SYMPOSIUM

IS THERE A PLACE FOR ISLAM IN THE WEST? ADJUDICATING THE MUSLIM HEADSCARF IN EUROPE AND THE UNITED STATES

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INTRODUCTION

On March 14, 2017, while the world was debating whether the White House was trying to ban Islamic immigration in its executive orders,[1] in the small town of Luxembourg fifteen judges spoke for the first time on Islam on behalf of the European Union. The result was not particularly good for Muslims, especially compared with the relevant United States Supreme Court case law.

The Court of Justice of the European Union (CJEU) dealt with two cases that revolved around religious discrimination in the workplace. *Achbita v. G4S Secure Solutions*[2] originated in Belgium and concerned a company's internal policies. A Muslim receptionist had been dismissed because she refused to take off her religious veil, which was forbidden by her company's internal rule that prohibited the use of visible religious, political, or philosophical signs.[3] The French case *Bougnaoui v. Micropole SA*[4] stemmed from the dismissal of an employee at a customer's request. An engineer who called on clients for the company was fired because she refused to

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1 *See, e.g.*, Farhana Khera & Johnathan Smith, Opinion, *Don't Be Fooled, Trump's New Muslim Ban is Still Illegal*, N.Y. TIMES (Mar. 6, 2017), https://www.nytimes.com/2017/03/06/opinion/dont-be-fooled-trumps-new-muslim-ban-is-still-illegal.html?mcubz=1; *see also* Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017); Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017).

2 Case C-157/15, Achbita v. G4S Secure Sols. NV, 2017 EUR-Lex CELEX LEXIS 0157, ¶ 11 (Mar. 14, 2017).

3 *Id.* ¶ 15–16.

4 Case C-188/15, Bougnaoui v. Micropole SA, 2017 EUR-Lex CELEX LEXIS 0188, ¶ 14 (Mar. 14, 2017).

take off her Muslim headscarf, as her company requested, after one of the company's customers complained that being served on its own premises by someone wearing the headscarf had "upset a number of its employees."[5]

The CJEU was perfectly aware of the political importance of its rulings. In *Achbita*, the Advocate General—a CJEU officer who advises the judging panel on how it should adjudicate in light of European Union (EU) interests[6]—had highlighted that the issue of the headscarf touched upon "the more fundamental question of how much difference and diversity an open and pluralistic European society must tolerate . . . and, conversely, how much assimilation it is permitted to require from certain minorities."[7] The CJEU's judges knew that their decisions would measure the tensions that derived from "an arguably unprecedented influx of third-country migrants and the question of how best to integrate persons from a migrant background."[8]

The CJEU was informed about the U.S. Supreme Court's recent case law on religious discrimination in the workplace: *Achbita*'s Advocate General explicitly mentioned the Court's recent decision *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*[9] In *Abercrombie*, a Muslim woman sued the clothing retailer for allegedly discriminating against her because it had decided not to hire her because of her religious expression.[10] The plaintiff's argument was that Abercrombie, which kept a strict dress code policy forbidding headgear, did not want to hire the woman for fear that she would seek an accommodation to wear the headscarf under Title VII of the Civil Rights Act of 1964.[11] The Supreme Court responded by making a clear statement in favor of religious freedom based on Title VII's statutory language. Although "[a]n employer [was] surely entitled to have . . . a no-headwear policy as an ordinary matter[,]" such policy did not rule out religious accommodations because "when an applicant requires an accommodation as an 'aspec[t] of religious . . . practice,' it is no response that the subsequent 'fail[ure] . . . to hire' was due to an otherwise-neutral policy."[12]

This was not the conclusion of the CJEU, which utilized *Achbita* and *Micropole* to mark the distance between the European and the American approaches to religious discrimination in the workplace. It made it crystal clear that Europe prioritizes economic activities over religious freedom and endorses neutrality as a plausible image for a company that can be forced upon employees, and it underlined

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5 *Id.*

6 *See* Consolidated Version of the Treaty on European Union art. 19, ¶ 2, Oct. 26, 2012, 2012 O.J. (C 326/13) [hereinafter Treaty on European Union].

7 Opinion of Advocate General Kokott, Case C-157/15, Achbita v. G4S Secure Sols. NV, 2016 EUR-Lex CELEX LEXIS 0157, ¶ 3 (May 31, 2016) [hereinafter Opinion of Advocate General].

8 *Id.* ¶ 2.

9 *See id.* ¶ 110 n.59 (citing EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (2015)).

10 *Abercrombie*, 135 S. Ct. at 2031.

11 *Id.*; *see also* 42 U.S.C. § 2000e (2012).

