Brems and Jogchum Vrielink, "Floors or Ceilings: European Supranational Courts and Their Authority in Human Rights Matters" in *Human Rights with a Human Touch. Liber Amicorum Paul Lemmen* , ed. K Lemmens et al. (Chicago: Intersentia, 2019), 271-302.

[57] Natalie Alkiviadou, "Freedom of religion: lifting the veils of power and prejudice", *The International Journal of Human Rights* 24, Iss.5 (2020): 509.

[58] Opinion of AG Sharpston, *Bougnaoui*, note 14 para. 118; Katayoun Alidadi, "Faith, Identity and Participation in the Workplace A Comparative Legal Study on the Role of Religion and Belief in Individual Labour Relations and Unemployment Benefits Litigation" (Ph.D Dissertation, Katholieke Universiteit Leuven, 2015): 150; Erik Baldwin et al, "The Burqa Ban: Legal Precursors for Denmark, American Experiences and Experiments, and Philosophical and Critical Examinations", *International Studies Journal* 15, no.1 (2018): 157.

[59] Joseph H.H Weiler, "Case Comment : Je Suis Achbita!" *European Journal of International Law* 28, Iss.4 (2017): 989.

religions with the consequence of social exclusion,[60] but also grants to undertakings a secular form of an authority or exception given either to organisations with a religious ethos in employment matters or to States in public employment.[61] That approach also in the end puts the level judicial protection with regard to discrimination on the ground of religion at the bottom in the hierarch of grounds of discrimination in practice. Such a conclusion forcefully causes to question in fact the neutrality of such a corporate neutrality policy.

IV. A Fair Balance of Rights/Freedoms through Proportionality?

Proportionality plays an important role in justification of discrimination. The restrictive measures taken by the employer shall go through the proportionality text. As previously stated, in the case of direct discrimination, justification is only possible if the restriction constitutes a genuine and determining occupational requirement, however proportionality also comes into play here as an obligation of that requirement insofar as the objective is legitimate and the requirement is proportionate.[62] In both circumstances, proportionality may be the instrument to strike a fair balance between the right to religious manifestation and the freedom to conduct a business.

The judgments in the *Achbita* and *Bougnaoui* cases have been heavily criticised, primarily because the CJEU failed to conduct a comprehensive, strict necessity and proportionality tests by leaving a number of issues unresolved.[63] The Court has not succeeded to strike a balance between the needs of the employer and the drawbacks of its corporate neutrality rule for an employee and his/her right to express religious beliefs, as stipulated by

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[60] Girogia Baldi, "Re-conceptualizing Equality in the Work Place: A Reading of the Latest CJEU's Opinions over the Practice of Veiling", 7(2) *Oxford Journal of Law and Religion* 7, Iss.2 (2018): 296.

[61] Matteo Corsalini, "Religious Freedom, Inc: Business, Religion and the Law in the Secular Economy", 9(1) *Oxford Journal of Law and Religion* 9, Iss.1 (2020): 28.

[62] *Bougnaoui*, note 4, para. 35.

[63] Lucy Vickers, "Achbita and Bougnaoui: One Step Forward and Two Steps Back for Religious Diversity in the Workplace", *European Labour Law Journal* 8, Iss. 3 (2017): 252; Titia Loenen, "In Search of an EU Approach to Headscarf Bans: Where to go After Achbita and Bougnaoui?', *Review of European Administrative Law* 10, no.2 (2017): 67; Eugenia Relano Pastor, "Religious Discrimination in the Workplace: Achbita and Bougnaoui" in *EU AntiDiscrimination Law Beyond Gender*, ed. Uladzislau Belavusau and Kristin Henrard (Oxford: Hart Publishing, 2018), 197; Erica Howard, "Islamic Head Scarves and the CJEU: Achbita and Bougnaoui", *Maastricht Journal of European and Comparative Law* 24, Iss. 3 (2017): 348.

