Naveiñ Reet: Nordic Journal of Law and Social Research (NNJLSR) No. 10 2020, pp. 121-144

Islam at the European Court of Human Rights[1]

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Abstract

The European Court of Human Rights (ECtHR or, the Court) is a formidable player in the development of legal approaches to Islam: its jurisdictional remit (covering over 800 million people across 47 countries) is vast; it is a standard setter for human rights protection in general on a global scale; and it has a rapidly growing body of case law relevant to Islam which has influenced states' engagements with Islam within Europe and beyond. Besides the Court's 'direct effects', in terms of impact on relevant legislation, through its decisions to do with Islam, it also has a significant 'indirect', social effect though the messages those decisions communicate about Islam and its place in society. This contribution examines the role of the Court in its direct and indirect effects on Islam, law and Europeanisation.

In the broader context of attention to Islam, law and Europeanisation, a consideration of the role played by the European Court of Human Rights (ECtHR or, the Court) is worthwhile for two main reasons. First, the Court has dealt with a number of cases to do with Islam, and in so doing has helped to shape national legal approaches to Islam in many of the countries within its ambit. The Court has engaged with a broad range of relevant topics, from the rights of Muslims to wear religious dress in schools and in the workplace, and the right to religious autonomy of Muslim minority communities living in Christian majority contexts, to the right to exemption claimed by Muslim parents from mixed-gender physical education and swimming classes in the public education systems. And, of course, the great geographic breadth of its jurisdictional remit (covering over 800 million people across the 47 member states of the Council of Europe, under the auspices of which the Court functions), together with the fact that any right won in one of these country contexts is automatically a right to which any

1 This paper reflects research conducted under the auspices of the European Research Council (ERC)-funded Grassrootsmobilise research programme (2014-2019; Grant Agreement No. 338463).

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individual in other member state may lay claim, render the ECtHR a formidable player in the development of legal approaches to Islam.

A second main reason to consider the role of the ECtHR is because of the 'messages' the Court communicates about Islam through its judgements (Fokas and Richardson 2018). As established through a rich body of socio-legal scholarship, though the 'direct effects' of courts referred to above, in terms of impacting on legal change in the contexts in which the rights claims are made in each case, are important, consideration of courts' direct effects tells only a very small part of the story of courts' broader potential impact on the issues they address. In the words of Marc Galanter, who pioneered in the study of courts' 'indirect' or 'radiating effects' (1981, 1983), 'courts resolve only a small fraction of all disputes that are brought to their attention. These are only a small fraction of the disputes that might conceivably be brought to court and an even smaller fraction of the whole universe of disputes' (1981: 3). He thus indicates that because of such limitations on courts' 'direct effects',

> The *social effects* they produce by communication must be far more important than the direct effects of the relatively few decisions they render. Law is more capacious as a system of cultural and symbolic meanings than as a set of operative controls (emphasis mine; 1981:13).

From this 'decentered' perspective, the impact of courts on disputes is accomplished more extensively through the dissemination of information: 'Courts produce not only decisions, but messages. These messages are resources that parties use in envisioning, devising, pursuing, negotiating, vindicating claims (and in avoiding, defending, and defeating them)' (Galanter 1983: 126). Such 'indirect effects' of courts, then, entail the impact of their 'messages' communicated through their judgements on societies at large and, more specifically, on peoples' perceptions of their rights, the discourse about their rights and their pursuit of their rights, whether through legal or political (e.g., lobbying) means.

Thus this contribution examines the role of the Court in its direct and indirect effects on Islam, law and Europeanisation. It begins with attention to the main relevant articles of the European Convention on Human Rights (ECHR), which the ECtHR interprets. It then offers an overview of the ECtHR's Islam-related case law, necessarily schematic due to space limitations but detailed enough to give a broad sense of the contours of

that case law. A third main section will consider three major lines of scholarly criticism of the Court in its engagements with Islam, followed by attention to the 'new kid on the block' – the Court of Justice of the European Union (CJEU) – and its recent entry into the field of religious rights. The articles closes with reflections on the messages communicated by the ECtHR through its case law related to Islam.

