

Religious Discrimination in Employment – A Comparative Analysis of the Law in the UK, France and Germany, with Reference to International and Supranational Law

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ABSTRACT

This thesis analyses religious discrimination in employment, using an applied comparison of the law in the UK, France and Germany. To this end, the thesis first explores national church-state relations, establishing potential links to religious discrimination at work. The investigation then moves on to the standards set by the Council of Europe and the European Union, against which the law in the UK, France and Germany will be measured against. The final chapter brings together the findings in an overall comparison of the national law, with particular emphasis on the role of church-state relations and impact on religious minorities. The original contribution of this thesis to knowledge lies in the assessment of the topic in the context of three jurisdictions, its interconnectedness with the ECHR and EU frameworks, using the framework of church-state relations.

The thesis reveals and explains similarities and differences between the law in the three jurisdictions, as well as the effects on employees practising their religion and underlying attitudes that formed the law. After identifying substantive neutrality as a promising characteristic of church-state models, it was set as a benchmark for assessment throughout the thesis. Themes emerging from the research reflect significant differences regarding religious discrimination in employment in the UK, France and Germany. Particularly striking is the arguably deliberate targeting of, and clearly detrimental impact on religious minorities by means of indirectly discriminating law in France and Germany, as well as some directly discriminating provisions that were enacted in the course of the German 'headscarf debate'. It is suggested, accordingly, that stereotypical assumptions about 'otherness' have influenced legislation, as well as case law, using church-state relations to underscore the decisive arguments. Due to its largely hypothetical nature, the assessment of the domestic laws' compatibility with European international and supranational legal frameworks result in a number of cautious predictions. Widespread compliance appears fairly likely in relation to the law in the UK, whereas French and German law can be challenged in several regards. Finally, this research contributes proposals aiming at effective solutions for a variety of religious discrimination scenarios pertinent in the UK, French and German work environments.

DECLARATION

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PREFACE

Stephie Fehr completed her undergraduate studies in law at the University of Cologne, specialising in the area of European Union and public international law. She emigrated to the UK on 11 September 2001, where she obtained an LLM in European Legal Studies from the University of Durham. Stephie then decided to embark on a career in academia and to obtain a PhD. In order to finance this degree and to gain relevant work experience, she assumed research, teaching and administrative roles at the Universities of Salford, Manchester, Leeds and MMU. During this time she published three chapters in edited volumes and two journal papers, and presented work at numerous conferences and seminars in the UK, Germany, the Netherlands and Iran. Besides, Stephie has acquired valuable insights into practical dimensions of her research through volunteering for various organisations.

TABLE OF CONTENTS

ABSTRACT	2
DECLARATION.....	3
COPYRIGHT STATEMENT	4
ACKNOWLEDGEMENTS	6
PREFACE	7
TABLE OF CONTENTS.....	8
INTRODUCTION	19
I. Religious Discrimination in the Workplace: The Topic and its Background.....	19
II. The Scope of the Thesis.....	24
1. Coverage of Jurisdictions.....	24
2. Coverage of Subject Matter.....	25
3. Integration of Elements from Disciplines other than Law.....	27
III. Research Objectives, Analytical Framework and Research Questions.....	28
IV. Methodology.....	29
1. Framing Comparative Law as a Methodology.....	29
2. Advantages and Disadvantages of Applied Comparative Law as a Methodology.....	30
V. Contribution to Knowledge and Originality	32
VI. Limitations of the Research.....	33
VII. Structure of the Thesis.....	34
VIII. Summary.....	37

CHAPTER 1 · Church-State Relations in the UK, France and Germany	38
I. Introduction.....	38
II. Models of Relating Church and State.....	39
1. Establishment or State Church Systems.....	40
2. Secularism.....	41
3. The Concept of Neutrality.....	44
III. Church-State Relations in the UK.....	48
1. Church and State in England.....	48
a) History.....	48
b) Current Status	49
c) Trends.....	51
2. Church-State Relations in Wales, Scotland and Northern Ireland.....	53
IV. Church-State-Relations in France	54
1. History.....	54
2. Current Status.....	55
3. Trends.....	60
V. Church-State Relations in Germany.....	63
1. History.....	63
2. Current Status.....	65
3. Trends.....	67
VI. Comparison.....	69
VII. Conclusions.....	71

CHAPTER 2 - Religious Discrimination in the Workplace under the Legal Framework of the Council of Europe