Article 10 of the Charter. The fundamental difficulty generated by the inadequate proportionality test was the recognition of a private enterprise's neutrality policy as a valid goal for justifying limits on employees' freedom of religion. According to the CJEU, neutrality policies can be justified if they are enforced genuinely, consistently, and systematically and are confined to employees in customer-facing positions.[64] The restrictions to employees who face the clients seem to be predicated on the assumption that when confronted with an employee wearing a political, philosophical or religious symbol customers would relate the beliefs represented via these symbols to the company (employer).[65] Nonetheless, the CJEU has no proof that this occurred, and it has not even requested any such evidence.[66] Placing religious staff in the back office might be interpreted as an attempt to accommodate them, however it may have a detrimental impact on their careers. Staying in back office does not provide opportunities for advancement to higher-level positions. It is another form of social exclusion within the area of work. If employees from other vulnerable groups were placed in the same situation, it would undoubtedly be rejected.[67] According to Vickers, a big group of employees are negatively affected by the ban on religious clothes and the neutrality policy of a private employer does not ensure equality for minorities, since it restricts not only employment opportunities but also inclusion, which is required for religious minorities to be visible.[68]

In some cases, the prohibition on wearing religious clothing at work as part of a neutrality policy may be viewed as a threat to the core of religious freedom. In the case of orthopraxis faiths, it might represent a violation of Article 52(1) of the Charter, because practicing religious freedom must be demonstrated outward by clothing or certain rituals, otherwise it would not be deemed a religious right for the devout followers of these faiths/religions at all. The essence of the right is the minimum essential or absolute core of a right that cannot be reduced, restricted or tampered with, otherwise, a fundamental right loses its worth for the right holders.[69] Consequently, a

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[64] *Achbita*, note 3, paras. 40, 42.

[65] Erica Howard, "Headscarves return to the CJEU: Unfinished business", *Maastricht Journal of European and Comparative Law* 27, Iss.1 (2020): 10.

[66] Schona Jolly, "Religious discrimination in the workplace: the European Court of Justice confronts a challenge", *European Human Rights Law Review* 22, Iss. 3 (2017): 308.

[67] Mark Bell, "Leaving Religion at the Door? The European Court of Justice and Religious Symbols in the Workplace", *Human Rights Law Review* 17, (2017): 796.

[68] Vickers, "*Achbita* and *Bougnaoui*", note 63, 252.

[69] Maja Brkan, "The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to its Core", *European Constitutional Law Review* 14, Iss. 2 (2018): 333.

violation of the essence may lead to the interference with human dignity, which is an obvious part of the right to non-discrimination (Article 21 EU Charter) and the also one of the founding values of the EU enshrined in Article 2 of the TEU.[70] According to the ECtHR, there is a certain degree of overlap between the proportionality and protection of the core of the right.[71]

The proportionality test is also used when the Member States have a certain level of discretion in deciding how to regulate the wearing of religious symbols in the workplace. The CJEU has been criticised for leaving this choice to the Member States without specifying how far this discretion should extend.[72] According to AG Kokott, granting a degree of discretion to national authorities and courts in applying the proportionality test is defended, since the CJEU did not necessarily have to propose a solution that is consistent throughout the EU.[73] On the other hand, this would demonstrate that protection against religious discrimination in EU law is not as powerful as protection against other grounds of discrimination, because a national court would not accept the State justifying sex or racial discrimination in employment with national traditions. In that regard, dropping the threshold for justifying religious discrimination contradicts the earlier CJEU jurisprudence, which has repeatedly concluded that exemptions to the principle of equal treatment must be strictly interpreted.[74] This margin of discretion could be only defended beyond the minimum standard of protection matching the level guaranteed by the Directive and being equal towards all the grounds of discrimination.

The CJEU once again accepted a certain level of discretion for Member States in the *Wabe* and *Müller* cases, stating that national provisions protecting religious freedom may be taken into account as provisions more favourable to

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[70] Ibid., 366.