Bases of relevant case law in European Convention on Human Rights articles

A collection of five ECHR articles may be identified as those most actively applied to religion-related case law in general, and to Islam-related case law specifically. The first and most conspicuous of these is Article 9 on the 'Freedom of Religion or Belief', which is divided into two clauses, the first of which protects the freedom of thought, conscience and religion, including the right to change and to manifest one's beliefs, alone or in community with others. Whilst there are no limitations on the freedom of belief, the second clause of Article 9 sets out potential grounds for limitations on the freedom to *manifest* religion or belief, indicating that such limitations must be 'prescribed by law and … necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, and for the protection of the rights and freedoms of others'. In the first case in which the Court issued a judgement finding a state in violation of religious freedom (*Kokkinakis v. Greece*, 1993), the Court expressed what can now be understood as its mantra on the freedom of religion or belief; this mantra can be found in the majority of cases henceforth which engage that right. It reads:

> As enshrined in Article 9 (art. 9), freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. (para. 31)

Other ECHR articles frequently invoked in cases somehow involving Islam, often in conjunction with Art.9, are Articles 10, 11, 14, and Article 2 of the 1st Protocol

to the Convention. Article 10 protects the Freedom of Expression, which includes the 'freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'. As in the case of the freedom to manifest one's belief, so too the freedom of expression includes limitations 'in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary'.

A third article of the Convention much engaged by conscience-based groups in their claims against states in which they reside is Article 11, on the Freedom of assembly and association. Like articles 9 and 10, the right is not absolute, and is subject to restrictions to do with national security, public safety, prevention of crime and disorder and protection of health, morals and the rights of others. In all, of the restrictions set out on the rights expounded in Articles 9, 10 and 11, 'necessary in a democratic society' and 'public order' feature most frequently in the ECtHR's judgements entailing Islam-related rights limitations. In some cases, as we shall see, it is rather striking how elastic these notions can be when used to defend Muslims' rights limitations.

A further ECHR article which features in a great deal of ECtHR case law involving a Islam is Article 14, which prohibits discrimination on several bases, including religion[3]. Finally, Article 2 of the first Protocol to the Convention guarantees the right to education and the right of parents to ensure such education and teaching 'in conformity with their own religious and philosophical convictions'. Neither of these two articles include, in the text of the Convention, any formal limitations on the rights guaranteed therein.

Islam-related ECtHR case law: broad themes

Islam-related claims arise before the ECtHR under a broad range of themes. This is *not* an exhaustive list but, as indicated above, it is sufficient for presenting the contours of the ECtHR's engagements with Islam and Muslims' rights claims. The themes are

3 Note bene: Art.14 may be invoked by the Court only in conjunction with other ECHR articles; i.e., discrimination in the enjoyment of any particular right secured by the ECHR is what Art.14 protects against.

presented *roughly* chronologically, based on when the first judgement relevant to each was delivered. This ordering of the material is to give a sense of how the case law has evolved over time[4].

In order to present the scholarly criticism of the Court's handling of Islam-related cases, in the following section a selection of these cases is presented in greater depth. The selection focuses on cases to do with religious dress, e.g., the headscarf or burqa ban, and *mainly* but not exclusively on those which have been heavily criticised. These are either 'problem cases' in and of themselves, or problematic in relation to one another. Together, they help tell a broader story about the ECtHR in relation to Islam.

Religious autonomy

The first several cases arising before the Court involving Islam had to do with religious autonomy and the right of religious groups to self-determination (within, always, the limitations set out above). For example, in a series of cases against the state of Greece (Serif v. Greece 1999, and Agga v. Greece *1-4,* 2000-2006), the Greek government was faulted for interferences in the selection of muftis for the Muslim communities in the region of Thrace. The same issue is addressed in the cases of Hasan and Chaush v. Bulgaria (2000), and Supreme Holy Council of the Muslim Community v. Bulgaria (2004). Thus in its early engagements with Islam the ECtHR tended mainly to questions of Muslim minority communities' right to freedom from interference from the states in which they are based.

Religious dress

A second and the largest body of cases relevant to Islam addressed here has to do with religious dress – mainly the headscarf and mainly in educational settings, of teachers and students. In Dahlab v. Switzerland (2001) the Swiss state was called to defend itself against the claim of a primary school teacher who was not allowed to teach with her headscarf, in spite of no complaints from the students or parents about the latter, because the headscarf was deemed a 'powerful religious symbol' which might impinge on the young students' freedom of conscience. Ms. Dahlab was a convert to Islam hired before that conversion, and taught wearing the headscarf for 3-4 years without

4 It should be noted however that dates somehow arbitrary though in this context, because the months or years between the date a case is filed by complainant and the date a decision is delivered may be wholly different from one case to the other. All cases can be found on the Court's database at www.hudoc.eu.

complaint by her students or parents of the latter. In *Dahlab*, the Court dismissed the case as inadmissible, but the case remains an important element in the Court's engagement with Islam because of statements the Court made in its inadmissibility decision regarding the meaning and impact of the headscarf, statements which made their way into other later case law. Specifically, in *Dahlab* the Court determined that

> … it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children … it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination (*Dahlab v. Switzerland,* p.13)