.....	74
I. Introduction.....	74
II. Religious Discrimination under the Framework of the Council of Europe.....	74
1. The Protection of Freedom of Religion under the ECHR.....	74
a) The Scope of Freedom of Religion under Article 9 ECHR.....	74
b) Justifiable Limitations to Freedom of Religion under Article 9 ECHR.....	78
c) Article 9 and its Application in the Work Environment.....	82
2. The Protection from Religious Discrimination.....	82
a) The Scope of Discrimination under Article 14 ECHR.....	82
b) Justifying Religious Discrimination under Article 14 ECHR.....	85
3. Protection from Discrimination under Protocol 12.....	86
4. The Protection of Minorities.....	87
5. The European Social Charter.....	89
III. ECtHR Jurisprudence dealing with Religious Discrimination at Work.....	90
1. Discrimination based on Religious Appearance— <i>Dahlab v. Switzerland</i>	90
a) The Proselytism Argument.....	91
b) The Sex Equality Argument.....	93
c) The Intolerance Argument.....	95
d) The State Neutrality Argument.....	96
e) Further Considerations pursuant to <i>Dahlab</i> —The <i>Şahin</i> Judgment.....	98
f) Wearing Crosses in the Workplace—The Rulings in <i>Eweida</i> and <i>Chaplin</i>	102
2. Religious Discrimination related to Hours of Work.....	105
3. Other Scenarios of Discrimination based on Religion in the Work Environment.....	107
a) Membership to Religious Institutions.....	107
b) Oath Requirements.....	108
c) Proselytism in the Workplace.....	108

d) Favouritism in the Workplace.....	109
e) Incompatibility of Religious Manifestations with the Rights of Clients and Colleagues not to be Discriminated Against on other Grounds.....	110
IV. Conclusions	112

CHAPTER 3 - Discrimination in the Workplace under the Law of the European Union	115
I. Introduction.....	115
II. Religious Discrimination under the Treaties	115
1. The Treaty of Amsterdam	115
2. The Treaty of Nice.....	118
3. The Treaty of Lisbon.....	119
a) The Treaty's Position on Religious Discrimination.....	119
b) The Treaty's Position on Church-State Relations	124
c) The Relationship between the EU and Religious Organisations.....	126
III. The Employment Framework Directive.....	131
1. Types of Discrimination	131
2. Justifiable Limitations and Exceptions under the EFD.....	133
3. Remedies and Implementation	135
IV. The Framework Decision on Racism and Xenophobia.....	136
V. CJEU Jurisprudence and Religious Discrimination.....	136
1. The CJEU's Position on Human Rights.....	136
2. The CJEU's Position on Non-Discrimination in General	137
3. The CJEU's Position on Religious Discrimination	139
VI. The Agency for Fundamental Rights.....	142
VII. Conclusions.....	143

CHAPTER 4 · The Law in the UK concerned with Religious Discrimination in Employment and its Compatibility with the ECHR and EU Law 145

I. Introduction.....	145
II. Court Structures and Statistics	145
III. Statutory Law.....	146
1. The Human Rights Act 1998.....	146
2. The 2003 Employment Equality (Religion or Belief) Regulations.....	147
3. The 2010 Equality Act.....	147
4. Statutory Exemptions and the Concept of Accommodation.....	153
5. Northern Irish Statutory Law	159
IV. Case Law	160
1. The Notion of Religion.....	160
2. Discrimination based on Religious Appearance	162
3. Religious Discrimination related to Hours of Work	167
4. Religious Discrimination based on Health, Safety and Security.....	171
5. Discrimination based on Workplace Requirements physically incompatible with Religious Beliefs.....	174
6. Discrimination based on Workplace Requirements morally incompatible with Religious Beliefs	175
7. Harassment.....	180
V. Compatibility of the Law in the UK with the ECHR	181
VI. Compatibility of the Law in the UK with EU Law.....	183
VII. Conclusions.....	185

