Responding to Religious Diversity in the Workplace: One Step Forward and Two Steps Back

Lucy Vickers[1]

Abstract:

This paper argues that while the CJEU cases of *Achbita* and *Bougnaoui* create some consistency with the case law of the ECHR on freedom of religion or belief in employment, they nonetheless represent a missed opportunity to develop the EU law on religious discrimination in a way that serves both the equality aims of the underpinning Directive, and the cause of European integration more generally. The paper explores the contextual background to the cases, and examines the theoretical debates surrounding religion claims at work. It argues that, by following an approach largely based on human rights thinking from the ECtHR, the CJEU has taken the wrong direction in its first cases, and that it should instead have framed the protection in terms of its own firm commitment to equality. In addition, the paper argues that the CJEU missed the chance to set the case law within the policy of European integration that is served by the EU equality agenda more generally.

Key words:

Religion or belief; equality; human rights; integration

A. Introduction: one step forward, two steps back

In March 2017 the CJEU decided its first cases on religious discrimination under Directive 2000/78. The decisions were much anticipated as they involved matters which are currently subject to an expanding, critical literature on the coherence and consistency of the protection for religion or belief at

[1] Professor Lucy Vickers, Oxford Brookes University. I would like to thank Dr Simon Cooper, Oxford Brookes University and Prof. Mark Bell, Trinity College Dublin, for comments on an earlier draft of this paper.

work.[2] In this paper, I argue that, while the CJEU cases create some consistency with the case law of the ECHR on freedom of religion or belief in employment, the two cases in fact represent a missed opportunity to develop the EU law on religious discrimination in a way that serves both the equality aims of the underpinning Directive, and the cause of European integration more generally.

Concerns about the coherence and consistency in the legal treatment of religion or belief at work are both practical and theoretical. Practical concerns relate to differences in the levels of protection across Europe, with, for example, Belgium and France banning headscarves and other religious symbols in parts of the public sector, in contrast to the UK where even police and judges can wear turbans and *hijabs*.[3] Deeper concerns relate to the fact that religion or belief protection is underpinned by two different theoretical frameworks, human rights and equality; and by two separate but interlinked legal frameworks, namely the European Convention on Human Rights, and the EU Equality Directive

[2] For example, S Benedi Lahuerta,'Taking EU Equality Law to the next level: in search of coherence' (2016) 11(3) *European Labour Law Journal* 348; 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" (2016) 5(2) *Oxford Journal of Law and Religion* 183; E R Pastor 'Towards Substantive Equality for Religious Believers in the Workplace? Two Supranational European Courts, Two Different Approaches? (2016) 5(2)*Oxford Journal of Law and Religion 255;* Tobias Lock, 'Religious Freedom and Belief Discrimination in Germany and the United Kingdom: Towards a Common European Standard?', (2013), European Law Review, Vol 38, pp 655-76; K Alidadi and M Foblets 'European Supranational Courts and the Fundamental Right to Freedom of Religion or Belief: Convergence or Competition?" (2016) 5 *Oxford Journal of Law and Religion* 532-540; M Pearson, 'Religious Claims vs. Non-Discrimination Rights: Another Plea for Difficulty' (2013) 15 *Rutgers Journal of Law and Religion* 47; C McCrudden, Human Rights and European Equality Law, University of Oxford Faculty of Law Legal Studies Research Paper Series Working Paper No. 8/2006 April 2006.

[3] For a general discussion of the law relating to the wearing of religious symbols at work in a number of EU states, see H van Ooijen, *Religious Symbols in Public Functions: Unveiling State Neutrality. A Comparative Analysis of Dutch, English and French Justifications for Limiting the Freedom of Public Officials to Display Religious Symbols*, (2012 Intersentia, Antwerpen). See also S Ferrari and R Cristofori (eds.) *Law and Religion in the 21st Century: Tensions between States and Religious Communities* (Ashgate, Cultural Diversity and Law Series, 2010).

2000/78, overseen by the ECtHR and the CJEU respectively. As a result there is ample opportunity for incoherence and inconsistency within the case law.

The cases of *Achbita* and *Bougnaoui* both concerned the wearing of the *hijab* at work. Prior to these decisions, the ECtHR had accepted that freedom of religion or belief could be protected at work, and that this could cover the wearing of religious symbols; but that restrictions on religious dress would be allowed where they were a proportionate means of achieving a legitimate aim, such as health and safety.[4] In *Achbita* and *Bougnaoui* the CJEU also held that the Equality Directive could cover the wearing of religious symbols at work, but similarly, that restrictions on religious dress could be limited where they are proportionate means to achieve a legitimate aim, such as an employer's policy of neutrality. By taking a broadly similar approach to the issue of religious symbols at work, the CJEU went some way towards addressing the potential inconsistencies between the courts. However, it did so at the expense of providing strong and coherent protection against inequality and disadvantage on grounds of religion and belief at work.

In what follows, I set the context of the debates by considering the relationship, both complementary and conflictual, between the two theoretical frameworks for addressing religion or belief in the workplace. For example, the notion of religious practice as chosen can be contested, as can the understanding of what is meant by equality, resulting in tensions between and within human rights and equality norms. These tensions create the potential for the two frameworks to lead to inconsistent levels of protection between the two courts. It is in this context that the similar outcomes reached by the two courts can be viewed as a step forward.

Having explored the contextual background to the cases, I then argue that by following an approach largely based on human rights thinking, the CJEU has taken the wrong direction in its first cases. This argument is established by looking first at the weaknesses of the approach of the ECHR in its case law

[4] *Eweida v. United Kingdom* 36516/10, 2013 Eur. Ct. H.R.

on religion and employment. I then analyse the decisions of the CJEU, including the contrasting opinions of the Advocates General, to demonstrate a number of ways in which the Court failed to set sound foundations for the protection against discrimination on grounds of religion and belief. I conclude that the court missed the opportunity to frame the protection in terms of its own firm commitment to equality. In addition, it missed the chance to set the case law within the policy of European integration that is served by the EU equality agenda more generally.

B. Competing or complementary foundations for religion claims?

The potential for inconsistency in the law governing religion or belief in the workplace is hardly surprising given the existence of the two legal frameworks, one based on human rights, and one on equality. Nonetheless, the two legal foundations for protection can also be understood as complementary, as they are both underpinned by a concern for human dignity.[5]

a. Theoretical foundation: Human rights and equality

The foundational human rights case for the protection for religion or belief is usually taken to be the idea that humans should be treated as ends rather than means,[6] and that we share an essential dignity.[7] From this it is claimed that human beings are equal in moral worth,[8] and there is an objective good in upholding their equality, and in attempting to create a society in which all can flourish. Based on these principles, it can be argued that individuals should be able to develop their own ideas of the good and exercise control over their lives,[9] and this involves an element of respect for individual freedom of conscience and thought. Whether the exercise of that freedom leads to religious or non-religious

[5] For a fuller explanation of these ideas, see D Feldman, 'Human Dignity as a Legal Value' [1999] *PL* 682.

[6] E Kant, *The Moral Law: Kant's Groundwork of the Metaphysics of Morals* (H J Paton, trans) (London, Hutchinson, 1963).

[7] For further discussion see C McCrudden (ed.) *Understanding Human Dignity* (Oxford, OUP, 2013).

[8] See R Dworkin, *Taking Rights Seriously* (London, Duckworth Press, 1977) and *A Matter of Principle* (Cambridge Mass, Harvard University Press, 1985).

[9] J Rawls, *A Theory of Justice* (Oxford, OUP, 1999, revised edition).

beliefs,[10] the freedom of others to develop their own religious view of the good can be shown to deserve some protection within the framework of human rights norms.[11]

The protection of religion or belief can also be framed as an equality claim, on the basis that by virtue of being human, we share a fundamental right to equal concern and respect,[12] including where we hold different conceptions of the good.[13] Protecting religion claims on an equality basis raises background questions regarding the aims of equality law, itself an area of extensive academic debate.[14] A full account is beyond the scope of this article, but certain elements of the debate are worth highlighting as they have a bearing on the discussion below.

One theoretical approach to equality focuses on the infringement of individual dignity that can occur when unequal treatment is identified.[15] This encompasses an aim of equality based on recognition of the uniqueness of individuals, and an acknowledgement that inequality can arise not just in socio-economic

[10] Nussbaum argues that an ability to 'search for meaning of life in one's own way is a central element of a life that is fully human' M Nussbaum, 'A plea for difficulty' in S M Okin (J Cohen, M Howard and M C Nussbaum, eds), *Is Multiculturalism Bad for Women?* (Princeton University Press, Princeton, 1999).

[11] M Nussbaum, 'A plea for difficulty' in S M Okin (J Cohen, M Howard and M C Nussbaum, eds), *Is Multiculturalism Bad for Women?* (Princeton University Press, Princeton, 1999).

[12] See R Dworkin, *Taking Rights Seriously* (London, Duckworth Press, 1977) and *A Matter of Principle* (Cambridge Mass, Harvard University Press, 1985).

[13] D Réaume, 'Discrimination and Dignity' (2003) 63 *Louisiana LR* 645, 678.

[14] See for example, D. Hellman and S. Moreau (eds) *Philosophical Foundations of Discrimination Law* (OUP, Oxford, 2013), T. Khaitan, *A Theory of Discrimination Law* (OUP, Oxford, 2015), I Solanke, *Discrimination as Stigma: A Theory of Discrimination Law* (2016, Hart Publishing, Oxford), S Fredman, Discrimination Law (Oxford, OUP, 2002), S. Fredman, 'Substantive Equality Revisited' (2016) 14(3) *International Journal of Constitutional Law* 712; Hepple, 'The Aims of Equality Law' in O'Cinneide and Holder (eds) Current Legal Problems (2008, OUP, Oxford). See also N Fraser, 'Rethinking Recognition' (2000) *3* New Left Review 107, and C Taylor, Multiculturalism and 'The Politics of Recognition (1992, Princeton University Press, Princeton).