There are three key elements in particular to the Court's reasoning which we see repeated in later judgments: 1. The headscarf is a 'powerful external symbol' which might have a proselytizing effect; 2. The headscarf is incompatible with gender equality, and 3. The headscarf is incompatible with tolerance and respect for others. Overall the judgement communicates a rather negative message about Islam: the wearing of the headscarf may have a proselytizing effect, the judgement suggests, specifically because 'it appears to be imposed on women by a precept which is laid down in the Koran'. As such, the Court argues, the wearing of the headscarf is contrary to a. tolerance, b. respect for others, and c. equality and non-discrimination. The conceptual leaps are significant here, and they are not much moderated by the 'softening' language of 'might have' and 'appears to be' used by the Court. Rather to the contrary, with such broadsweeping claims being made, one would expect evidence to be offered and precise rather than fuzzy wording.

Likewise in Leyla Sahin v. Turkey (2005), the Court deemed that the Turkish state was not violating the religious freedom of a university student when she was banned from sitting her university exams wearing a headscarf. In *Sahin,* the Court ruled that interference with right of a university student to wear headscarf to sit her exams was

justified because it had a legal basis and pursued the legitimate aims of protecting the rights and freedom of others and protecting public order. Specifically, the Court stated:

> 'In such a context, where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn'.

In short, the Court emphasized the importance – in the Turkish context where the state is formally secular - of preserving secularism, gender equality, and the rights of others, because elsewhere in the judgment it indicates: 'it must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it'. Thus similarly with the *Dahlab* decision, the Court expresses concern regarding the impact on others of a woman wearing a headscarf, though – rather critically – it does not discriminate between the potential impact on young school children, on the one hand, and fellow university students, on the other. As such, this decision too communicates negative and essentialized notions of harm caused by the wearing of Islamic religious dress.

The *Sahin* judgment is amongst the most vehemently contested and criticized religious freedoms judgments of the ECtHR.One such criticism comes from within the Court itself, in the form of a dissenting opinion by Judge Francoise Tulkens. Tulkens describes the judgment as an expression of paternalism, as far as the gender equality argument goes. 'I fail to see', she notes, 'how the principle of sexual equality can justify prohibiting a woman from following a practice which [she says she has] freely adopted…'. Likewise, Professor Jeremy Gunn highlights irony in the case: '[w]e would not normally expect a human rights tribunal to be more solicitous of the sensibilities of those who do not like religious expression (which is *not* guaranteed by the European Convention) than of the right to manifest religion (which *is* guaranteed by the Convention)' (Gunn 2012: 133). *Sahin* is particularly noteworthy because it is the first Grand Chamber decision on the issue of religious clothing.

Kervanci v. France and Dogru v. France (2008) are cases brought before the ECtHR by Muslim students in the French education system claiming that mandatory participation students in physical education which did not allow the wearing of the headscarf violated their right to manifest their belief; their claim was not vindicated by the Court. (Notably, though decided in 2008, these cases arose *prior* to the 2004 general ban on headscarves in schools; a string of cases later challenging that ban (*Singh* et al. 2009, etc.) was declared inadmissible by the ECtHR).

Arslan and others v. Turkey (2010) concerned 127 Turkish nationals convicted for wearing religious clothing in public other than for religious ceremonies; *Arslan* was at that time exceptional as a religious dress case in that the Court *did* find a violation. The Court noted that, unlike several other religious dress cases it had decided, the applicants here were punished for their religious dress in public areas that were open to all, rather than in public establishments where the state's interest in religious neutrality might outweigh the individual's right to manifest his/her religion. Thus the Court explicitly stated that it saw no basis for defending a general ban on religious dress in public spaces. The Court further noted that it *might* have accepted that strict maintenance of a secular system was important for Turkey's democracy and public safety, but that the Turkish judicial decisions at issue had failed to rely on that justification.

In so doing it presaged its judgement in the much better-known case of S.A.S. v France (2014), which also concerned the ban on religious dress (in this case, the full face covering of the burqa), from all public spaces. Here the Court exchanged its earlier resistance to a general ban in public spaces in favour of the French state's argument that such a ban was justifiable in the interest of 'living together'. S.A.S. claimed violation of her religious freedom after France passed the 2010 ban on full-face covering in all public spaces (except religious ones) across the country. She emphasised that it was her choice to wear the veil, in efforts to override arguments about women's rights and gender equality as those made in *Dahlab* and *Sahin*. That aspect of S.A.S.'s position was supported by a third party intervention from the Human Rights Center at the University of Ghent, led by Eva Brems, the language of which intervention factored prominently in the Court's final judgment, in *spite of*, however, its ultimate acceptance of the French state's defense based on the principle of 'living together[5]. The S.A.S.