[71] Dissenting opinion of Judge Pinto de Albuquerque in ECtHR 13 July 2012, Case No. 16354/06, Mouvement raëlien suisse v Switzerland.

[72] Howard, "Islamic Head Scarves and the CJEU: Achbita and Bougnaoui", note 63, 360-362; Loenen, "In Search of an EU Approach", note 63, 66-67; Vickers, "Achbita and Bougnaoui", note 63, 249; Opinion of Advocate General Kokott , *Achbita*, note 13, para. 99.

[73] Kokott, "Achbita", note 13, para. 99.

[74] Case 222/83 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* EU:C:1986:206, para. 36; Case C-273/97 *Sirdar* v *the Army Board and Secretary of State for Defence* EU:C:1999:523, para. 23; Case C-285/ 98 *Kreil* v *Bundesrepublik Germany*, EU:C:2000:02, para. 20, (all three are concerned with the sex discrimination); Case C-41/08 *Petersen* v *Berufungsausschuss fü r Zahnarzte für den Bezirk Westfalen-Lippe* EU:C:2010:4, para. 60; Case C-447/09 *Prigge and Others* v *Deutsche Lufthansa AG* EU:C:2011:573, para. 56 and 72 (both are concerned with the age discrimination).

the protection of the principle of equal treatment, within the meaning of Article 8(1) of the Directive.[75] The same was advanced by the Advocates General Sharpston and Rantos.[76] The Court held that the justification and proportionality test in Article 2(2)(b) of Directive 2000/78/EC need to be carried out in accordance with the need to compromise all the various rights applicable in a case and the need to strike a fair balance between them. The CJEU concluded that the Directive does not establish the necessary balance between religious freedom and legitimate goals that may be used to justify indirect discrimination and that it is so up to the Member States and their courts to accomplish that reconciliation.[77] The CJEU's reference to the "margin of discretion" being left to the Member States should be and has been criticised one more time, since it could lead to acceptance of discrimination in other situations and on the other protected grounds too, which could lower the protection of all grounds under EU law.[78] According to van den Brink, the CJEU could have simply accepted that Directive 2000/78/EC sets minimum rules and gives permission for more favourable national provisions.[79] What we see here ignorance of the minimum standardising nature of these directives.

Certain requirements must be met in order to avoid the lower standards for justification of indirect discrimination. The CJEU defined the three aspects of the justification test for indirect sex discrimination in the *Bilka Kaufhaus* case: the measures adopted must correspond to a real need; they must be appropriate to achieve the goal pursued; and they must be necessary to that end.[80] The use of the justification and proportionality test in the *Achbita* case could be criticised for failing to properly adhere to any of these three elements.[81] If a neutrality policy is seen as a legitimate aim, the next should be considered whether the means to achieve this aim are proportionate and necessary.[82] When there are less discriminating alternatives to achieving the

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[75] *Wabe and Müller*, note 7, para. 33.

[76] Opinion of AG Rantos *Wabe* and *Müller*, note 40, para. 112; Elanor Sharpston, *EU Law Analysis*, 2021, para. 109. Referring to Case C-617/10 *Åklagaren v. Hans Åkerberg Fransson*, EU:C:2013:105.

[77] *Wabe* and *Müller*, note 7, para. 87.

[78] Erica Howard, "Headscarves and the CJEU: Protecting fundamental rights and pandering to prejudice", *Maastricht Journal of European and Comparative Law* 29, Iss. 2 (2022): 245.

[79] van den Brink, "Pride or Prejudice?", note 52.

[80] Case 170/84 *Bilka Kaufhaus* v *Karin Weber von Harz*, EU:C:1986:204, para. 36.

[81] Howard, "Islamic Head Scarves and the CJEU: Achbita and Bougnaoui", note 63, 14.