[15] See H Sheinman, 'Two Faces of Discrimination' in D. Hellman and S. Moreau (eds) *Philosophical Foundations of Discrimination Law* (OUP, Oxford, 2013).

terms, but in cultural and symbolic terms too,[16] leading to stigma and lack of self-esteem.[17] The question of whether protection for religion or belief can be justified in terms of dignity alone is contested,[18] but the other concepts of equality, discussed below, can provide a firmer basis for including religion or belief within equality law.

A second approach to equality sees the harm in terms of economic disadvantage, rather than individual or collective dignitary harm. A correlation between religion and belief and economic disadvantage can be identified;[19] economic activity varies according to religion with the 2011 UK census[20] showing that Muslims have the lowest rates of economic activity. Of course, reasons for this vary, but there is evidence that this disadvantage is caused at least in part by religious discrimination. In 2015 the EHRC published the findings of a large scale call for evidence from individuals and organisations about how their religion or belief, or that of other people, may have affected their experiences in the workplace.[21] Although many positive experiences were recounted, such as workplaces in which employers were described as being supportive of religion and belief needs, nonetheless, many negative experiences were also reported, such as a report of a job offer being retracted after religious holidays were discussed. A concern to redress such disadvantage can work as an alternative justification for the inclusion of religion

[16] See N Fraser, 'Rethinking Recognition' (2000) *3* New Left Review 107 and C Taylor, Multiculturalism and 'The Politics of Recognition' (1992, Princeton University Press, Princeton). Rawls, too, identifies self-respect as a 'primary good'. A Theory Of Justice (Oxford, OUP, 1999, revised edition).

[17] I Solanke, *Discrimination as Stigma: A Theory of Discrimination Law* (2016, Hart Publishing, Oxford).

[18] A McColgan 'Discrimination on Grounds of Religion and Belief' (2105) 14 *The Equal Rights Review* 47

[19] See P Weller, K Purdam, N Ghanea, and S Cheruvallil-Contractor (2013) *Religion or belief discrimination and equality*. (London, Bloomsbury Academic), and L Vickers, Religious Freedom, Religious Discrimination and the Workplace , chapter 1,

[20] See Office of National Statistics, Full story: What does the Census tell us about religion in 2011? available at www.ons.gov.uk/ons/dcp171776_310454.pdf

[21] M Mitchell and K Beninger (with E Howard and A Donald) (2015) *Religion or belief in the workplace and service delivery*. (Manchester: Equality and Human Rights Commission)

or belief within an equality framework.

A third model of equality is based on inclusion and participation in society.[22] It suggests that lack of recognition and economic disadvantage can impede full participation in social life, and that equality law provides a method to promote greater participation in society as a way to achieve broader social justice. This latter aim for equality law ties in with the foundational values of the EU, where the principle of equality has fundamental status, along with respect or dignity and human rights.[23] Within the EU framework, equality is seen as both a reflection of the principles and values that stem from Europe's common history and identity,[24] and as a means to achieve greater social cohesion within and between states. The aim is to create a greater sense of shared identity and inclusion for citizens in the EU as it seeks greater economic and social integration.[25]

Despite the fact that there is a variety of meanings for the foundational concepts of human rights and equality, at a fundamental level they are clearly deeply interconnected, and in a sense they can be understood as two sides of the same coin.[26] To an extent, the relationship between the two concepts can

---

[22] S Fredman, 'Substantive Equality Revisited', (2016) 14(3) *International Journal of Constitutional Law* 712 and *The Future of Equality In Britain*, EOC, Working Paper Series No. 5, (London, Equal Opportunities Commission 2002) 11, H Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66 *MLR* 16, N Fraser, 'From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age' (1995) New Left Review 1/212 68.

[23] Article 2 TEU.

[24] S Morano-Foadi "EU Citizenship and religious liberty in an enlarged Europe", European Law Journal, 2010, Vol 16(4): 417-438

[25] J Croon-Gestefeld, Reconceptualising European Equality Law: A Comparative Institutional Analysis (Hart Publishing, Oxford, 2017).

[26] They are not the same concept, however. Evans argues that non-discrimination 'is simply a tool that assists the realization of religious liberty; a means not an end': M Evans, 'Religious Liberty and Non-Discrimination' in T Loenen and P Rodrigues (eds), *Non-Discrimination Law: Comparative Perspectives* (The Hague, Kluwer Law International, 1999) 120.

be seen as complementary and to improve the protection available. For example, in the context of religious freedom, an appreciation from the perspective of equality law, that religion is not fully 'free' if it comes with gross inequalities, can lead to better protection for religious claims in contexts such as education and the workplace. Additionally, equality thinking has added to the protection of human rights the recognition that practices which appear neutral may in fact limit the freedom to manifest religion or belief: for example, it may be more difficult for religious minorities to comply with working time rules and dress codes. An additional insight from equality law comes from disability discrimination jurisprudence and its recognition of the concept of a 'social' model of equality. This allows for greater focus on the lived experience of disadvantage caused by religious identity and practice.[27] Moreover, the recognition of intersectional discrimination,[28] particularly as regards gender and religion, adds depth to our understanding of freedom of religion or belief.

Equally, an appreciation of the right to freedom of religion or belief can improve our understanding of equality on grounds of religion or belief, and may explain why religion or belief is included as a protected characteristic in the first place.[29] For example, an understanding of the importance of manifesting religion or belief is necessary if one is to balance correctly the needs of a business with the needs of the employee when it comes to working time, dress or grooming codes etc. Without an appreciation of the importance of religious identity and practice to the freedom of religion or belief, precedence could too readily be given to the managerial convenience of standardised work rules. Human rights understandings can also help explain the special protection available for religious organisations, as the right to enjoy freedom of religion in community with others is a key aspect of religious freedom.

---

[27] A Lawson and M Priestley, 'The Social Model of Disability: Questions for Law and Legal Scholarship?', in P Blanck and E Flynn (eds) *Routledge Handbook of Disability Law and Human Rights* (Abingdon, Routledge, 2016)

[28] I Solanke, 'Infusing the Silos in the Equality Act 2010 with Synergy' (2011) 40 *Industrial Law Journal* 336-358

[29] As some have noted, this is not necessarily agreed. See A. McColgan 'Class wars? Religion and (In)equality in the Workplace' (2009) 38 (1) *Industrial Law Journal* 1-29

Despite the interconnections and complementary relationship between human rights and equality, the two frameworks can also be seen to be in tension. This can be seen perhaps most clearly in two examples of potential clashes between equality law and human rights. The first involves the wearing of the headscarf, in which some argue that religious freedom conflicts with gender equality. For example, in *Şahin v Turkey*[30] in which a university student objected to the prohibition on religious dress in her university the ECtHR referred to the view that the headscarf is "hard to square with the principle of gender equality."[31] The second example involves Christian marriage registrars. In the case of *Ladele*,[32] the court rejected the claim that dismissal for a religiously motivated refusal to conduct civil partnerships was a breach of the right to freedom of religion. Instead the equality rights of gay couples justified any limitation on religious freedom represented by the dismissal.

Although there is potential for conflict between the right to religious freedom, and equality, care does need to be taken before assuming too readily that the two inevitably clash.[33] For example, many Muslims women do not wear headscarves; and the reasoning of those who do is varied, with many wearers not viewing them as based on male dominance.[34] Similarly, organisations such as the Lesbian and Gay Christian Movement demonstrate the varied views on sexuality within Christianity. The assumption that 'religion' is antithetical to 'equality' is often based on essentialised views of what religious individuals

30 Şahin v. Turkey, 2005-XI Eur. Ct. H.R. 175, 204–05.

31 *Id.* at 463.

32 Heard as part of *Eweida v. United Kingdom* 36516/10, 2013 Eur. Ct. H.R.

33 M. Malik, 'From conflict to cohesion': competing interests in equality law and policy, A paper for the Equality and Diversity Forum, 2008; and E Brems and L Peroni 'Religion and human rights: Deconstructing and navigating tensions' in S Ferrari (ed) *Routledge Handbook of Law and Religion* (Routledge, Abingdon, 2015).

34 E Brems, 'Equality problems in multicultural human rights claims: the example of the Belgian "burqa ban"' in M van den Brink, S Burri & J Goldschmidt (eds), *Equality and human rights: nothing but trouble?, Liber amicorum Titia Loenen*, SIM Special no. 38, SIM; Utrecht, 2015.

believe,[35] and can itself lead to hostility to religion, which in turn could lead to less favourable treatment against religious adherents. Nonetheless, elements of conflict between religion and other rights are evident in the case law before the courts.

b. Legal foundations: harmony or discord between the two courts?

The commonalties and tensions between human rights and equality frameworks are reflected in the two legal frameworks for the protection of religion or belief. In some respects, the two European legal systems share their foundations in a common commitment to creating greater solidarity and collaboration between European nations following the Second World War, through the creation of supranational legal systems to which member states cede some element of sovereignty.[36] However, in other respects the two legal systems can be understood to be distinct, and to espouse quite different legal cultures.

The Council of Europe, with its wider geographical coverage, seeks to secure an end to human rights violations in Europe and to uphold values such as human rights and minority rights. In response the ECtHR has developed an approach which allows those with conflicting interests to find a space in which they can live together, based on a level of pluralism and acceptance of difference.[37] The European Union, in contrast, was founded initially on economic co-operation, commerce and trade, and has more recently increased its remit to create a more social Europe, with a focus on broader integration between

[35] T Modood: Anti-Essentialism, Multiculturalism and the 'recognition' of religious groups (1998) 6(4) Journal of Political Philosophy 378-399

[36] O Pollicino, 'A Further Argument In Favour Of The Construction Of A General Theory Of The Domestic Impact Of Jurisprudential Supranational Law' (2012) Comparative Law Review, Vol 3, No 2

[37] C McCrudden, 'Marriage Registrars, Same-sex Relationships, and Religious Discrimination in the European Court of Human Rights' (2016) U of Michigan, Public Law And Legal Theory Research Paper Series Paper No. 513. SSRN.

states.[38] Equality or anti-discrimination norms have thus developed in a quite different context, usually aiming for parity, or at least an ironing out of differential treatment.