5 See the aforementioned Third Party Intervention at https://hrc.ugent.be/wp-content/uploads/2019/10/SAS.pdf, and the text of the Court's judgement at https://hudoc.echr.coe.int/eng#{"itemid":["001-145466"]}.

judgement may be interpreted as an expression of the Court's tendency to protect state secularism, as in the Turkish cases also, as both countries are constitutionally-determined secular states. Rather controversially though, in *Belkacemi and Oussar* v. Belgium and *Dakir v. Belgium* (2017), the right of a state to ban full-face covering specifically in favour of 'living together' was similarly conferred by the Court on Belgium, a state which is not however similarly constitutionally-determined as a secular state.

Further extending its sanctioning of French bans on religious dress, in Ebrahimian v. France (2015), regarding the non-renewal of the contract of a social worker as a result of patients complaining about her wearing headscarf, the Court ruled that Ebrahimian's religious freedom was *justifiably* restricted for the sake of preserving secularism and religious neutrality in work environments. Thus in this case the Court approves of the extension of the ban on headscarves in public schools to a ban on headscarves in the public sector in general, without any discussion as to whether this jump from the educational sphere to the public sector in general is necessary and referring simply to the rationale of the French system which, the Court says, it is not its role to assess.

Finally, in Lachiri v. Belgium (2018), the ECtHR for the first time finds a violation in a case where the wearing of a headscarf by a Muslim woman was at stake. Here the claimant argued that her exclusion from a Belgian courtroom (where she was to act as a witness in a case) on the ground that she wore a hijab amounted to a breech of Art.9. The Court agreed, notably indicating that the Belgian state did *not* claim the ban was aimed at preserving secular or democratic values (and thus leaving open the interpretation, then, that *had* the state claimed the ban was for protecting secularism, then the Court would have found in favour of the state) (see Ringelheim 2018). The ban was instead justified by the Belgian state on the grounds of 'protection of public order', but the Court did not find any real threat to public order in Lachiri's wearing of the headscarf in the courtroom.

Religious political party closure

Refah Partisi v. Turkey (2003) is in a category to its own, because it is the only case to do with a closure of an Islamist political party (the follow up *Fazilet v. Turkey* case was withdrawn, with a rather heavy letter to the Court indicating that after *Refah* and *Sahin* there was little hope for their case; see Gulalp 2019: 149). It also stands out from the present presentation of cases in that it does not engage Art.9 on religious

freedom (it rests instead on Art.11 regarding the right to association). But it is worthy of careful consideration because the case communicates an especially powerful message regarding Islam in relation to democracy. In *Refah* the Court considered the decision of the Turkish Constitutional Court to close down the ruling political party Refah, on the grounds that it was a 'centre of activities against the principle of secularism'. The ECtHR ruled unanimously that actions and speeches by Refah leaders showed the party had a long-term aim to set up a regime based on sharia. In the Court's estimation, 'in the past political movements based on religious fundamentalism have been able to seize political power in certain States' (para.124*;* note that Refah *achieved,* did not seize, power through elections), and the establishment of a theocratic regime was not completely inconceivable in urkey, 'account being taken of recent Turkish history and, secondly, of the fact that the great majority of its population are Muslims' (paras. 95 and 125). As in the cases of *Dahlab* and *Sahin*, here too we find rather essentialised notions of Islam being expressed by the Court. This is most conspicuously the case in its handling of sharia law: 'the Court considers that sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it' (para.123). In short, the Court here expresses the view that the fact that Turkey has a majority Muslim population makes the establishment of a theocratic regime more likely, and that sharia is 'stable and invariable' and antithetical to pluralism.

Minaret ban

Like the case of *Refah,* the case of Ouardiri v. Switzerland (2011) on the minaret ban is in a category to its own, but worth mentioning for the controversiality of the topic at the time. The case concerned the Swiss ban on the minaret introduced into Swiss law in 2009, following a highly publicised campaign and referendum 'against the building of minarets'. The campaign included posters suggesting a proliferation of minarets in Switzerland whilst in reality there were only 4 across the country at the time. The Court's decision was one of inadmissibility, because the claimant could not claim to be a *direct* victim of the minaret ban. But it is notable nonetheless because the ban garnered so much attention and the Court's pronouncement on it was eagerly anticipated. That pronouncement, empty of content though it was and based on consistently applied legal reasoning (lack of direct victimhood of claimant), may still be considered as having communicated a powerful *message* of a lack of the Court's willingness to defend the right of Muslim communities to have mosques with minarets. It may also have

communicated to some observers a more message of Court unwillingness to engage in such a controversial issue of 'Islam v. Christian-majority state'[6].