[82] Article 2(2)(b) of Directive 2000/78/EC.

same goal, a measure is not necessary.[83] Was not there truly any less discriminating alternatives within the working place instead of dismissing the employees in *Achbita* and *Wabe*? Proportionality that has to be struck between the means and ends was not taken into account as well. Moreover, the Court even did not mention the applicant's religious freedom or the importance of the headscarf for her. It is difficult to accept in the CJEU's proportionality assessment, since only one side's interests - the employer's - were deliberately taken into consideration.[84] That freedom however as explained above is not an absolute right and may be limited in relation to its social function. In that respect, the judgment is also defected with a one-sided application of proportionality principle. The CJEU fails to apply double proportionality test to protect each party's interests and rights/freedoms as much as possible without any toleration of a disproportionate interference with the other party's rights and interests[85] as in the case of *Schmidberger*.[86] The approach of the CJEU in that regard could indeed be regarded as amounting to a disproportionate interference with the fundamental right to religious manifestation of the employees who are devout followers of orthopraxis religions by removing a certain part of the substance of their right.[87] Lest the fact that the Court did not even practice strictly one-sided application of proportionality. By applying the lenient proportionality test,[88] it enabled just wearing of any religious apparel to be able to easily infringe the employer's freedom to conduct a business by elevating the latter to an almost absolute freedom/right compared to the right to religious manifestation of the employee.

The restrictions, imposed on the right to set up and run a business, are allowed if they match up the objectives of general interest followed by the EU,

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[83] Schiek, "Indirect Discrimination", note 30, 357; Haverkort-Speekenbrink, "European Non-Discrimination Law*"* note 12, 76; Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace*, 2nd edition (Oxford: Hart Publishing, 2016), 66.

[84] Eva Brems, "European Court of Justice Allows Bans on Religious Dress in the Workplace", *IACL-AIDC Blog* (2017), last visited: the 8th of September, 2022, https://blog-iacl-aidc.org/test-3/2018/5/26/analysis-european-court-of-justice-allows-bans-on-religious-dress-in-the-workplace.

[85] Hugh Collins, "Justice for Foxes: Fundamental Rights and Justification of Indirect Discrimination" in *Foundations of Indirect Discrimination Law, ed.* Hugh Collins and Tarunabh Khaitan (Oxford: Hart Publishing, 2018), 271.

[86] Case C-112/00 *Schmidberger, Internationale Transporte und Planzüge* v *Republik Österreich* EU:C:2003:333.

[87] Collins, "Justice for Foxes", note 85.

[88] Howard, "Islamic Head Scarves and the CJEU: Achbita and Bougnaoui", note 63.

are proportionate to the pursued aim and are prescribed by law.[89] As noted by AG Sharpston, the restrictions imposed by the right to equal treatment within the non-discrimination on grounds of, *inter alia*, religion or belief, are clearly established by law, since they are settled in Directive 2000/78. It indicates that non-discrimination on religion is a reasonable legitimate cause to limit the employer's freedom to conduct a business in order to protect the employee's religious freedom. The employee's right to be treated equally, namely workers who consider it obligatory to wear headscarves as a part of their religious beliefs, is supposed to constitute a legal basis for restrictions on the freedom to conduct a business in the landmark cases of *Achbita, Bougnaiou*, and further headscarves cases, such as *Wabe, Müller*, and *L.F v. S.C.R.L.*[90] Conversely, the CJEU has examined the issue from a different angle, focusing on the economic interests of employer, but not on the rights of workers. The CJEU has therefore been criticised for neglecting Article 31(1) of the Charter, which states that "every worker has the right to working conditions which respect his or her [...] dignity"[91] in favour of the freedom to conduct a business under Article 16 of the Charter. Exercising the freedom of religion through wearing religious clothes is a part of religious person's dignity, which should be counted at the workplace.