Both legal systems contain protection for religion and belief. Article 9 ECHR protects freedom of religion and belief, and freedom to manifest religion or belief, as both an individual and a collective human right, in all contexts, not just employment. Similar protection is found in the European Charter of Fundamental Rights.[39] The EU protection[40] arises in the context of the Equality Directive 2000/78, a general equality measure which prohibits discrimination in employment on a number of grounds, including of religion and belief.[41] Although their legal bases are very different, the two frameworks are closely aligned and work reciprocally with both courts recognising the importance of the other.[42] EU law provides human rights protection in the EU Charter on Fundamental Rights, and the fundamental rights of the ECHR constitute general principles of EU law.[43] The ECHR recognises the principle of equality in Article 14; and the ECtHR has stated that the Convention should be interpreted in the light of elements of international law[44] including the practice of contracting member states such as the equality norms of the EU Directive. In effect, then, both courts recognise that the relationship between them

[38] See for example, the new EU Social Pillar, announced in 2017. https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_en.

[39] Although the human rights framework protects religion more widely, the focus here is on the protection of religion and belief in the employment context.

[40] For more general discussion of the role of religion and belief in the EU see R McCrea, *Religion and the Public Order of the European Union* (Oxford University Press, Oxford Studies in European Law, October 2010).

[41] Religious freedom is also protected internationally under the ICCPR and in ILO conventions.

[42] L Vickers, 'Freedom of Religion and Belief, Article 9 ECHR and the EU Equality Directive' in Dorssemont, Lörcher and Schömann (eds) The European Convention on Human Rights and The Employment Relation (2013 Hart Publishing, Oxford).

[43] Article 6(3) Treaty of the European Union. See also *Kucukdeveci v Swedex* Judgment of 19 Jan 2010, C-555/07, at para 20

[44] *Demir and Baykara v Turkey*, Application No 34503/97, 12 November 2008

should be one of reciprocity, with each taking into account the jurisprudence of the other in their interpretation.[45]

The existence of two parallel legal frameworks of rights protection is, of course, not limited to the protection of religion or belief. Protection for rights based on sexual orientation have also developed in tandem based on non-discrimination under Directive 2000/78 as well as under the ECHR right to private and family life. In the context of sexual orientation rights, Wintemute has shown how the CJEU has followed the lead of the ECtHR in recognising sexual orientation rights, with a concomitant extension in the protection of non-discrimination on ground of sexual orientation provided by EU law.[46] Prior to the decisions in *Achbita* and *Bougnaoui* it was unclear whether the CJEU would take a similar approach and follow the lead of the ECtHR in relation to religion or belief claims, or whether instead the existence of two frameworks would lead to an incoherent pattern of protection for religion and belief at work.[47]

i. The prior case law of the ECHR

Prior to the *Achbita* and *Bougnaoui* decisions of the CJEU, the ECtHR had also considered questions of religious dress in its recent case law: *Eweida v UK*,[48] *Ebrahimian v. France*,[49] and *S.A.S v France.*[50]

---

[45] S Morano-Foadi, 'Fundamental Rights in Europe: constitutional dialogue between the Court of Justice of the EU and the European Court of Human Rights' (2013) 5(2) *Onati Journal of Emergent Socio-Legal Studies* 120-144.

[46] R Wintemute 'In Extending Human Rights, Which European Court Is Substantively "Braver" and Procedurally "Fitter"? The Example of Sexual Orientation and Gender Identity Discrimination' in S. Morano-Foadi and L. Vickers (eds) *Fundamental Rights in the EU: A Matter for Two Courts* (Hart Publishing Ltd, 2015).

[47] S Benedi Lahuerta,'Taking EU Equality Law to the next level: in search of coherence' (2016) 11(3) *European Labour Law Journal* 348; K Alidadi and M Foblets 'European Supranational Courts and the Fundamental Right to Freedom of Religion or Belief: Convergence or Competition?" (2016) 5 *Oxford Journal of Law and Religion* 532-540; C McCrudden, Human Rights and European Equality Law, University of Oxford Faculty of Law Legal Studies Research Paper Series Working Paper No. 8/2006 April 2006.

[48] Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) decision of 15 January 2013.

Eweida v UK involved two cases where the wearing of a cross was restricted at work: Eweida, a member of the check-in staff for British Airways and Chaplin, a nurse. The reason given by British Airways for refusing to allow the cross was that it interfered with the employer's ability 'to communicate a certain image of the company and to promote recognition of its brand and staff'.[51] For Chaplin, the concerns related to health and safety for nurses and patients. The ECtHR found that in Eweida's case, the restriction on religious dress was not a proportionate means of achieving a legitimate aim as the desire to maintain corporate image was insufficient to outweigh Eweida's interest in religious freedom. In contrast, in Chaplin's case, the Court decided that the restriction was proportionate because the interest in protecting health and safety on a hospital ward was of greater magnitude than the interest in maintaining corporate image. Both cases were decided with reference to the margin of appreciation afforded to states in setting standards of protection for fundamental rights.

The ECtHR returned to the question of religious symbols at work in 2015. In *Ebrahimian v. France*[52] it held that the failure to renew the contract of a hospital social worker who had refused to stop wearing a head covering at work was proportionate. The Court noted the lack of consensus across Europe on the issue, as well as relying heavily on the national context and the principle of secularism in France with regard to the state and the public service.

In the final case, *S.A.S v France*,[53] the Court upheld a ban in public spaces on the wearing of the full face veil (*niqab*). The Court discounted a number of the more obvious legitimate aims that the ban could potentially serve, such as to uphold human dignity or gender equality, or to maintain security, but

---

[49] Application no. 64846/11) decision of 26 November 15.

[50] *S.A.S v France* Application no. 43835/11 decision of 1 July 2014.

[51] *Eweida* at para 93.

[52] Application no. 64846/11) decision of 26 November15.

[53] *S.A.S v France* Application no. 43835/11 decision of 1 July 2014.

concluded that the aim of 'living together' (*le "vivre ensemble"*) could justify the ban as long as it was proportionate.[54]

Taken together, the approach of the ECtHR has been to recognise that the right to religious freedom applies within the workplace, and that it protects the right to wear religious symbols as the manifestation of religion; but that the right to manifest religion can be fairly easily restricted where it is proportionate to do so, to serve other needs such as health and safety, or an interest in secularism in the public service.

c. The CJEU decisions: A step forward for consistency

In the light of these ECtHR decisions, the judgment of the CJEU, allowing the employer to restrict the wearing of religious symbols at work where necessary to uphold employer interests such as maintaining a secular image, can be seen to follow the lead of the ECHR. The decisions can be viewed as a welcome step forward in providing some consistency in the approach of the courts. The two courts can be seen to be enjoying a relationship of reciprocity, with each taking into account the jurisprudence of other in their interpretation to reach complementary decisions.[55]

However, it is argued in what follows that the reciprocal relationship between the courts in terms of their approach to religion or belief in fact represents a missed opportunity. By relying on an approach based on the human rights framework of the ECHR, the CJEU has failed to assess these religious claims adequately from an equalities perspective, and has allowed some features of human rights thinking to be translated inappropriately into the equality framework. As a result, the decisions represent a backwards step in terms of promoting equality and in terms of EU integration, both key aims of Directive 2000/78.

C. Features and shortcomings of the human rights framework

[54] The same approach was taken in *Belcacemi and Oussar v. Belgium* Application no. 37798/13 and *Dakir v. Belgium* Aapplication no. 4619/12, decisions of 11 July 2017.

[55] Sabel and Gerstenberg, 'Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order' (2010) 16 *European Law Journal* 511.

In *Eweida*, *Ebrahimian* and *S.A.S.* the ECtHR relied on a number of traditional features of human rights adjudication such as the specific situation rule and the margin of appreciation. In this section, I show how these norms of human rights law act to limit the protection of religious rights at work, and why it is particularly unfortunate if they are allowed to infiltrate the equality context.

a. Specific situation rule:

Although the right to freedom of religion is granted extensive protection within the ECHR, the extent to which this right is protected at work has not been so clear. ECHR jurisprudence has traditionally accepted what is known as the 'specific situation rule', the recognition that a person's convention rights may be influenced by the particular situation of the individual claiming that freedom. In particular, where individuals voluntarily submit themselves to a system of rules which limits their freedom, their claims will be limited. This has led to reduced protection for rights at work, because the court has assumed that the underlying freedom is protected through the right of an individual to resign: their freedom is protected by their freedom to leave.

Although the ECtHR began to move away from the specific situation in relation to other rights, in 1996,[56] it took much longer to accept that this applied in the case of religion or belief. For example, in *Sessa* v. *Italy*,[57] decided in 2012, the ECtHR upheld a court's refusal to adjourn a hearing despite a clash with major Jewish religious festivals, holding instead that the applicant remained free to fulfil his religious duties.[58] It was not until the *Eweida v UK*[59] decision in 2013 that the ECtHR signalled a clear change to this approach, accepting that work-based restrictions on a person's exercise of religious freedom can amount to a *prima facie* infringement of the right to freedom of religion or belief. The step signalled the end of the assumption that the specific situation would act as a bar to bringing a case.

[56] *Vogt* v. *Germany* Series A no. 323, (1996) 21 EHRR 205.

[57] 28790/08 [2012] ECtHR (3 April 2012).