12 *Abercrombie*, 135 S. Ct. at 2034 (alterations in original) (quoting 42 U.S.C. §§ 2000e(j), 2000e-2(a)(1)).

that the EU model of social compact largely differs from the United States' traditional protection of freedom of religion.

The judgments are unprecedented for the topics covered and are expected to have a long-lasting impact on religious accommodation throughout the twenty-eight countries that compose the European Union. The importance of numerous rulings of the European Court of Human Rights ("ECtHR") on the Islamic headscarf[13] is probably minuscule in comparison with these two judgments.

Part I of this short Article explains the relevance of the *Micropole* and *Achbita* decisions; Part II explores the common line of reasoning behind them; and, finally, the conclusion analyzes their impact within the European scenario of religious freedom—especially for Muslims—and contrasts them with the United States' approach to the topic.

I. THE ISLAMIC HEADSCARF AT THE CJEU: WHY IT IS SO IMPORTANT

The CJEU had scarcely, if ever, addressed the issue of religious freedom before *Achbita* and *Micropole*. This is not by accident. The CJEU patrols EU law, which covers twenty-eight countries (twenty-seven after the completion of Brexit)[14] and is the offspring of the three European Communities—the Economic one, that on Coal and Steel, and the one for Atomic Energy. The European project was initially conceived as a form of legal integration that focused on economic issues and aimed at achieving peace for the whole continent while setting aside topics such as human rights and fundamental freedoms.[15]

Surely, the European Union incorporated human rights into its core business in the 1990s and 2000s, in order to revitalize its fading legitimacy.[16] The language of rights gained so much momentum that in 2000 the European Union enshrined them in its *Charter of Fundamental Rights*,[17] which it later incorporated into its governing Treaty.[18] This is why the European Union is now committed to the protection of religious freedom[19] and even has a special envoy for religious freedom

13 *See, e.g.*, Kocabaş v. Switzerland, App. No. 29086/12 (Eur. Ct. H.R. 2017); S.A.S. v. France, App. No. 43835/11 (Eur. Ct. H.R. 2014); Aktas v. France, App. No. 43563/08 (Eur. Ct. H.R. 2010); Bayrak v. France, App. No. 14308/08 (Eur. Ct. H.R. 2009); Gamaleddyn v. France, App. No. 18527/08 (Eur. Ct. H.R. 2009); Ghazal v. France, App. No. 29134/08 (Eur. Ct. H.R. 2009); Kervanci v. France, App. No. 31645/04 (Eur. Ct. H.R. 2009); Dogru v. France, App. No. 27058/05 (Eur. Ct. H.R. 2008); Sahin v. Turkey, App. No. 44774/98 (Eur. Ct. H.R. 2005); Dahlab v. Switzerland, App. No. 42393/98 (Eur. Ct. H.R. 2001).

14 *See The 28 Member Countries of the EU*, EUROPEAN UNION, https://europa.eu/european-union/about-eu/countries_en#28members (last visited Sept. 27, 2017).

15 *See The History of the European Union*, EUROPEAN UNION, https://europa.eu/european-union/about-eu/history_en (last visited Oct. 9, 2017).

16 *See* J.H.H. Weiler, *Deciphering the Political and Legal DNA of European Integration: An Exploratory Essay*, *in* PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW 137, 151 (Julie Dickson & Pavlos Eleftheriadis eds., 2012).

17 *See* Charter of Fundamental Rights of the European Union, 2000/C 364/1, 18 Dec. 2000 [hereinafter Charter of Rights].

18 Treaty on European Union, *supra* note 6, at art. 6, ¶ 1.

19 *See* Charter of Rights, *supra* note 16, art. 10.

outside the European Union, who advocates for this right through diplomatic efforts.[20]

The European Union's shift to encompass human rights has not expanded its powers, which remain mostly confined within the spectrum of economic activities. But the European Union has become committed to the protection of human rights—including religious freedom—in the spheres in which it operates. It is no surprise, therefore, that the two headscarf cases arose in the field of discrimination in the workplace.

Put this way, religious freedom concerns still might seem peripheral to predominantly economic issues. Make no mistake: the fact that the European Union addresses religious freedom topics within the economic sphere is both symbolically and legally relevant. Symbolically, the European Union has constantly committed itself to a model of social market economy,[21] according to which economic activities should function as proxies for social inclusion and for the enjoyment of human rights. A conflict with Islam in the workplace is therefore a clash at the heart of the European Union's political philosophy.