Legal status issues

A number of cases on these issues has arisen especially from amongst Alevi groups in Turkey, because their lack of recognised legal status disadvantaged them significantly in terms of their rights to operate places of worship, or to enjoy tax exemptions similar to those for Sunni Islam, or to have their perspective taken into consideration in the teaching of religious education in public schools. These include Zengin v. Turkey (2007), Yalcin v. Turkey (2014), Cem Vakfı v. Turkey (2014), Sofuoglu and others v. Turkey (2014), and Dogan v. Turkey (2016) and critically, in each of these the Turkish state is judged by the Court as in violation of freedoms secured by the ECHR. The judgements in these cases, when considered alongside the other cases against the state of Turkey presented above, suggest the Court treats Islam differently when pitted against secularism, on the one hand, and when expressed as a minority position within a majority Muslim context, on the other.

Sharia law

Finally, in this selective list, one of the Court's most recent and notable engagements with Islam is in the case of Molla Sali v. Greece (2018). This case concerned the claim of religion-based discrimination of Molla Sali, a resident of the Western Thrace region of Greece where, due to the conditions of a population exchange between Greece and Turkey set out in the 1923 Treaty of Lausanne, sharia courts prevailed over secular courts in matters of family law for the Muslim population in the region. The civil will of Molla Sali's husband was thus contested by the deceased's sisters on the grounds that Islamic law – according to which 2/3rds of the estate would go to the sisters – should govern this matter of inheritance. Here the Court ruled in Molla Sali's favour, indicating that the government's refusal to allow members of a religious minority the right to voluntarily opt for and benefit from ordinary law was not only discriminatory but also breeches the right to free self-identification (i.e., the right to choose *not* to be treated as a member of a minority; see para.157).

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6 One may of course only hypothesize about messages potentially received by different sectors of a population in a given context. As Galanter explains (1983: 126), 'a single judicial action may radiate different messages to different audiences'.

Scholarly critique

Clearly the presented case law offers much basis for criticism. Here I focus on three main lines of criticism embedded in much of the relevant scholarly literature. The first is that through its Islam-related jurisprudence, the Court has treated secularism as an 'extra-conventional goal'. As Kayaoglu notes, secularism is *not* listed as one of the potential limitations to the Article 9-guaranteed enjoyment of the Freedom of Religion or Belief, and secularism is not mentioned in the European Convention on Human Rights (2014). Yet the Court has appeared willing to renounce some of the requirements of democracy (e.g., guarantee of religious freedom) in favour of the principle of secularism (McCrea 2013). It does so perhaps most conspicuously in the *Refah* case, where it held that the right of states to defend liberal democracy encompasses measures to protect the secularity of the state and the separation of religion and politics.

A second major critique regarding the Court's handling of Islam is that it exercises a double-standard as compared with its treatment of Christianity. Indeed, rather conspicuously, secularism as a goal does not factor in the same way in case law to do with majority Christianity. The Court's interventions go beyond just defending a state's right to a secular regime (as in the Turkish case or, with a stretch, in defending 'living together' as a French state principle), to - as we have seen in cases such as *Dahlab* and *Sahin* – communicating normative and essentialised statements about Islam. As posited in the introductory chapter to one of the most thorough treatments of the Court's engagements with Islam (Durham et al 2012: 2): 'Are the remedies available under the key European human rights instruments … as effective for those whose beliefs, culture and identities are rooted in Islam as they are for other inhabitants of Europe?'.

The contrast is particularly striking when considering the case of *Dahlab* in which, as noted above, the Court described the headscarf as a 'powerful external symbol', in spite of *no* complaints to that effect (and thus no evidence suggesting it was impacting upon students' perspectives in any way), in comparison with those of *Eweida and Others v. United Kingdom* (2013), and *Lautsi v. Italy* (2011). In *Eweida*, and after a long string of cases in which the Court upheld states' headscarf bans, the UK was reprimanded by the ECtHR for defending British Airways in asking a woman not to visibly wear

her Christian cross necklace[7]. And in *Lautsi,* the claim of an atheist parent that the presence of the crucifix on Italian school walls violates her right to educate her children in accordance with her own religious or philosophical beliefs (enshrined in ECHR Art.2 of Protocol 1) was rejected by the Court, which accepted instead the Italian state's description of the crucifix as a 'passive' religious symbol unthreatening to parents' rights to educate their children in accordance with their own religious or philosophical beliefs, *in spite of* (and unlike in *Dahlab*) there having been complaints to that effect.