[58] *Sessa* At para 37.

[59] [2013] ECHR 37.

Instead, the ECtHR accepted that freedom to leave the workplace might be relevant in assessing justification of any interference, but would not result in a case falling at the first hurdle. Thus the specific situation rule has moved from being a potential block on providing human rights protection at work, to an aspect of the proportionality review.

However, even in its more diluted form, post-*Eweida*, the specific situation rule does still create a limitation on the protection for religious interests offered under the human rights framework; and this limitation may be less acceptable when considered from an equalities perspective. In the context of discrimination law, an onus is rarely put on an individual to take steps to avoid discrimination by staying out of harm's way;[60] and responses to sex discrimination which amount to 'fixing the women' are rightly condemned.[61] In addition, the language of choice would not usually be used to deny an equality claim. For example, whether a pregnancy is chosen or not would not affect the provision of maternity protection. Moreover, 'separate but equal' provision is not accepted as a defence to direct or indirect discrimination in the provision of a service, and so the fact that a child could choose a different school would not be reason to deny admission on grounds of race. Although, post-*Eweida*, the specific situation rule in relation to religious freedom has moved from an *a priori* rule against protecting religion in certain circumstances to a factor to determine proportionality, the approach is still unlikely to be appropriate when used in the context of an equality-based claim.

b. 'Manifesting' religion

Even if not prevented from making a claim because of the specific situation rule, workers are still faced with significant further hurdles before any claims under Article 9 ECHR will succeed: where freedom to

[60] For example, in cases of harassment, it would be seen as bad practice to move the victim of harassment away from the perpetrator; instead, the perpetrator would be expected to be disciplined. See ACAS Guide for Managers and Employers, Bullying and Harassment at Work available at www.acas.org.uk/media/pdf/l/r/Bullying_and_harassment_employer_2010-accessible-version-July-2011.pdf

[61] A. Wittenberg-Cox, 'Stop "Fixing" Women and Start Fixing Managers' Harvard Business Review, February 12 2014 https://hbr.org/2014/02/stop-fixing-women-and-start-fixing-managers

manifest a religion or belief is claimed, a practice will first need to be established as a manifestation of religion or belief; and then it will be necessary to show that any restriction on the practice is not justified under the Article 9(2) ECHR. In assessing these questions additional limitations of a human rights approach are made plain.

It is the manifestation of religion or belief that causes many of the incidents of interference with Article 9 ECHR in the work context, with many claims involving religious dress or time off for religious observance. Whether or not an employer may be required to allow religious practices at work will depend in part on whether the practices are viewed as manifestations of religion, in which case they can be protected; or merely motivated by religion in which case they can be restricted without engaging Article 9 ECHR. A restrictive approach on this issue has meant that cases have been lost before the proportionality of restrictions could be considered.[62] However, in *Eweida et al* v. *UK*[63] the ECtHR was more flexible, holding that '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'. Instead, there needs only be 'the existence of a sufficiently close and direct nexus between the act and the underlying belief … determined on the facts of each case.'[64]

The acceptance that the manifestation of religion can include a much wider range of activities than those strictly required by religion is to be welcomed as it allows courts to proceed to the question of whether restrictions are proportionate. However, the reliance on a distinction between manifestation and motivation within the proportionality assessment remains a source of concern.

One problem caused by the distinction between practices which manifest and those which are motivated by religion is that a court is not the appropriate body to determine detailed questions related to the

[62] *Arrowsmith* v. *UK* [1978] 3 EHRR 218; *Pichon and Sajous* v. *France* Application No. 49853/99, admissibility decision of 2 October 2001.

[63] [2013] ECHR 37.

[64] At para 82.

content of religious belief. This can be seen in the decision of the domestic courts in the *Eweida* litigation. In *Ladele v Islington Borough Council*[65] a Christian marriage registrar sought to be excused from carrying out civil partnerships on the basis of her religious beliefs, but permission was refused. This was justified because the employer could rely on its policy of requiring all staff to offer services to all service users regardless of sexual orientation. One matter which made refusing her request more likely to be proportionate was the argument that her request not to perform civil partnerships was not a 'core' part of her religion. However, determining such a question can lead courts into contentious theological territory. Courts have usually been clear that protection is provided for the subjective belief of an individual, and it is not for the court to judge the validity (or centrality) of a belief.[66]

Moreover, different religions or beliefs could be treated differently in terms of how ready courts are to determine such issues. It seems that courts are more ready to determine what is and is not 'core' with regard to Christianity than other faiths. For example, at the domestic stage of the cases, in *Ladele* the Court of Appeal accepted that the belief regarding marriage was not core, and in *Eweida* the court accepted that the claimant was not required by her religion to wear a visible cross. In both cases these conclusions can be questioned: for example, beliefs about marriage may or may not be 'core' to Christianity, but reframed as a belief in the authority of the Bible, the question certainly seems fairly central. In contrast, in cases involving other religions courts have been clear that it is not their role to determine the validity of religious views or their doctrinal status.[67] An assessment of religious claims by reference to whether a belief is 'core' thus clearly has potential both to undermine the protection for religion or belief, and for courts to over step their competence.

---

[65] *Ladele v Islington Borough Council* [2009] EWCA Civ 1357; then heard with *Eweida and Others v the United Kingdom*, Application No. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013.

[66] *Williamson v Secretary of State for Education and Employment* [2005] UKHL 15 at para 22

[67] *R (Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15; *R (Watkins-Singh) v The Governing Body of Aberdare Girls' High School* [2008] EWHC 1865 (Admin).

In addition, the distinction between manifestation of belief and behaviour motivated by belief relies on an understanding of the content of religious rights based on a binary division between inner belief and manifestation of that belief. This means courts can miss some of the additional aspects of religious belief and practice as experienced by religious individuals. Religious interests include expressing religious identity and this creates additional reasons for protecting religiously motivated behaviour. For example, the decision to follow a religious dress code may express religious identity as much as express a set of beliefs.[68] Creating a split between practices that are motivated by beliefs and those which are mandated by them thus imposes a somewhat subjective means for distinguishing between claims.

The split between manifestation and motivation also reflects a split between belief and action which is peculiar to certain forms of religion, in particular protestant Christianity.[69] As a result, different religions may be treated very differently on the basis of their different theology. Moreover, forms of religion with stricter rules are likely to enjoy greater protection, because of the fact that they mandate a larger number of practices; and yet it seems somewhat counter-intuitive to allow the level of obduracy in the religion's rules to play role in setting standards of legal protection.

Although it is deeply entrenched in the ECtHR case law, distinguishing between practices which manifest religion, and those which are merely motivated by it, is clearly problematic. The inequality that results, as between different religions, makes this a feature of human rights adjudication that is particularly inapt for translation into the equality law framework.

3.2.1 The paradoxical role of choice:

The role that the notion of choice plays in determining the proper scope for human rights protection for religion or belief is complex and contradictory. Some have argued that religious affiliation is a chosen characteristic and so the religious person's rights should usually yield when set against the rights of

[68] P W Edge, 'Religious rights and choice under the European Convention on Human Rights' [2000] 3 *Web JCLI*.

[69] See generally The Oxford Handbook of Global Religions, Ed. M Juergensmeyer (OUP, Oxford, 2006). For further discussion see L Vickers, 'Religious Freedom: Expressing Religion, Attire and Public Spaces' (2014) 22 J.L. & Pol'y 591

others. The idea, as with the specific situation rule, is that the religious person can change religions if he or she wishes to, or change his or her level of practical commitment to those beliefs, in order to avoid the resulting disadvantage.[70] However, the question of whether religion or its practice is chosen can certainly be questioned.[71] First, Riordan suggests that a phenomenology of religious faith shows that believers tend to understand themselves as chosen rather than choosing their faith.[72] Also, there is little mobility between religious groups in practice, suggesting that the exercise of any 'choice' is very limited. Second, religious affiliation may be ascribed by others' perceptions rather than by choice of the individual. For example, in *Ebrahimian* one of the factors taken into account by the ECtHR in deciding that the worker could not wear the headscarf was that clients may not be confident of equal treatment. Yet as the dissenting judge De Gaetano remarked, assumptions of religious affiliation can be made because of a person's name (e.g. names such as such as Singh, Mohammed or Christian) and this will not have been chosen. Third, it is arguable that even if in some respects the views and beliefs are chosen, nonetheless, this should not be used as reason to reduce protection for religion and belief interests: such choices are so closely related to concepts of identity that they become 'fundamental choices'.[73]

However, the issue of choice cuts both ways. Although, strong reasons are articulated above for rejecting the idea that religion is chosen, nonetheless, one of the reasons for including religion within the protection of human rights law was that of autonomy and the freedom to choose one's own conception of the good life. The role of choice in determining the parameters of the protection for religion and belief thus creates something of a paradox: religion acquires value from the notion of choice; but for

[70] See D Schiek, 'A New Framework on Equal Treatment of Persons in EC Law' (2002) 8 *European LJ* 290, and M Bell and L Waddington, 'Reflecting on inequalities in European equality law' (2003) 28 *EL Rev* 349.

[71] See I Solanke, *Discrimination as Stigma: A Theory of Discrimination Law* (2016, Hart Publishing, Oxford) Chapter 2.

[72] P Riordan, 'Which Dignity, Which Religious Freedom?' in C McCrudden (ed.) *Understanding Human Dignity* (Oxford, OUP, 2013) 431. See also R Ahdar and I Leigh, *Religious Freedom in the Liberal State* (Oxford, OUP, 2005) 62.

[73] See P W Edge, 'Religious rights and choice under the European Convention on Human Rights' [2000] 3 *Web JCLI*, and R Wintemute, *Sexual Orientation and Human Rights* (Oxford, OUP, 1985).

many individuals it is not experienced as chosen. Given this paradox, the notion that religion and belief are chosen should not be given decisive weight in the assessment of the scope of protection for religion or belief.