Legally, the CJEU's decisions are not like the older ECtHR judgments in the fields of religious freedom or Islam. The latter court intervenes only after the exhaustion of domestic remedies and binds only the states that are involved in the proceedings.[22] Even more importantly, the judgments create only an international obligation to comply with them.[23] A state may disregard a judgment, as compliance is at its discretion and depends on the status it awards to the ECtHR's decisions.[24] The ECtHR has ruled on French, Swiss, and Turkish bans of Islamic headscarves multiple times, and, admittedly, no claim of a religious freedom violation has ever succeeded within this field.[25] But, had they lost, those states could still have ignored the judgments and kept their bans.

European Union law is one of a kind. It is good law within EU Member States. This means that its laws are immediately enforceable.[26] Moreover, the CJEU often intervenes during domestic proceedings.[27] As has happened in these two cases, a domestic court can request the CJEU to issue a judgment on the correct interpretation

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20 Press Release, European Commission, President Juncker Appoints the First Special Envoy for the Promotion of Freedom of Religion or Belief Outside the European Union (May 6, 2016), http://europa.eu/rapid/press-release_IP-16-1670_en.htm.

21 *See* Lázló Andor, Emp't, Soc. Affairs & Inclusion Comm'r, European Union, Building a Social Market Economy in the European Union (Oct. 20, 2011).

22 Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms art. 46, Nov. 4, 1950, 213 U.N.T.S. 221.

23 COURTNEY HILLEBRECHT, DOMESTIC POLITICS AND INTERNATIONAL HUMAN RIGHTS TRIBUNALS: THE PROBLEM OF COMPLIANCE 3 (2014).

24 *See id.*

25 *See supra* note 13 and accompanying text.

26 This has been solid doctrine since Case 26-62, N.V. Algemene Transp.- en Expeditie Onderneming van Gend v. Netherlands Inland Revenue Admin., 1963 EUR-Lex CELEX LEXIS 026 (Feb. 5, 1963).

27 *See* COURT OF JUSTICE OF THE EUROPEAN UNION, ANNUAL REPORT 2014, https://curia.europa.eu/jcms/upload/docs/application/pdf/2015-04/en_ecj_annual_report_2014_pr1.pdf (summarizing cases in which Member States' national courts requested the CJEU to interpret the validity of certain European laws).

of EU law that is relevant for the internal controversy at hand. The CJEU's rulings on the Muslim headscarf will function as binding precedents for not just the referring courts, but also for any other domestic court within the European Union, should a similar, new case arise within any of the Member States' jurisdictions.

In a few words, states *can* comply with the ECtHR's rulings, while they *have to* comply with the CJEU's ones. This is why the CJEU has definitely set the stage for the next controversies as well as for more developments in the field.

II. THE DECISIONS AND THEIR BROADER RAMIFICATIONS

Both *Achbita* and *Micropole* focused on the antidiscrimination directive, which is an EU regulation with binding effect on Member States.[28] The directive prohibits discrimination on the ground of religion as well as on other grounds.[29] It distinguishes, however, between two different types of discrimination.[30] Discrimination is "direct" "where one person is treated less favourably than another is, has been or would be treated in a comparable situation;" it is "indirect" "where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief . . . at a particular disadvantage compared with other persons."[31] This latter kind of discrimination is permissible, however, if "justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."[32] Member States may permit different treatment where, "by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate."[33]

One judgment did not raise too many problems. In *Micropole*, the French domestic court asked the CJEU a very specific question, namely whether a customer's request that the employee take off her headscarf while she worked for her constituted a "genuine and determining occupational requirement."[34] This eased the CJEU's work, as it promptly concluded that the directive's allowance for different treatments did not cover "the wishes of a customer."[35] The company therefore had clearly discriminated against the Muslim employee on religious grounds.

Achbita really made the difference. At the start, the Belgian court made a request that was easy to handle: namely, whether the prohibition on the Muslim headscarf stemming from an internal, general ban on religious, political, or

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28 *See* Council Directive 2000/78/EC of 27 Nov. 2000, 2000 O.J. (L 303/16) (by which the Council of the European Union "establish[ed] a general framework for equal treatment in employment and education").

29 *Id.* at ch. 1, art. 2.

30 *Id.* at ch. 1, art. 2, § 1.

31 Id. at ch. 1, art. 2, § 2(a), (b).

32 *Id.* at ch. 1, art. 2, § 2(b)(i).

33 *Id.* at ch. 1, art. 4, § 1.