CHAPTER 5 - French Law concerned with Religious Discrimination in Employment and its Compatibility with the ECHR and EU Law	188
I. Introduction.....	188
II. Court Structures and Statistics	188
III. Statutory Law.....	189
IV. Case Law	193
1. The Notion of Religion.....	193
2. Discrimination based on Religious Appearance	194
a) Religious Appearance in French Private Sector Employment.....	194
b) Religious Appearance in the French Public Sector	199
3. Religious Discrimination related to Hours of Work	201
4. Religious Discrimination based on Health, Safety and Security, and on Work Activities physically incompatible with Religious Beliefs	202
5. Discrimination based on Work Activities morally incompatible with Religious Beliefs	202
6. Harassment as a Form of Religious Discrimination.....	203
V. Compatibility of French Law with the ECHR.....	203
1. The Notion of Religion.....	203
2. Appearance.....	203
a) Private Sector	203
b) Public Sector	204
3. Hours of Work.....	207
4. Moral or Physical Conflicts.....	207
VI. Compatibility of French Law with EU Law	207
1. The Notion of Religion.....	207
2. Appearance.....	207
a) Private Sector	207
b) Public Sector	208

3. Hours of Work.....	211
4. Moral or Physical Conflicts.....	211
VII. Conclusions.....	211

CHAPTER 6 - German Law concerned with Religious Discrimination in Employment and its Compatibility with the ECHR and EU Law	214
I. Introduction.....	214
II. Court Structures and Statistics	214
III. Statutory Law.....	215
1. Constitutional Law.....	215
2. Customary Principle of Equal Treatment.....	216
3. The Betriebsverfassungsgesetz	217
4. The Allgemeines Gleichbehandlungsgesetz	217
5. Staatsverträge.....	224
IV. Case Law	224
1. The Notion of Religion.....	224
2. Discrimination based on Religious Appearance	226
a) Religious Appearance in the Private Sector.....	226
b) Religious Appearance in the Public Sector	228
3. Discrimination based on Hours of Work, Health, Safety and Security, Work Activities physically or morally incompatible with Religious Beliefs, and Harassment.....	236
V. Compatibility of German Law with the ECHR.....	236
1. The Notion of Religion.....	236
2. Appearance.....	236
VI. Compatibility of German Law with EU Law	237
1. The Notion of Religion.....	237
2. Appearance.....	237
3. Statutory Law.....	238
VII. Conclusions.....	239

CHAPTER 7 - Comparing the Law related to Religious Discrimination in Employment in the UK, France and Germany	242
I. Introduction.....	242
II. Court Structures, Statistics and Anti-Discrimination Authorities	242
III. Statutory Law in the UK, France and Germany.....	244
IV. Specific Issues of Religious Discrimination Law in the UK, France and Germany	245
1. The Notion of Religion.....	245
2. Making a Religious Discrimination Case in Court.....	246
3. Discrimination based on Religious Appearance.....	247
4. Religious Discrimination related to Hours of Work	252
5. Religious Discrimination and Exemptions from Workplace Requirements.....	252
6. Religious Discrimination based on Health, Safety and Security.....	253
7. Workplace Requirements Physically incompatible with Religious Beliefs.....	253
8. Workplace Requirements Morally incompatible with Religious Beliefs.....	254
9. Harassment.....	255
V. Conclusions.....	255

CONCLUSIONS	259
I. Introduction.....	259
II. Main Findings and Arguments.....	259
1. Religious Discrimination and Church-State Relationships.....	259
2. Religious Discrimination under the Council of Europe's Framework.....	261
3. Religious Discrimination and the EU Framework.....	262
4. The Law in the UK concerned with Religious Discrimination in Employment and its Compatibility with the ECHR and EU Law.....	262
5. The Law in France concerned with Religious Discrimination in Employment and its Compatibility with the ECHR and EU Law.....	263
6. The Law in Germany concerned with Religious Discrimination in Employment and its Compatibility with the ECHR and EU Law.....	265
7. Comparing the Law related to Religious Discrimination in Employment in the UK, France and Germany	267
III. Proposals for Reform.....	270
1. Repealing the Baden-Württemberg and Hessen School Acts	270
2. Duty of Reasonable Accommodation.....	270
3. Recognition of Religion in the Public Sphere	271
4. Awareness and Training.....	272
5. Interfaith Dialogue.....	272
IV. Contribution and Originality.....	273
V. Limitations of the Research	273
VI. Proposals for Future Research.....	274
VII. Final Remarks.....	275
BIBLIOGRAPHY	277

INTRODUCTION

I. Religious Discrimination in the Workplace: The Topic and its Background

Religion has played a central role throughout the history of humanity, impacting most societies and individuals. In contributing ideas, religion has advanced scientific, societal and individual progress, but it has also posed political challenges when interpretations clash with a local reality or are abused for personal gain.¹ Because religion and the alignment of conduct with one's religious beliefs are also vital to individuals, it is equally important that law provides fair and, as far as possible, permissive structures. Thus, law can contribute to religion being a source of improvement in any society.