In the context of equality law, the notion of choice is rarely used to limit protection. Therefore, any transposition of the paradoxical and rather uneasy relationship between choice and religious freedom into the equality law context would be unwelcome.

c. The Margin of Appreciation

Under Article 9(2) ECHR, limitations on the manifestation of religion are allowed as long as they serve a legitimate aim, and are necessary and proportionate to the achievement of that aim. It is relatively easy to establish a legitimate aim for restrictions on religion or belief at work, not least because of the clear rights of employers to managerial discretion in the running of the business and the rights of other staff to work in an environment in which their equality and dignity are respected. Given that this is a relatively simple hurdle to cross, much will depend on whether any restriction is necessary and proportionate. At this stage, the decision will be fairly dependent on the facts of the individual case, and factors such as the nature of the restriction on religion,[74] and the nature of the applicant's job[75] will influence the outcome of the court's proportionality assessment.

More significantly, the ECtHR has also recognised that states need a certain flexibility in their observance of the Convention, and has established the concept of the 'margin of appreciation', which gives states flexibility in the interpretation of the Convention and in setting the parameters of their domestic law. In religion cases the ECtHR has allowed a fairly wide margin to operate, to reflect the very different approaches to religion that exist across Europe.[76]

---

[74] *Lingens* v. *Austria* Series A 103 (1986) 8 EHRR 407.

[75] *Pitkevich* v. *Russia* App. No. 47936/99, decision of 8 February 2001.

[76] Carolyn Evans, *Freedom of Religion under the ECHR* (Oxford: Oxford University Press, 2001) 143–44.

Whilst it is perhaps politic, out of respect for state sovereignty, to leave some discretion to states on contentious issues about which there is disagreement, nonetheless it does give rise to concern. Concerns regarding the use of the margin of appreciation in human rights cases are well rehearsed;[77] discussed here are additional concerns related to the potential for such a concept to infiltrate equality thinking and to undermine a unified approach to religion or belief across Europe.

On a practical level, reliance on the margin of appreciation leads to uncertainty. This can be seen in the fact that the ECtHR has given rather different answers to the question of whether religious symbols can be worn at work in its recent cases. In *Eweida*, the decision that the restriction on Ms Eweida's freedom of religion breached Article 9 ECHR suggested that the ECtHR required strong reasons before they would allow limitations on religious symbols at work, such as the health and safety concerns raised in Chaplin's case. Yet, following soon after the case of *Eweida*, the ECtHR reverted to a more restrictive approach to upholding religious interests in *Ebrahimian v France.*[78] In reaching this decision the Court relied heavily on the margin of appreciation, and noted the lack of consensus across Europe on the issue and the national context of the case, including the principle of secularism in the France, and the secular nature of the state and the public service.

Yet the underlying idea that there is a lack of consensus in the treatment of religion or belief across Europe is arguably based on a misconception. Although constitutional arrangements vary, there is in practice a far greater level of similarity in treatment than might be expected.[79] Indeed, in *S.A.S. v France*

[77] See D Tsarapatsanis, 'The margin of appreciation doctrine: a low-level institutional view' (2015) 35(4) Legal Studies 675; see also G Letsas, 'The Truth in Autonomous Concepts: How to Interpret the ECHR' (2004) 15(2) *European Journal of International Law* 279, and K Dzehsiarou 'Does Consensus Matter? Legitimacy of the European consensus in the case law of the ECHR' (2011) *Public Law* 534.

[78] (application no. 64846/11) decision of 26.11.15.

[79] See N Doe, *Law and Religion in Europe:* A Comparative Introduction (Oxford, Oxford University Press, 2011) discussed by C Evans and T Baker, in 'Religion and human rights: principles and practice', in F Cranmer, M Hill, C Kenny and R Sandberg (eds) *The Confluence of Law and Religion: Interdisciplinary Reflections on the Work of Norman Doe*, (2016 CUP, Cambridge).

the ECtHR relied on a wide margin of appreciation even whilst recognising that there *was* consensus against bans on face coverings in public spaces. Instead the ECtHR referred to the fact that the issue is subject to debate in many states.[80] The effect was to widen the margin of appreciation even further, beyond where there is a 'lack of consensus' to where 'debate' exists.

Apart from creating uncertainty and possible inconsistency in the protection of fundamental rights, reliance of lack of consensus, or even merely on the presence of debate, gives rise to a deeper concern, particularly where the rights involved also have an equality dimension. Use of a wide margin of appreciation involves a reliance on the concept of consensus to set the boundaries of human rights protection, leaving minority rights and interests vulnerable to the power of the majority. The aim of human rights protection is to protect the individual from the power of the majority (as represented by the state), making it dangerous for the boundaries of protection to be set by reference to majority opinion.[81]

Over-reliance on the margin of appreciation presents a risk that human rights protection can be significantly compromised.[82] Instead of highlighting the core of acceptable practice, and encouraging states to comply with that standard, the use of the margin of appreciation can lead states to assume that anything that is within that margin is acceptable, even practices which are at the outer limits of that margin. This can lead to very low levels of scrutiny, and a tendency to assume that the court's use of the

[80] *S.A.S v France* Application no. 43835/11 Judgment 1 July 2014. See further MLP Loenen and L Vickers, 'More is less? Multiple Protection of Human Rights in Europe and the Risks of Erosion of Human Rights Standards' in S Morano-Foadi and L Vickers (eds) *Fundamental Rights in the EU: A Matter for Two Courts* (Hart Publishing Ltd, 2015)

[81] See G Letsas, 'The Truth in Autonomous Concepts: How To Interpret the ECHR' (2004) 15(2) *European Journal of International Law* 279, and K Dzehsiarou 'Does Consensus Matter? Legitimacy of the European consensus in the case law of the ECHR' (2011) *Public Law* 534

[82] L Sager, 'Fair measure: the legal status of underenforced constitutional norms' (1978) 91 Harv L Rev 1212, cited in D Tsarapatsanis, 'The margin of appreciation doctrine: a low-level institutional view' (2015) 35(4) Legal Studies 675.

margin of appreciation determines that the practice is acceptable. Instead, national courts should still review the practice to see if it is acceptable within its own national context.[83]

Moreover, if the existence of debate (rather than lack of consensus) becomes the new test, this is also open to manipulation, whereby interested parties can engender debate, even on issues where practice is reasonably settled. Indeed, by applying the margin of appreciation where debate exists, the ECtHR has created an incentive for groups to create such debate. The aim of such debate does not need to be to win round public opinion, merely to generate a discussion. The acceptance, procedurally, in the ECtHR, of third party interventions creates significant space for such debate to be brought to the attention of the Court,[84] with a consequent risk that the Court will further reduce its supervision of religion or belief claims. Research suggests that this is a tactic already being used by some religious groups working to generate public debate on contentious issues.[85] Meanwhile organisations such as the European Centre for Law and Justice and the Alliance Defense Fund regularly intervene in cases involving religion or belief in Europe,[86] and some Christian groups have actively encouraged the idea that thinking and acting

[83] E Brems and L Peroni, 'Religion and Human Rights: Deconstructing and Navigating Tensions in S Ferrari (ed) Routledge Handbook on Law and Religion (Routledge, Abingdon, 2016) 155

[84] R Wintemute 'In Extending Human Rights, Which European Court Is Substantively "Braver" and Procedurally "Fitter"? The Example of Sexual Orientation and Gender Identity Discrimination' in S. Morano-Foadi and L. Vickers (eds) *Fundamental Rights in the EU: A Matter for Two Courts* (Hart Publishing Ltd, 2015).

[85] E Fokas, 'Comparative Susceptibility and Differential Effects on the Two European Courts: A Study of Grasstops Mobilizations around Religion' (2016) 5(3) *Oxford Journal of Law and Religion*, 541-574; C McCrudden, 'Transnational Culture Wars' Public Law and Legal Theory Research Paper Series, SSRN Paper 447, April 2015.

[86] See also C McCrudden, Transnational Culture Wars, Public Law and Legal Theory Research Paper Series, SSRN Paper 447, April 2015.

like a minority will improve their protection.[87] As McCrudden puts it, the aim is to create a 'cascade' and influence legal developments in other jurisdictions.[88]

Of course, there will always be a need for some level of discretion for national courts, and the margin of appreciation has a long pedigree in the case law of the ECHR. Indeed, it is now explicitly referred to in Article 1 of Protocol 15 to the Convention. Discretion is needed as the human rights framework is based on the need to find a plural space in which individuals can live together, despite profound differences.[89] To a degree, it reflects the fact that the human rights norms of the ECHR are based on incompletely theorised agreement, whereby, in order to produce agreement on contested issues, legal systems tend to agree on outcomes without agreeing the abstract underlying principles.[90] However, as shown above, the extension of the margin of appreciation seen in *S.A.S. v France* can serve to undermine any move towards consistency in the treatment of religion or belief in Europe. This inability to subject state practice to appropriate levels of scrutiny is all the more problematic if applied in the context of EU equality law, the aim of which is to promote inclusion by setting common standards across EU member states.

d. Shortcomings of the human rights framework for the protection of equality

Whilst the human rights framework for the protection of religion and belief is well established, the level of protection is weak, with low levels of scrutiny applied by the Court in Strasbourg. Some shortcomings in its doctrinal framework have been identified above: courts can be led into inappropriate discussions on matters of religious doctrine; the court can be inconsistent on questions related to choice, in both a general sense and with respect to the specific situation rule; and perhaps the most serious shortcoming,

[87] See for example, T Stanley 'British Christians must start to think and act like a minority' The Spectator, 29 March 2016.

[88] C McCrudden, Transnational Culture Wars, Public Law and Legal Theory Research Paper Series, SSRN Paper 447, April 2015 at p. 12, citing K Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (2011).