The *Lautsi* case leads us to a third major critique against the Court for its handling of Islam: that it places politics over religion. The Court's final decision in *Lautsi* was reached in 2011 by its Grand Chamber, after a chamber's original 2009 judgement which found unanimously (7-0) in favour of Lautsi. That judgement was reversed rather dramatically by the Court's Grand Chamber (15-2), after an intensive backlash across several states, embodied in an unprecedented number of national governmental interventions in the case (10, all in favour of the Italian state), as well as multiple interventions by NGOs (10, 6 of which supported the Italian state's arguments), and by 33 members of the European Parliament (all in support of the defendant state) (on *Lautsi* see Mancini 2010; Liu 2011; Ronchi 2011; Fokas 2015; Ringelheim 2014). If the lens on *Lautsi* is widened, we give due attention to the reform process which the Court was undergoing and to the particularly sharp direction the latter was taking whilst the UK was at the helmof the Council of Europe (the 'Brighton Process'; see Christoffersen and Madsen 2013; Fokas 2016). That reform process entailed national governments' efforts to reign in what many described as the Court's infringements on national sovereignty. And it converged, temporally, with UK threats to withdraw from convention system over what it saw as the Court overstepping its bounds especially over the *Hirst v. UK* (2004) case on prisoner's voting rights. The timing of the mobilisations aiming for *Lautsi's* reversal coincided with these developments – and in interviews with ECtHR judges and former judges, several indicated that the *Lautsi* reversal was influenced by this broader climate. The '*Lautsi* effect' has also been described as having had an influence over the *S.A.S.* judgement, in that the Court was more reserved in

7 It should be noted however that three other Christianity-based claims against the UK which the Court considered alongside that of Eweida were *not* supported by the Court: these are the claims of Ms. Chaplin, a nurse asked for reasons of health and safety to remove her Christian cross necklace; Ms Ladele, a registrar who on religious grounds refused to have (same-sex) civil partnership duties assigned to her; and Mr McFarlane, a counseller who refused to give psycho-sexual therapeutic counselling to same-sex couples.

Lautsi's aftermath regarding issues which involve politically sensitive issues as is religion (Fokas 2016).

Similarly, the *Refah* and *Sahin* decisions were widely seen as heavily influenced by political considerations. One major relevant factor was Turkey's pending EU membership, which it was still pursuing actively at the time of those cases. Another is the fact that the timing of these cases coincided broadly with that of France's introduction of its headscarf bans in schools.

Of course, also key is the 'margin of appreciation' which the Court affords to states in determining whether a particular restriction of a right is required ('necessary in a democratic society') in the given circumstance (Evans 2001: 142). In the religious freedoms context where, according to Evans (2001: 143), the margin tends to be particularly wide, the margin of appreciation is a substantial tool through which the Court allows states a certain, variable, leeway to interpret religious rights and freedoms within the broader context of their national cultures and traditions. Julie Ringelheim (2012: 306) suggests that the large discretion that the Court tends to grant to national authorities on religion cases is 'symptomatic of its difficulty in dealing with them'. Most likely by 'them' Ringelheim means the religion cases, but there's a strong case for saying the margin of appreciation is also symptomatic of the Court's difficulty dealing with the states and their potential backlash and thus political in nature.

Enter the CJEU: hope for venue shoppers?

Against the backdrop of the questionable record of the Court in its handling of Islam-related claims, many welcomed the idea that the Court of Justice of the European Union (CJEU) might be an alternative venue where some such issues could be addressed[8]. The EU formally extended its competence to the protection of fundamental rights through its 2000 Charter on Fundamental Rights. And the CJEU entered the realm of religion-related case law especially through the 2000/78 equality directive which establishes a general framework for equal treatment specifically (and exclusively,

8 See Fokas 2016 for interview-based research with social actors with a vested interest in religion-related case law.

unfortunately) in employment and occupation settings[9]. This directive was applied, with somewhat varied reasoning, to two headscarf cases addressed by the CJEU (notably, the first cases on religious discrimination to which this directive was applied by the CJEU).

In *Achbita v. G4S Secure Solutions* [C-157/15], the CJEU addressed the claim of Achbita who had worked for three years as a receptionist and after the 3rd year informed them that she intended to start wearing an Islamic headscarf during working hours. G4S had an unwritten rule that workers could not wear visible signs of their political, philosophical or religious beliefs in the workplace, and she was told she could not wear it, and was fired when she refused to remove it. The Belgian Court of Cassation asked the CJEU for a preliminary ruling on: 'should Art 2(2) of Directive 2000/78 be interpreted as meaning that the prohibition on wearing, as a female Muslim, a headscarf at the workplace does not constitute direct discrimination where the employer's rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace?