34 Case C-188/15, Bougnaoui v. Micropole SA, 2017 EUR-Lex CELEX LEXIS 0188, ¶¶ 19 (Mar. 14, 2017).

35 *Id.* ¶¶ 40–41.

philosophical signs was *direct* discrimination.[36] Such a general ban plainly shielded the company from charges of direct discrimination, and so concluded the CJEU.[37]

But the CJEU went beyond the Belgian court's request, answering more than it was asked. The CJEU had already done such a thing in the past;[38] but this time its deliberation had a different intonation and far more implications. It spontaneously decided to provide the referring state with more guidance through inquiring whether the internal rule amounted to an *indirect* discrimination, and responded in the negative.[39] This is the most troublesome part of *Achbita*, as it legitimized virtually any internal ban on visible religious signs.

The CJEU found that a general ban could legitimately enforce a "private undertaking's" policy of "neutrality."[40] "Neutrality" itself, in the CJEU's reasoning, is an image that an employer may "wish to project . . . towards customers," and "relates to the freedom to conduct a business" that the EU Charter enshrines among the freedoms it protects.[41] The fact that such a policy of neutrality was fleshed out in an "internal rule" confirmed that it was "genuinely pursued in a consistent and systematic manner."[42]

The CJEU did not close the door to further scrutiny: it remembered that it was for the domestic judge to ascertain that the ban is concretely necessary and confined to workers who interact with customers before blessing it as legitimate.[43] But, in principle, in the CJEU's perspective a policy of neutrality is perfectly sound, within the scope of the freedom to conduct business, and even *enforceable* on the employees.

The typically dry, formulaic, and extremely succinct style with which the CJEU's judgment couched *Achbita* does not give full justice to the importance of this statement. That the freedom of business *always* includes the freedom to enforce a strict policy of neutrality is, at least, questionable, as is the fact that *Achbita* expressly legitimizes only a policy of neutrality, without saying a word about other religious or philosophical options that a company may wish to embrace.

Although a country like France cherishes neutrality as one of its core constitutional values, it is not uniformly accepted in many EU countries. In fact, Europe has been debating about neutrality for at least ten years.[44] The EU Treaty itself celebrates cultural diversity among and within states, but it took only seven

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36 Case C-157/15, Achbita v. G4S Secure Sols. NV, 2017 EUR-Lex CELEX LEXIS 0157, ¶ 21 (Mar. 14, 2017).

37 *Id.* ¶ 32.

38 KATRIN NYMAN-METCALF & IOANNIS F. PAPAGEORGIOU, REGIONAL INTEGRATION AND COURTS OF JUSTICE 47 (2005) ("The ECJ [now the CJEU] has shown that it is prepared to reformulate questions or find in the questions asked what needs to be answered, rather than refuse to deal with the request."). For an example of such a usage of preliminary ruling, see C-44/79, *Hauer v. Land Rheinland-Pfalz* 1979 E.C.R. 3727.

39 *See Achbita*, 2017 EUR-Lex at ¶¶ 34–35.

40 *Id.* ¶¶ 22, 37.

41 *Id.* ¶ 38.

42 *Id.* ¶ 40.

43 *Id.* ¶ 42.

44 *See generally* Andrea Pin, *Does Europe Need Neutrality? The Old Continent in Search of Identity*, 2014 BYU L. REV. 605.

lines of *Achbita*[45] for the CJEU to prioritize neutrality over religious freedom within private undertakings, while remaining silent on other options. And this preference for neutrality is not without consequences for the states as well as for individuals. Hereafter, undertakings will be able to invoke the freedom to conduct business in order to enforce neutrality on their employees *everywhere within the European Union*.

It is hard not to read *Achbita*'s line of reasoning as being driven by France and Belgium's sensitivity about the Muslim headscarf: they were the first EU states to legislate against garments that conceal the face in the public square.[46] Many details attest to this national influence on the decision. First, the French government intervened in the proceedings warning that its constitutional secularism imposed some limitations on public servants,[47] and that this would have been at risk had the CJEU ruled in favor of religious freedom.

Second, *Achbita* intentionally confined its own reasoning about indirect discrimination to "private undertakings."[48] In so doing, it left the door open to more limitations on religious signs in the context of public services, such as to also target employees who are not exposed to the general public. In other words, *Achbita* provided more types of headscarf bans with a subtle, indirect, but general legitimization.

Finally, the CJEU went all the way by also legitimizing the prohibition on the slightest visible sign of religious belief. Even the French approach to neutrality is more nuanced and varies from one context to the other: France forbids only the headscarf that hides the face completely in the public square;[49] it bans any visible sign of belief only among public officers;[50] in public schools, it targets only conspicuous signs, which need to be more than simply visible.[51] *Achbita* rudimentarily legitimizes the prohibition of religious signs that are merely "visible," namely the strictest version of French neutrality.

By moving beyond the Belgian court's inquiry about direct discrimination, legitimizing a business policy of neutrality, and justifying religious bans in the

45 *See Achbita*, 2017 EUR-Lex at ¶¶ 37–38.