[89] C McCrudden, Marriage Registrars, Same-sex Relationships, and Religious Discrimination in the European Court of Human Rights 2016 U of Michigan, Public Law And Legal Theory Research Paper Series Paper No. 513. SSRN.

[90] C R Sunstein 'Incompletely Theorized Agreements' in (1995) 108 (7) *Harvard Law Review* 1733-1772

the use of a wide margin of appreciation allows for very different levels of protection for freedom of religion or belief in the workplaces of Europe, and results in limited protection for religious minorities.

These shortcomings are particularly significant when religious claims are viewed from the perspective of equality. For example, as noted above, in the context of equality law, the idea that a person discriminated against can choose to avoid the discrimination by choosing to resign would not be accepted. More significantly, in its use of the margin of appreciation doctrine, the human rights approach conflicts most directly with an approach based on equality. This conflict is exacerbated by the move by the Court in *S.A.S v France* to allow the existence of debate to trigger reliance on the margin of appreciation, leaving the protection for religious interests vulnerable to manipulation.

Having identified a number of shortcomings in the human rights framework for the protection of religion or belief at work, I now turn to assess the extent to which these concepts have infiltrated the CJEU reasoning in its recent decisions on non-discrimination on grounds of religion or belief.

D. Transplanting human rights concepts into equality law: one step back by the CJEU

The two cases referred to the CJEU from France and Belgium concerned a similar factual question regarding treatment of restrictions on the wearing of the *hijab* at work under the EU Equality Directive. Judgment was given on the same day, although the two cases were the subject of separate Advocate General opinions (AG Kokott and AG Sharpston).

Achbita v *G4S* concerned a receptionist who informed her employers that she intended to wear an Islamic headscarf at work. She was told that this would breach the company's rule, at that time unwritten, requiring neutrality in terms of dress. The company then adopted a change to its written rules to ban the wearing of visible signs of political, philosophical or religious belief and Ms Achbita was dismissed for refusing to comply with this rule. The question referred to the CJEU was whether this amounted to direct discrimination. The CJEU ruled that because the rule applied to all religions and beliefs, it was not directly discriminatory. Whether the court was correct in deciding that there was no

direct discrimination is discussed briefly below, although the CJEU did not give the issue much attention. Instead it ruled that Ms Achbita's treatment would be indirectly discriminatory unless it could be objectively justified by a legitimate aim, such as a policy of neutrality vis-à-vis its customers.

Bougnaoui v *Micropole Univers* concerned a design engineer who wore a headscarf when visiting clients. She was dismissed for refusing to accede to her employer's request that she desist from wearing the headscarf in future following a complaint from a client. The employer claimed that its requirement that staff should not wear the headscarf could be viewed as a 'genuine occupational requirement' (GOR) under Article 4(1) of Directive 2000/78. The CJEU held that the requirement could not be a GOR, as such exceptions only apply to requirements which are objectively dictated by the nature of the job, or by its context, and could not be used to cover such client requests.

The opinions of the two AGs differed significantly. Aspects of the reasoning found in the ECHR case law can be seen in their opinions, with their divergent views on the role of choice and the role of the margin of appreciation of particular note. What can be seen from an analysis of these decisions is that incorporating human rights concepts into the equality framework, can lead to limited protection for religious minorities at work.

a. The Advocate General Opinions

i. The role of choice and the specific situation rule

As noted above, the role of choice in determining religious rights is complex and paradoxical. In *Achbita* AG Kokott took the view that the wearing of a headscarf by an employee could lawfully be restricted by the employer, and this view was based in part on her approach to the question of choice. She viewed religion as different to other characteristics because *'the practice of religion is not so much an unalterable fact as an aspect of an individual's private life, and one, moreover, over which the employees concerned can choose to exert an influence…. an employee may be expected to moderate the exercise of his religion in the workplace..."* [116] This approach also suggests that AG Kokott was happy to incorporate the human rights based 'specific

situation rule' into the jurisprudence of the CJEU, despite the fact, as discussed above, that such a rule is usually not accepted in the context of equality law.

In *Bougnaoui,* AG Sharpston took the preferable view that although religious observance can involve an element of choice in practice, nonetheless, religion is not always a chosen characteristic; and to the extent that it is chosen, such choice is closely related to an individual's concept of identity and self-respect. AG Sharpston noted that '*to someone who is an observant member of a faith, religious identity is an integral part of that person's very being… it would be entirely wrong to suppose that, whereas one's sex and skin colour accompany one everywhere, somehow one's religion does not*'.[91] By framing the protection for religion and belief in the context of other equality grounds, she avoided limiting the protection for religion or belief by reference to notions of choice or immutability. Yet at the same time, she left space for the paradoxical role of choice identified above in her recognition that religion or belief is an integral part of identity. She recognised that although some compromises may be needed between an employer's needs and those of the employee, nonetheless, staff should not be readily told to look for alternative employment.[92] In taking this line, she effectively rejected the specific situation rule that has been so readily applied in the context of the human rights framework.

ii. The use of 'margin of appreciation' reasoning

As noted above, heavy reliance on the 'margin of appreciation' serves to limit the protection provided in religious freedom cases. Given that EU equality law has traditionally set common standards to eradicate inequality across the EU, it might be expected that the argument that national traditions should be allowed to justify discrimination in employment would not be accepted. Yet in *Achbita* AG Kokott appeared to do just that. Using reasoning that is entirely consistent with the approach of the ECtHR, she concluded that some discretion is needed for States when applying the Equality Directive and that one

[91] *Bougnaoui and ADDH* C-188/15 Judgment of 14 March 2017 at para [118]

[92] *Bougnaoui* at 128

of the factors to which the court should have regard in assessing proportionality was 'the national identities of Member States inherent in their fundamental structures'.

In contrast, AG Sharpston in *Bougnaoui* was clear that different standards of protection should not be applied to different equality grounds. By implication then, if national identity would not be allowed to justify gender discrimination, nor should it justify religious discrimination. Moreover, she warned strongly against businesses relying on customer prejudice to justify discrimination, suggesting that arguments based on established practice should not be accepted as justifying a refusal to accommodate religious manifestations at work.[93] Instead, she assumed that in the vast majority of cases it will be possible for employers and employees to reach an accommodation allowing the employer's business needs to be met while providing for the manifestation of religion, stating that the need to make a profit can prevail over an individual employee's right to manifest religion only 'in the last resort'. This suggests that general issues such as national identity should not generally provide valid reasons for restricting the wearing of religious symbols at work.

b. The decisions of the CJEU

The divergent AGs opinions in the two cases left the CJEU's options open in making the final determination in the case. It could follow AG Kokott and rely on the specific situation rule and concepts akin to the margin of appreciation to grant significant discretion to the national court, as has traditionally been the approach to religion and belief protection under the ECHR; or follow AG Sharpston, and uphold the traditions of the CJEU when it comes to equality law by setting high, and internationally consistent, standards of protection.

The decision of the CJEU amounts to something of a compromise between the two, although as the following analysis suggests, overall, the CJEU veered towards AG Kokott's reasoning. Whilst it upheld AG Sharpston's decision on its facts (that the employer's requirement could not be a genuine and

[93] *Bougnaoui* at 133

determining occupational requirement within Article 4(1)) at the same time, the CJEU generally upheld the use of national courts' discretion, and concluded that religious dress at work could be fairly readily restricted. Indeed, it went further than it needed to in concluding that in some circumstances employers must, rather than may, impose restrictions.

The ready acceptance by the CJEU that the treatment did not amount to direct discrimination can be questioned in the light of the academic debate on this issue.[94] On the face of it, the distinction appears clear: direct discrimination occurs where the less favourable treatment is because of religion or belief; indirect discrimination arises because of the use of neutral criteria which have an unequal impact in practice for reasons related to religion or belief. However, it is arguable that the distinction is not so clear in practice, particularly since the acceptance by the CJEU in *CHEZ*[95] that where a protected characteristic is a determining factor for the decision to impose a different treatment, this is sufficient to demonstrate direct discrimination. Moreover, in the context of religious discrimination, where restrictions apply almost exclusively to one religious group, such as Muslim women, then it is arguable that they should be treated as directly discriminatory.

Where this argument has been run in the UK, it has been unsuccessful. For example, in *Azmi v Kirkless B.C.*[96] the UK Courts have held that a rule against face covering which applied to everyone and was neutral in terms of religion was not directly discriminatory but was potentially indirectly discriminatory and would need to be justified. This approach, confirmed by the CJEU accords with the approach of ECtHR under Article 9 ECHR. To use its terminology, a ban on the headscarf did not treat Ms Achbita less favourably because of her beliefs themselves, but because she wished to manifest those beliefs.

---

[94] G Pitt, 'Keeping the faith: trends and tensions in religion or belief discrimination', (2011) 40(4) *Industrial Law Journal* 384-404; B Hale 'Religion and sexual orientation: the clash of equality rights' (2014) Comparative and Administrative Law Conference, Yale Law School, 7 March. This is also discussed in A McColgan, 'Class wars? Religion and (in)equality in the workplace' (2009) 38(1) *Industrial Law Journal* 1-29; see also See for example, E Bribosia and I Rorive, 'The dark side of neutrality' Strasbourg Observers Blog, 14 September 2016 available at https://strasbourgobservers.com/2016/09/14/ecj-headscarf-series-4-the-dark-side-of-neutrality/accessed 11 July 2017. See also E. Brems, 'Analysis: European Court of Justice Allows Bans on Religious Dress in the Workplace', International Association of Constitutional Law Blog, available at https://iacl-aidc-blog.org/2017/03/25/analysis-european-court-of-justice-allows-bans-on-religious-dress-in-the-workplace/ accessed 11 July 2017.