In the case of *Bougnaoui v. Micropole Univers SA* [C-188/15], Bougnaoui was a design engineer whose work included going to customer's sites, and her employer told her to remove her headscarf when visiting clients because one client had complained about it. She refused and was dismissed. French Court of Cassation: 'Must Art4 (1) of Directive 2000/78 be interpreted as meaning that the wish of a customer of an info tech consulting co no longer to have the information tech services of that company provided by an employee, a design engineer, wearing an Islamic headscarf, is a genuine and determining occupational requirement, by reason or the nature of the particular occupational activities concerned or of the context in which they are carried out?

Two Advocates General of the CJEU – Juliane Kokott (*Achbita*) and Eleanor Sharpston (*Bougnaoui*) gave divergent opinions on the respective questions. In Kokott's opinion, in *Achbita* there was no discrimination, because the rule was equally applicable to people of any faith. Kokott's opinion was rather provocative in indicating:

9 The 2000/43 equality directive on racial and ethnic discrimination has a broader remit, covering not only employment but also healthcare, social security, education, public housing, etc.

> if a ban such as that at issue here proved to be based on stereotypes or prejudice in relation to one or more specific religions – or even simply in relation to religious beliefs generally…then it would without any doubt be appropriate to assume the presence of direct discrimination based on religion[10].

The approach seemed blind to the social reality in Belgium, one of the countries to have introduced a ban on full face veils in all public spaces and where the ban at issue at Achbita's company was highly likely to be based on stereotypes and prejudice. Further, Kokott suggested that the employer should offer the employee a position which does not require contact with customers. This too is rather provocative, literally suggesting that religion should be hidden, at best, and that it is ok that Muslim women who chose to cover their heads would be limited – extremely limited – in their employment possibilities (non-visible, backroom roles).

The CJEU in the end found indirect discrimination in this case, but ultimately deemed that discrimination justifiable: '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', because it relates to the freedom to conduct a business as guaranteed by Art 16 of the Charter. The judgement is criticised because the rule does not apply equally between people of faith and people of no faith. Further, the CJEU's approached hinged on the idea that it is acceptable for a company to wish to maintain (and project) a religiously neutral image. But as Eva Brems et al have argued, extending neutrality to the private sector is a 'big leap', - and 'neutrality can be an easy cover-up for prejudice' (Brems et al 2017).

Also highly controversially, Kokott opined that

> unlike sex, skin colour, ethnic origin, sexual orientation, age or a person's disability, 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. While an employee cannot 'leave' his sex, skin colour, ethnicity, sexual orientation, age or disability 'at the door' upon entering his employer's premises,

10 See http://curia.europa.eu/juris/document/document.jsf?docid=179082&doclang=en

> he may be expected to moderate the exercise of his religion in the workplace...[11]

Sharpston's opinion in the case of *Bougnaoui* was nearly opposite on that matter:

> 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[12].

Ultimately in *Bougnaoui* the CJEU found evidence of discrimination, in indicating that a customer's wish not to deal with a person wearing a headscarf is insufficient to make not wearing a headscarf a 'General Occupational Requirement'.

Thus far, then, the messaging of the CJEU on Islam, insofar as the wearing of religious symbols is concerned at least, in one case communicates a prioritization of business interests over religious freedom for Muslim minorities, and in the other places a (not particularly strict) limit on that prioritization. Certainly, as a result of these two cases, at least some of the aforementioned hope in the CJEU was thwarted.

This court has not yet been called upon to address discrimination with regards to Christian or other religious symbols, thus we do not have a comparative perspective in this regard. However, the CJEU has addressed cases regarding majority *and* minority Christian priviledge and the right to religious autonomy of Christian churches. In one such case the CJEU addressed the Austrian state's classification of Good Friday as a public holiday only for members of three particular Christian minority churches, resulting in the privileging of members of those churches with a paid holiday on Good Friday or additional pay if they worked on that day [C-193/17; see CJEU Press Release No.4/19]. The CJEU here engaged with the question of whether a measure intended to benefit the adherents to a minority faith amounts to illegal direct discrimination against those who are not a member of that minority (McCrea 2019), and found in a 22 January 2019 ruling that this policy violates the EU equality directive 2000/78.