This thesis investigates the law related to religious discrimination at work in the UK, France and Germany, as well as their compatibility with the law provided of the Council of Europe (CoE) and the European Union (EU).

The focus on non-discrimination law, as opposed to freedom of religion, allows for a clearer accentuation of the element of comparative disadvantage experienced by adherents of specific religious groups in comparison with others, and thus, it highlights the treatment of majority and minority religions. These facets will be explored in this thesis, with specific reference to church-state relations and also taking into consideration the interaction between religious minorities and majorities. The focus will consequently be not only on the degree of freedom granted to individuals but also on the treatment of minorities as markers of unequal structures, as well as on the exposition of the attitudes underlying freedom of religion.

¹ Adams M and Overbeeke AJ, "The Constitutional Relationship between Law and Religion in the History of Ideas: A Contemporary European Perspective", (2008) 8(3) Global Jurist Article 4;
 Evans C, *Freedom of Religion under the European Convention on Human Rights* (Oxford: Oxford University Press, 2001), at 1-2;
 Hannam J, *God's Philosophers: How the Medieval World laid the Foundations of Modern Science* (London: Icon Books, 2009);
 McCrea R, *Religion and the Public Order of the European Union* (Oxford: Oxford University Press, 2010), at 16-50;
 Sacks J, *The Dignity of Difference – How to avoid the Clash of Civilisations* (London/New York: Continuum, 2002);
 Wolfe J, "Introduction", in J Wolfe (ed), *Religion in History: Conflict, Conversion and Coexistence* (Manchester: Manchester University Press, 2004).

Religious discrimination in the work environment in Europe has had many faces throughout history. A tolerant approach, which is often absent in legal debates today, was already suggested in the 18th century by the secular, for most of his life anti-religious, Arouet (Voltaire), who contributed the following “Prayer to God” in his *Traité sur la Tolérance*:

“Make us help each other bear the burden of our difficult and transient lives. May the small differences between the clothes that cover our weak bodies, between all our inadequate languages, all our petty customs, all our imperfect laws, all our foolish opinions, between all of the circumstances that seem so enormous in our eyes but so equal in yours—may all these...not serve as a basis for hatred and persecution.... May those who show the love for you by wearing white cloth not detest those who express their love for thee by wearing black wool.”²

Nevertheless, from the Middle Ages to the 20th century, Jewish workers were prevented from entering many professions, restricting their work activities to niche areas. It is well-known that exclusion from participation in regular (working) life led to disastrous consequences for Jews and for most of their fellow and subsequent humanity. Employment plays a pivotal role in addressing cycles of exclusion because it provides individuals with economic, personal and social benefits unrivalled by any other area of life except perhaps education. Because human rights discourses and protection have developed significantly since the end of the Second World War, such overt forms of religious discrimination are now rarely heard of in Europe. As this research will reveal, however, the most controversial issues in the workplace still surround cases of (alleged) indirect discrimination that disproportionately affect religious minorities.

The situations and circumstances under which religious discrimination in employment occurs are varied, such as church-state relations, monolithic nationalism that affects religious minorities, discrimination to the detriment of a specific religious group and (alleged) conflict between religious belief and public safety, health, order or morals, as well as the use of prejudice for argumentation.³ The first decade of the 21st century saw a telling rise in cases and legislative activities concerned with the practice of Islam. The events of 11 September 2001 shows that a sole incident can spark or legitimise previously suppressed sentiments

² Arouet F-M (Voltaire), *Traité sur la Tolérance* (1763; reprinted Paris: GF Flammarion, 1989), at 141.

³ Haltern P, Preliminary Report on the proposed Study on Discrimination in the Matter of Religious Rights and Practices, UN Doc E/CN4/Sub2/162, at 14-24 (1954).

towards a minority group. A useful parallel⁴ can be drawn with the situation of Jews in the past to highlight the underlying political, sociological and psychological influences the law is subject to in this field, in particular in terms of polarisation between mainstream society and perceived 'otherness'. These circumstances point to the fact that instances of religious discrimination involve wider implications than the mere inconvenience and injustice that it may entail for the individual. These larger-scale implications, in addition to the fact that religious beliefs constitute an essential part of individual identity, reflect the importance of providing a sound framework that protects against religious discrimination.