[95] Case C-83/14, *CHEZ Razpredelenie Bulgaria AD v Komisa ZA Zashtita ot Diskriminatsia*

[96] [2007] ICR 1154

Under Article 9(2) manifestations of religion are not granted absolute protection, but are only protected to the extent that they are proportionate. An acceptance in *Achbita* that discrimination for manifesting religion amounts to indirect discrimination thus creates a close fit with the scheme of protection under Article 9 ECHR.

In both cases, whether the restriction on religion or belief is treated as a form of indirect discrimination or as direct discrimination to which a genuine occupational requirement is applied, the same questions arise: whether there is a legitimate aim for any restriction on religion; and whether that restriction is a proportionate means of achieving the legitimate aim.

In terms of legitimate aims, the CJEU was somewhat inconsistent as between the two cases. The Court was clear in *Bougnaoui* that a desire to uphold customer choice cannot be a legitimate aim for restrictions on religious dress. To be legitimate, the requirements must be objectively required by the nature of the occupational activities concerned or of the context in which they are carried out; subjective considerations such as the wishes of the customer cannot be relied on to justify religious discrimination. Yet the CJEU took a contradictory approach to the same issue in *Achbita*, stating that the "the desire to display, in relations with both public and private sector customers, a policy of political, philosophical or religious neutrality must be considered legitimate" and that an employer's wish to project an image of neutrality towards customers relates to the freedom to conduct a business.

There are two reasons to challenge this conclusion. First, it is surely not the case that such requirements 'must' be legitimate, given the conclusion in *Bougnaoui* and the fact that so many organisations both in the public and private sector operate successfully without such neutrality rules. Second, the CJEU takes an inconsistent approach to the role of customer preference. In both cases, the wish for a neutral appearance came from a customer. In *Achbita* the CJEU held that it is legitimate for an employer to wish to project an image of neutrality towards customers; whilst in *Bougnaoui* it decided that a requirement to dress neutrally cannot be justified by the employer's willingness to take account of the particular wishes of the customer. It is possible to explain the difference in approach to customer preference based on

the fact that in *Achbita*, customer preference was used as a factor in assessing the proportionality of the potential indirect discrimination, whereas in *Bougnaoui* the customer opinion was to act as a defence to direct discrimination.[97] However, although technically used in these different ways, the CJEU does not draw such a distinction, and the cases still reflect a level of inconsistency on this issue. This was despite the clarity of AG Sharpston's opinion in *Bougnaoui* that it would be dangerous to allow businesses to rely on customer preference to justify discrimination. She specifically drew attention to "the insidiousness of the argument, 'but we need to do X because otherwise our customers won't like it'." Such an argument may be "indicative of prejudice based on …. religion" and it is "particularly dangerous to excuse the employer from compliance with an equal treatment requirement in order to pander to that prejudice."

After *Achbita* it would seem that the legitimacy of any restriction on religion or belief will be fairly easy to make out. Nonetheless, the application of the aim in the particular case must be proportionate, and so there remains some space for the Court to engage in a degree of standard setting for the protection of religious interests at work. In *Bougnaoui* this question was given little discussion: having decided that customer preference could not be an occupational requirement there was no need to consider proportionately in any detail. However, the question was discussed in *Achbita.* Here the Court took into account that the prohibition covered only G4S workers who interact with customers, and held that where that is so, the prohibition 'must' be strictly necessary for the purpose of achieving the aim. Given that it had already accepted that a desire to display neutrality to customers 'must' be legitimate, there is internal logic to the rule that it is proportionate to apply that rule to all those interacting with customers. However, such an absolute rule is not only inconsistent with *Bougnaoui* but also carries with it the dangers of pandering to prejudice, as identified by AG Sharpston.

Moreover, such an absolute statement regarding proportionality leaves the Court no discretion to consider some of the wider contextual issues that can arise in religion or belief cases such as the fact that

[97] See R. McCrea, 'Faith at work: the CJEU's headscarf rulings' EU Law Analysis, 17th March 2017; available at http://eulawanalysis.blogspot.co.uk/2017/03/faith-at-work-cjeus-headscarf-rulings.html (accessed 11 July 2017)

restrictions on religion or belief in large parts of the public and private sector workplace can lead to a significant diminution in employment opportunities for religious minorities; and that restrictions on the Islamic headscarf in particular has particularly disparate impact on Muslim women, and so raises issues of intersectional discrimination. These factors all have particular resonance from the perspective of equality, particularly when equality is understood to include the aim of redressing disadvantage and promoting inclusion of minorities.

The failure of the Court to reflect on the insights that come from equality thinking is seen particularly in its approach to limiting visible symbols in public facing roles. This has the potential to create very significant limits on the protection of religious dress at work, given just how many roles can be public facing. Any individual who is in a client facing role, such as design engineers like Ms Bougnaoui, together with anyone working in health and social care, teaching, law, policing, retail, tourism, catering, etc. are all covered by this restriction. Confining protection for religious expression to non-visible or back room roles can thus be seen as a backwards step in terms of promoting equality for minority groups. The effect is to restrict not only employment opportunities, but also broader inclusion of groups such as Muslim women and Sikh men at work, thereby creating invisibility for religious minorities. In contrast to the usual approach in equality law, which has been to encourage participation of protected groups by addressing their needs (for example, the introduction of maternity leave), the courts seems to revert to an approach where the minority group has to take responsibility to solve any difficulties by removing themselves from parts of the workforce. In effect, the onus seems to be on religious minorities to 'fix' themselves, rather than changing the discriminatory practices.

Having ruled that the particular aim in question in *Achbita* 'must' be proportionate on its facts if the restriction was limited to public facing roles, the Court did go on to make some more general comments about assessing proportionality. The Court suggested that it could take into account whether the employer had tried to find alternative work for the employee, perhaps in a non-client facing role. The

requirement to engage in some dialogue to see if there are other roles that the employee could fulfil creates a level of obligation on employers to try to accommodate religious employees in other roles.[98]

Apart from its comment on the need to consider alternative work, the Court gave very little guidance on how domestic courts should determine the proportionality of restrictions on religion or belief, merely reiterating the fairly generic statement that the referring court should have regard to all the facts and interests in the case and limit the restrictions on the freedoms concerned to what is strictly necessary. Although this serves as a reminder that a requirement of proportionality does require some scrutiny by courts,[99] it is noteworthy that in comparison with cases from the CJEU involving other equality grounds the court gives little guidance on the standards to be applied. For example, in the context of age and sex discrimination, in the cases of *Abercrombie & Fitch Italia,*[100] *Kreil*[101] and *Lommers*,[102] the Court gave more detailed guidance on the particular facts as to whether the discriminatory rules in question were proportionate rather than merely referring the matter to the domestic court. In *Bougnaoui* and *Achbita* in contrast, the CJEU does not take the opportunity to establish strong standards for the protection of religious equality.

---

[98] The Court stopped short of advocating a duty of reasonable accommodation for religion or belief. However, the suggestion that failure to consider accommodation of religion could be relevant to assessing the proportionality of any restriction on religion or belief adds weight to the argument that a separate duty of reasonable accommodation is unnecessary as implicitly included in the notion of indirect discrimination. See K. Alidadi, 'Reasonable accommodations for religion and belief: Adding value to Art.9 ECHR and the European Union's anti-discrimination approach to employment?' (2012) 37 (6) *European Law Review* 693, and L Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (2nd edition, 2016, Hart Publishing, Oxford) Chapter 7.

[99] E Brems and L Peroni 'Religion and human rights: Deconstructing and navigating tensions' in S Ferrari (ed) *Routledge Handbook of Law and Religion* (Routledge, Abingdon, 2015).

[100] *Abercrombie & Fitch Italia Srl v Antonino Bordonaro* Case C-143/16 23 March 2017.

[101] *Kreil v Bundesrepublik Deutschland* Case C-285/98 11 January 2000.

[102] *Lommers v Minister van Landbouw* Case C-476/99 19 March 2002.

Thus, in its first religion or belief cases, the CJEU largely followed the reasoning of the ECtHR on religious claims, with its attendant limitations. In doing so, it failed to set clear and consistent standards across the various strands of equality law, settling instead for greater consistency between the two courts in their approach to religious claims at work.

E. One step back for equality law

Discussion of first two CJEU cases on religion or belief equality has highlighted significant shortcomings in the Court's treatment of religion or belief claims resulting from its reliance on human rights concepts. In particular the acceptance of the specific situation rule and the reliance on national traditions in setting the standards of protection could leave members of religious minorities vulnerable to discrimination. By adopting the conceptual approach of the ECHR in dealing with non-discrimination on grounds of religion or belief, the CJEU has missed the opportunity to bring insights from equality thinking to the protection of religion or belief interests at work. In particular, the introduction of something akin to the margin of appreciation into EU equality law brings with it the risk that the current debate and a supposed lack of consensus surrounding matters of religion or belief will result in reduced protection for minority groups. This also runs the risk of compromising the effective transposition of the EU equality directives as different states are allowed to impose different standards of protection for religious minorities. It might have been preferable if, instead of falling into line with the human rights framework of the ECHR, the CJEU had instead relied on the equality framework that was already established for other grounds, requiring careful scrutiny of the proportionality of treatment that may result in less favourable treatment of workers because of religion or belief.

An equality based approach, particularly one built on notions of equality including disadvantage and inclusion, would allow greater weight to be given to the types of concerns with which equality law usually engages. Issues which would then be taken into account could include the level of economic or social disadvantage suffered by the religious group, and any stigma attached to the religion in question. It

would also enable weight to be given to any socio-economic disadvantage associated with the religious group, and could give considerable protection where a restriction on the manifestation of religion at work leads effectively to the denial of the opportunity to work. An equality based approach also allows matters such as intersectional discrimination to be taken into account, so that a court could take account of the whether bans on head covering have a greater impact on women than men, for example.