46 *See* S.A.S. v. France, App. No. 43835/11, ¶ 40 (Eur. Ct. H.R. 2014).

47 Opinion of Advocate General, *supra* note 7, ¶ 31.

48 *See Achbita*, 2017 EUR-Lex at ¶¶ 34–35.

49 Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of October 11, 2010 Prohibiting the Concealment of the Face in the Public Space], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010, p. 18344.

50 *See* Céline Ruet, *Interdiction du Port de Signes Religieux par les Agents du Service Public: La Combinatoire Subtile de L'arrêt Ebrahimian* [Prohibition of the Wearing of Religious Symbols by Public Officials: The Subtle Combination of the Ebrahimian Judgment], 2016 LA REVUE DES DROITS DE L'HOMME 1, 1, https://revdh.revues.org/2516.

51 Loi 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, colléges et lycées publics [Law 2004-228 of March 15, 2004 Framing, in Application of the Principal of Secularity, the Wearing of Signs or Outfits Displaying a Religious Affiliation in Public Schools, Colleges and Lycées], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 17, 2004, p. 5190.

workplace, the CJEU gave a favor to the most rigid political philosophy of secularism.

CONCLUSION

The U.S. Supreme Court is normally reluctant to look into foreign law for inspiration while adjudicating.[52] Conversely, the CJEU is accustomed to looking into U.S. case law for advice when it has to deal with unprecedented, difficult controversies.[53]

This time, *Achbita* intentionally *decided not to follow* the U.S. approach. The Advocate General clarified that in the United States "the employer has an obligation to provide 'religious accommodation.'"[54] But the Advocate thought that the EU position was to be "different,"[55] and for a quintessentially economic reason: "[T]he search for alternative forms of deployment for each individual employee itself [would have] place[d] on the employer a substantial additional organisational burden with which not every undertaking [could] necessarily cope."[56]

It is especially hard to follow the Advocate General's reasoning, given the size of G4S, the company for which Achbita worked, and the types of scrutiny under which CJEU normally operates. G4S is a global operator with more than 600,000 employees,[57] and the CJEU has consistently promoted an *in concreto* approach in its case law by urging domestic courts to evaluate whether a measure that impinges upon other EU interests is really proportionate to the aim.[58] The Advocate General could have suggested that undertakings such as the G4S or even those much smaller in size may allow for religious accommodations, and that the CJEU had to consider this aspect thoroughly. On the contrary, the Advocate maintained that accommodation is economically expensive, and the CJEU's reasoning followed that approach rather closely. *Achbita* used very few words to flag the possibility that an employee may be reassigned to a position that would not affect an undertaking's policy of neutrality. It considered religious accommodation more as an extraordinary exception than the norm.

Achbita married the freedom of economic initiative with the legitimization of a policy of neutrality, almost ruling out religious accommodations from the economic scenario. With its dry, quasi-oracular phrasing, *Achbita* has widened the

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52 *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 622–28 (2005) (Scalia, J., dissenting) (criticizing the majority's reference to foreign law in determining whether it is constitutional to impose the death penalty on offenders who were minors when their crimes were committed).

53 *See, e.g.*, Opinion of Advocate General Poiares Maduro, Case C-438/05, Int'l Transp. Workers' Fed'n v. Viking Line ABP, 2007 EUR-Lex CELEX LEXIS I-10806, ¶ 39 n.38 (Dec. 11, 2007) (drawing from the relevant Supreme Court decisions when reflecting on whether the freedom of establishment within the EU was enforceable also against private parties and not only states).

54 Opinion of Advocate General, *supra* note 7, ¶ 110 n.59 (quoting 42 U.S.C. § 2000e-2 (2012)).

55 *Id*.

56 *Id.* ¶ 110.

57 *See* Scott DeCarlo, *The World's 10 Largest Employers*, FORTUNE (Nov. 12, 2014), http://fortune.com/2014/11/12/worlds-largest-employers/.

58 *See e.g.*, Case C-491/01, The Queen v. Sec'y of State for Health *ex parte* British Am. Tobacco (Investments) Ltd., 2002 E.C.R. I-11550.

European Union's gap with the United States,[59] embraced the French approach, and ultimately stricken a blow to the possibility of integrating Islam in the field where most social relationships start, deepen, and broaden: the workplace.

59 On the rising Islamophobia in the United States, however, see generally Khaled A. Beydoun, *Islamophobia: Toward a Legal Definition and Framework*, 116 COLUM. L. REV. ONLINE 108 (2016), http://columbialawreview.org/content/islamophobia-toward-a-legal-definition-and-framework/.