The CJEU in *Achbita* case stated that the policy of religious, political, philosophical neutrality of the private company is legitimate to restrict religious freedom of employees who has a direct contact with customers, since it is a part of the freedom to conduct a business. However, the Court has not further clarified why neutrality should be seen as a reasonable aim for private enterprises in the *Achbita*, *Bougnaoui*, and *Wabe* cases. Since public entities serve as the State's representatives, this policy has been adopted for them, therefore it is debatable whether neutrality policies are necessary for private businesses. Neither Articles 10 and 52 of the Charter, nor Article 9 of the ECHR mention the aim of preserving religious neutrality. Furthermore, the Court considers the company's neutrality policy toward clients, notably in the company's solely external interactions, but not how it impacts internal relations between employees. Neither employees wearing religious apparel at

[89] Case C 447/09 *Prigge and Others* EU:C: 2011:573, paras. 55-56.

[90] Case C-344/20, *L.F.* v *S.C.R.L.*, Request for a preliminary ruling from the Tribunal du travail francophone de Bruxelles (Belgium) lodged on 27 July 2020.

[91] Monique Steijns, "Achbita and Bougnaoui: Raising more Questions than Answers", *Eutopia Law* (2017), last visited: the 1st of September, 2022, https://eutopialaw.wordpress.com/2017/03/18/achbita-and-bougnaoui-raising-more-questions-than-answers/.

work were viewed as a problem or as a form of proselytism by co-workers, nor was neutrality in internal relations considered necessary, but it suddenly became an issue within the context of interactions with the customers. In other words, the questionable nature of neutrality policy in the mentioned cases is seen through the controversial attention paid to customers' interests or prejudices and biases.

In the *Bougnaoui* case, the customer's desire not to be served by someone wearing a headscarf has influenced the company's restriction on wearing any religious, political or philosophical symbols. The CJEU in fact adopted AG Sharpston's interpretation and decided that a customer's preference not to be served by someone with a headscarf was not a genuine and determining occupational requirement, which implies that the customer's demand cannot justify religious discrimination. There is a risk that a customer's attitude based on prejudice of forbidden criteria, such as religion, may exempt the employer from conforming to an equal treatment requirement in order to cater this prejudice. Despite of the Court's welcomed view that derogation from the equality principle must be interpreted strictly, it causes the conflict between this and the position taken in the *Achbita* case that the aim of neutrality is legitimate. According to Peers, there is a thin line between stating that headscarves cannot be banned simply because consumers want them and, on the other hand, allowing businesses to restrict such clothes in expectation of customer reaction. In both circumstances, the company's neutral image is influenced by the customer's preferences and the pursuit of economic benefits.[92] If it was decided in one instance that it could not justify discrimination, it should be the same in the other. Policies based upon preempting or precautionary approaches should not have been excused or even rewarded.

Customers' wishes have been regarded in the most recent *Wabe* and *Müller* cases too. AG Rantos stated that protection under Article 16 of the Charter includes the willingness of employers to respect their customers' wishes, in particular for commercial reasons and gives them the power to establish neutrality policies depending on their customers' wishes.[93] The CJEU unfortunately has followed the same position, however the genuine need requirement was added as one of the conditions for neutrality policy.

[92] Steve Peers, "Headscarf Bans at Work: Explaining the ECJ Rulings", *EU Law Analysis* (2017), last visited: the 1st of September, 2022, http://eulawanalysis.blogspot.com/2017/03/headscarf-bans-at-work-explaining-ecj.html.

[93] Opinion of AG Rantos, note 40, paras. 66-67.

According to it, prohibition of wearing any visible religious, political and philosophical signs in workplace may be justified by the employer's neutrality policy with regard to its customers, if that policy constitutes a genuine need for employer to be demonstrated with adduced evidence that in the absence of such a neutrality policy its freedom to conduct a business would be undermined because of adverse consequences.[94] It indicates that if the employer cannot establish a genuine need for a neutrality policy, it will not be considered a legitimate aim for justification. As a result, the CJEU holds that the employer must weigh his interests in conducting business against the restriction on employee's religious freedom. When many rights and values are at stake, the proportionality test must nonetheless be applied.[95] This may be perceived as a step forward, however the CJEU still allows customer wishes to take a significant part in the justification of indirect religious discrimination. That is though not allowed to occur for the other grounds of discrimination. Generally, customers' wishes and prejudices and biases, and even Islamophobia, have thus been incorporated into the (legitimate) neutrality policy through the back door provided that certain conditions are met.