An equality based approach does not automatically mean that religion or belief will be protected or accommodated, as factors which may tell against accommodating religious practices would be weighed in the balance too. For example, a court could give weight to an employer's interest in setting its own image or ethos, secular or religious, as well as recognising interests such as economic efficiency and health and safety concerns, and whether the workplace is public sector or private sector.[103] An approach to religion or belief claims based on proportionality,[104] retains flexibility for domestic courts, but equally serves an agenda of setting equality standards rather than merely reflecting exiting national norms.

On the one hand, the approach of the CJEU is not a surprise. The CJEU already allows a 'margin of discretion' in other cases involving fundamental rights, such as *Schmidberger v Austria*,[105] *Omega*[106] and *Viking and Laval*[107] where it was accepted that EU law must be interpreted in the light of fundamental human rights principles. The decision in *Achbita* and *Bougnaoui* can be seen to reflect the same approach.

---

[103] This can work in favour or against accommodating religious practice. Public sector workplaces arguably should reflect the secular nature of the public sphere; but equally the public sector could be said usefully to reflect the community it serves, by accommodating religious practice.

[104] For further discussion see L Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (2nd ed. 2016, Hart Publishing, Oxford) Chapter 3.

[105] *Schmidberger Internationale Transporte Planzüge v Republik Österreich* Case C-112/00.

[106] *Omega v Oberburgermeisterin der Bundesstadt Bonn* Case C-36/02.

[107] *The International Transport Workers' Federation and The Finnish Seamen's Union v Viking Line* Case C-438/05; *Laval v Svenska Byggnadsarbetareforbundet,*Case C-341/05. For discussion, see A.C.L. Davies, *One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ* (2008) 37 (2) *ILJ* 126.

And yet, on the other hand, the CJEU has been less deferential to national context in respect of other equality grounds such as sex or race discrimination. Given the traditional strength of EU equality law on other grounds, the CJEU decisions in *Achbita* and *Bougnaoui*, with their deferential approach to national traditions, can be understood as backwards step for equality law.

F. A second step back – a backwards for integration

The reason for the backwards step in terms of equality can best be understood in the context of a deeper reluctance on the part of the CJEU to address issues of state sovereignty which arise when considering the highly contentious question of the proper scope of protection for religion or belief in Europe. Its failure to address this deeper matter of the integration of standards across the EU can be seen as second backwards step on the part of the CJEU.

The continent has a long and very troubled relationship with religion as a major cause of dispute over matters of sovereignty between and within states.[108] Since the wars of the twentieth century, the political settlement has involved economic and then increasingly social and political integration between European states, with the introduction in the Treaty of Maastricht of Union citizenship.[109] The moves to increase integration across Europe, politically and socially, have had significant impact on conceptions of state sovereignty.

The EU's move from an economic union to a social and political union has involved an agenda to promote integration.[110] The EU Equality Directives can be seen to form part of this process, with the recognition that 'employment is a key part of the integration process.'[111] Thus the development of protection against discrimination on grounds of religion or belief can be understood to form part of a

[108] L. Zucca *A Secular Europe* (OUP Oxford 2012).

[109] Introduced by Art 2 EU and 17-22 EC of the Treaty of Maastricht.

[110] Tampere Presidency Conclusion, European Council, 15-16 October 1999, SN 200/99, Brussels.

[111] Common Basic Principles for Immigrant Integration Policy in the European Union, Council document 14615/04, 19.11.2004, agreed by the European Council.

strategy to promote the integration of minorities, by developing diversity and inclusion.[112] In effect, employment has become a key site for promoting integration, in part because the workplace can lead to interaction between immigrants and other citizens, and in part because improved employment levels for migrant populations will increase their social integration.

Religious claims at work can be understood to form part of the policy agenda for increasing EU integration, and it is arguable that this aim should be taken into account in assessing the proportionality of any potential indirect religious discrimination. The aim of promoting the employment of minority groups, and thereby enhancing the European social policy agenda, could be taken into account alongside issues such as, the importance of religious identity, and the interest of the employer in promoting a particular corporate image.

However, the decision of the CJEU in *Achbita* and *Bougnaoui* suggests that such a step is unlikely. By relying on human rights thinking about the margin of appreciation, the CJEU has reduced the likelihood that the Equality Directive can be used to enhance the employability of religious minority workers across the EU. To that extent, it represents a second backwards step for workers from religious minorities.

This second backwards step is understandable when viewed from a broader political perspective. Although integration policy involves integration of minority groups within and between member states, integration policy also operates at the level of the EU as a whole, including in the constitutional sphere. Within this broader constitutional context, matters of religion or belief have proved intractable. The movement towards a social Europe has seen significant developments in the harmonisation of standards across the EU on a range of social issues including health and safety,[113] working time,[114] and family

[112] See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, European Agenda for the Integration of Third-Country Nationals (Brussels, 20.7.2011, COM (2011) 455 Final, p 5.

[113] Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.

reunification.[115] In order to achieve greater political and social integration, Member states have ceded key areas of sovereignty including border controls, currency and even national security. Nonetheless, different national approaches to religion appear unamenable to such levels of EU integration, with very different approaches to religious dress codes remaining accepted: for example, following the *Achbita* decision, the UK Government was quick to issue a statement reinforcing the message that in the UK religious dress would usually be allowed at work.[116] At the same time, courts in France are unlikely to discontinue their approach to *laïcité*.[117]

Viewed at from the perspective of national sovereignty, the approach of the CJEU in *Achbita* and *Bougnaoui* the headscarf cases may be disappointing, but not surprising. National approaches to religion or belief have long caused tension at the constitutional level of the EU, as seen in the difficult debates in the drafting of the EU treaties and the development of the EU Constitution.[118] It would appear again that despite significant moves to integrate, member states are not willing to countenance giving up sovereignty when it comes to national approaches to religion. It may be that as far as EU integration is concerned, losing sovereignty on matters of religion would be a step too far. Given the poor level of political capital enjoyed by the EU currently, it is unsurprising that the CJEU has taken an approach that

---

[114] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.

[115] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

[116] *Hansard* HL vol 779 col 1869 (15 March 2017). See also the Government statement *Hansard* HC vol 623 col 409 (15 March 2017).

[117] See the *Baby Loup* case, Cour de cassation Assemblée Plénière 25 June 2014 (2014) *Recueil Dalloz*, 1386. See Hunter-Henin, M. (2015) Living Together in an Age of Religious Diversity: Lessons from *Baby Loup* and *SAS' Oxford Journal of Law Religion* 4 (1) 94-118.

[118] R McCrea *Religion and the Public Order of the European Union* (Oxford, OUP, 2010).

is deferential to national context. To do otherwise could have pushed social integration at European level further than most member states would tolerate.[119]

G. Conclusion

Recent developments in the case law of the ECtHR and the CJEU suggest that the two European courts continue to struggle when it comes to religious claims. Although there is some consistency between the approaches of the two courts, the outcomes remain somewhat unpredictable. After it was found in *Eweida* that corporate image could not justify a restriction on the cross, in *Ebrahimian* the ECtHR upheld a ban on the headscarf in order to uphold the employer's secular image; in *Achbita* the headscarf ban was upheld, in *Bougnaoui* it was not. Of course the differences in treatment can be explained, but nonetheless, there does not appear to be any systematic answer to the practical question of when religious attire is allowed at work. The case is made above that this is in part due to conceptual limitations identified in the human rights framework having infiltrated into the equality framework; and that these difficulties reflect broader discomfort with notions of integration across Europe.

In some regards, the two legal frameworks rely on a common framework,[120] and it is certainly simpler if the two courts move towards a common approach to determining what is proportionate. On the one hand, the reliance by the CJEU on concepts found in the ECHR case law can thus be viewed as a positive step in terms of developing reciprocity between the two courts. On the other hand, although understandable as a matter politics, the decisions represent backwards steps in terms of the trajectory of European integration, and from the perspective of equality law. This becomes particularly apparent

[119] See further, R. McCrea, 'Faith at work: the CJEU's headscarf rulings' EU Law Analysis, 17th March 2017; available at http://eulawanalysis.blogspot.co.uk/2017/03/faith-at-work-cjeus-headscarf-rulings.html (accessed 11 July 2017)

[120] Article 9(2) ECHR allows for limitations on religious practice where such they serve a legitimate aim, and are necessary and proportionate to the achievement of that aim; under the Equality Directive, restrictions are also allowed when necessary and proportionate to achieve a legitimate aim, either as justifications for potential indirect discrimination, or to justify a GOR under Article 4(1) of the Directive.

when equality is understood in terms of overcoming disadvantage and promoting inclusion. A preferable approach would be to continue to promote reciprocity in the interpretation of proportionality in religion and belief, but using understandings from equality law to infiltrate human rights thinking rather than vice versa.

Concepts from equality law which could usefully be incorporated into the assessment of proportionality in relation to religion or belief at work include: the recognition that failure to accommodate the common religious practices of minority religious groups can lead to significant inequalities in terms of access to employment; that restricting employment opportunities for minority groups to 'back room' roles will limit the promotion of positive role models for minorities and the promotion of social inclusion at work; and that it is rarely acceptable to respond to discrimination by 'fixing' the disadvantaged group, for example by requiring them to dress differently or stay out of sight.

By incorporating into the equality framework concepts borrowed from the European human rights tradition, the CJEU has thus taken one step forward in terms of consistency, but in the process it has taken two steps back in terms of its potential to enhance EU integration, and provide effective equality protection at work for Europe's religious minorities.

Final manuscript of an article published as:

Vickers, L. (2017). 'Achbita and Bougnaoui: One Step Forward and Two Steps Back for Religious Diversity in the Workplace'. *European Labour Law Journal*, 8(3), 232-257. https://doi.org/10.1177/2031952517724897.