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11 http://curia.europa.eu/juris/document/document.jsf?docid=179082&doclang=en

12 See https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-07/cp160074en.pdf

In two other cases referred to the CJEU by German national courts, the court dealt with religion-based discrimination of (potential) employees by a church-based employer. One was raised by Vera Egenberger, a not religiously affiliated woman who claimed she had been discriminated against in her application for a position advertised as requiring membership in a Protestant church or a church affiliated with the Working Group of Christian Churches in Germany, though the work entailed 'had very little to do with churches' (Ciacchi 2019)[13] [C-414/16]. The second case concerned the termination of the employment contract of a man ('JQ') working for a private institution ('IR') dependent on the Catholic Church and who had remarried after divorce but without prior annulment of his first marriage by a church tribunal [C-68/17]. The German General Law on Equal Treatment allows significant excemptions for church-based employers based on the 'self-perception of the religious society or association concerned, in view of its right of self-determination or because of the type of activity' (Para.9, cited by Ciacchi 2019: 297). The CJEU rejected the subjective ('self-perception') perspective on church-based organisations' rights to exceptions from non-discrimination legislation with reference to 'objectively dictated' occupational requirements (for Vera Egenberger) and 'effective judicial review' over any decisions regarding the impact of the faith or lack thereof of employees on their performance of managerial duties (in the case of JQ) (see Ciacchi 2019 for further analysis).

Lucy Vickers (2017) describes the CJEU headscarf cases as a 'backwards step' in terms of equality which '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'. By this reading, the CJEU has in common with the ECtHR a sensitivity to political concerns. But the latter three cases presented here, concerning Christian majority or minority claims, tentatively suggest the CJEU's willingness to contend with states' traditional approaches to Christian minorities or majorities when the latter are in breach of the equality directive. Arguably however, the political sensitivities around Islam are more often than not greater than those around Christian majority or minority privilege. Further, it must be noted regarding the CJEU preliminary reference procedure that – as compared with the ECtHR – the CJEU has a rather limited competence: according to the EU treaty article establishing this procedure (Art.267), it is at the

13 As Ciacchi notes, rather ironically the post consisted of writing reports on German efforts to combat discrimination in the framework of the UN Convention on the Elimination of All Forms of Racial Discrimination. (295).

national court's discretion whether to ask the CJEU for a preliminary ruling on a particular question; the *obligation* to refer a question to the CJEU only arises 'Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law,' (Art.267 TFEU para.3).

Concluding remarks

Realistically speaking, issues around Islam and law in Europe are bound to be politically fraught, just as issues around religion in the public sphere *in general* are increasingly politically fraught. As Ronan McCrea (2017) indicates, ' the question of religion's role in society has become bound up with highly combustible political issues such as migration, changing norms in relation to gender and sexuality, national identity and even national security'. However, when considering the treatment of Islam specifically, it is difficult not to see the latter as qualitatively different to that of other faiths.

In the case of the CJEU, there is yet fairly little evidence to go by: though that court has considerable experience with prohibition of discrimination in the employment context, its experience of dealing with religion-based discrimination is thus far fairly limited (O'Leary 2018; Pastor 2016). As such it has also not, yet, become a significant 'target' of national governments' ire regarding the supranational court's overstepping of their national sovereignty specifically to do with regulation of religion; the two courts are not evenly exposed to political pressures in these domains.

In the case of the ECtHR, however, it has actively engaged with religion-related case law claims at least since 1993, when it issued its first judgment finding a violation of religious freedom on the case of *Kokkinakis v. Greece.* It was not long after that it addressed religious autonomy claims of Muslim minorities in Greece and Bulgaria (e.g., *Serif v. Greece*, 1999; *Hasan and Chaush v. Bulgaria*, 2000); in such cases the ECtHR ruled in favour of the Muslim claims. But there seems to be a difference in the Court's approach to cases to do with outward expressions of Muslim identity and with Muslim challenges to state secularisms, and this difference is not limited to the past decade's 'high combustibility' of religion-related issues in the context of new nationalisms and turns towards particularism, both in Europe and globally.

As Siofra O'Leary (2018) notes, a further fundamental difference between the ECtHR and the CJEU is that the former rules in a fact specific and country specific way: each case it takes is judged on the basis of the specifics of the facts of the case in question, and in relation to the relevant laws in the given country context. The CJEU, on the other hand, is engaged to provide general interpretative guidance to courts in the now 27 Member States; its rulings are neither case nor country specific.

If, however, we return to the question of the 'indirect' or 'radiating' effects of courts, then beyond the impact of court decisions whether specific to the facts of a case and the country in question, or directly relevant to all 27 member states of the EU, the *messages* that court decisions communicate more broadly to society at large are far more important in terms of potential impact on peoples' perceptions of their rights. To date there is no systematic comparative study of these two courts' indirect effects[14], one may assume that the sheer volume of relevant case law at the ECtHR as compared with the CJEU entails far greater indirect effects of the former in terms of stakeholders' conceptions of their rights. In the case of both European level courts, however, it is safe to say that the overall message communicated to Muslims thus far is less than encouraging in terms of these Courts' concerns for protection of their rights to manifest their faith in public and, in some cases, in the private business sphere.

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