The emphasis on the employer's financial gain through the fulfilment of discriminatory or prejudicial wishes of clients cannot be recognised as a way of striking a fair balance between the employee's right to religious manifestation and the employer's freedom to conduct a business, since it is contradictory to EU values. The proportionality test may be beneficial in cases of indirect discrimination, but if the Court accepts the company's neutrality policy as direct discrimination, as we argue in this article, religious freedom would prevail. Despite their fundamental nature, these freedoms have distinct aspects as demonstrated above. The freedom to conduct a business might be referred to as an economic right and is related to the EU's economic freedoms. The analogy of a collision between fundamental rights and economic freedoms might be applied here benefiting from the European jurisprudence with solutions to these conflicts.

Relating to the free movement rules, wearing headscarves because of religious beliefs at work has no limiting effect on any of the movements linked to freedom to conduct a business, such as freedoms of capital, establishment, to provide services. On the contrary, the company rule prohibiting religious clothing at work may impede workers' free movement, as religious employees

[94] *Wabe and Müller*, note 7, paras. 64-67.
[95] Ibid., para. 84.

from different Member States, who consider wearing religious attire compulsory, would be unwilling or unable to work there.

Some CJEU judgments, though rare, show a tendency to prioritise the preservation of fundamental human rights above economic rights, as in the *Omega* case[96] (human dignity over free movement of commodities and services) or the *Schmidberger* case (freedom of expression and freedom of assembly over the free movement of goods). The Court held in *Schmidberger* case that "since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods."[97] The CJEU confirmed in *Omega* that "the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law" and "the protection of [fundamental] rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services".[98] As Rosas argues, while talking about the balancing of competing fundamental rights, some more weight should be put on the fundamental rights which can be found in the ECHR, as an obvious link with this Convention whose relevance is also enshrined in Article 52(3) of the EU Charter.[99] Considering that freedom to conduct a business is not even laid down in the ECHR, the right to religious freedom would prevail the freedom to conduct a business, which is mostly in economic nature, in such cases.

Conclusion

Corporate neutrality policies are not in fact neutral towards devout followers of orthopraxis religions. They indeed constitute less favourable treatment of those employees compared to non-believers or followers of religions or faiths which do not require any attire or clothes.

Legitimising corporate neutrality policies allow the employers an authority, which is in fact granted either to the States within the context of

[96] Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH* v *Oberbürgermeisterin der Bundesstadt Bonn* EU:C:2004:614.
[97] *Schmidberger*, note 86, para. 74.
[98] *Omega*, note 96, paras. 34-35.
[99] Allan Rosas, "Balancing Fundamental Rights in EU Law", *Cambridge Yearbook of European Legal Studies* 16, (2014): 347.

public employment or religious organisations, to selectively exclude certain employees with their commercial image concerns from the front positions in the work and even from the social/economic life. This approach therefore provides for social and economic exclusion of employees, who are almost females and members of religious minorities, and constitutes a discrimination in a different form, i.e. a secular type of discrimination. Secularism should not be narrowly interpreted, and strictly and extensively applied beyond the public domains depending on the margin of discretion of the State.[100] Hiding minority employees from the customers or placing them in back offices and even excluding them from the social and economic life cannot however change the reality, but just amounts to closing the eyes of the society to it. It however remains as a growing and bleeding problem deep inside the society.

[100] ECtHR *Leyla Şahin* v *Turkey* Appl. no. 44774/98, 10.11.2005.

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