The negative effects of religious discrimination are in fact eventually felt by everyone in society, not only by its immediate victims. Downward spirals emerge from subjection to detriment and exclusion, magnified by the media and globalisation. Victims or target groups of religious discrimination may resort to passive endurance on one end of the scale, for instance, resentment, resistance to integration or assimilation (policies),⁵ isolation, resignation to unemployment, and progress to active responses on the other end such as protests⁶ and even terrorism.⁷ Along this line, the OSCE's Astana Declaration, for example, links persisting security threats with the need to increasingly promote freedom of religion and to fight intolerance and discrimination.⁸ Since 11 September 2001, religious discrimination law has thus become increasingly significant in that it can serve to counterbalance the legal trends that have evolved under the umbrella of anti-terror measures.⁹ Action against terrorism appears to erode the human rights of minorities¹⁰ and thus add to the experiences of discrimination in these communities.¹¹ On the other end of the scale, law in the UK, France and Germany comprehensively protects against religious

⁴ This parallel is no way intended to belittle the Holocaust, or to ignore the desolate position of the Roma in European states, who are certainly not any better situated. The proposition merely refers to similar basic attitudes, which are fortunately less acceptable and therefore limited in effect in the three jurisdictions examined by this thesis.

⁵ Adida CL, Laitin DD and Valfort M-A, "Identifying Barriers to Muslim Integration in France", (2010) 107(52) Proceedings of the National Academy of Science of the United States of America 22384.

⁶ In France and Germany, legal debates concerned with religious discrimination have, for instance, been responded to by the means of music;

<http://www.golvr.de/ammarr114-und-serkan/songtext-liebe-schwester-610000.html>;

<http://www.youtube.com/watch?v=1fuGSiR4ZX0&feature=related>;

<http://www.youtube.com/watch?v=mWZPzfCzQbl> (all accessed 15 March 2014).

⁷ A comprehensive account is, for instance, provided by Ziegler J, *La Haine de l'Occident* (Paris: LGF/Livre de Poche, 2010).

⁸ Astana Commemorative Declaration towards a Security Community (OSCE, December 2010), Point 7, available at

<http://www.osce.org/node/74985> (accessed 15 March 2014).

⁹ Gearty C, "11 September 2001, Counter-Terrorism and the Human Rights Act", (2005) 32(1) Journal of Law and Society 18;

Haubrich D, "September 11, Anti-Terror Laws and Civil Liberties: Britain, France and Germany compared", (2003) 38(1) Government and Opposition 3;

Poynting S and Mason V, "Tolerance, Freedom, Justice and Peace? Britain, Australia and Anti-Muslim Racism since September 11th 2001", in B Spalek (ed), *Ethnicity and Crime: A Reader* (Maidenhead: Open University Press, 2008);

<http://www.guardian.co.uk/uk/2006/aug/07/ukcrime.topstories3> (accessed 15 March 2014).

¹⁰ Bonner D, *Executive Measures, Terrorism and National Security: Have the Rules of the Game changed?* (Aldershot: Ashgate, 2007);

Leigh I, "Changing the Rules of the Game: Some Necessary Legal Reforms to United Kingdom Intelligence", (2009) 35(4) Review of International Studies 943; <http://www.justice.org.uk/pages/terrorism-and-counter-terrorism.html> (accessed 15 March 2014).

¹¹ Weller P, "Religious Discrimination in Britain: A Review of Research Evidence, 2000-10", Equality and Human Rights Commission Research Report 73, 2011, <http://www.equalityhumanrights.com/publications/our-research/research-reports/research-reports-71/> (accessed 15 March 2014).

discrimination. In regard to religious discrimination in the workplace, the instruments that implement the EU's Employment Framework Directive¹² are the most noteworthy thereof.

In order to improve the effectiveness of the law countering religious discrimination, however, one also needs to determine the root causes underlying the specific forms of discrimination.¹³ Covert or open prejudice may originate from legal, social, political or economic inequality, potentially making way for perceptions of threat by a religious community.¹⁴ The role of the law (in theory and in practice) in abstaining from subjective differentiations is paramount considering that a legal system is one of the main representatives of any state. Consequently, the law governing religious discrimination at work can powerfully symbolise attitudes. In this regard, the French and German 'headscarf debates' epitomise the case of a majority's failing its test of tolerance towards a minority per Voltaire in that the opinions opposing headscarves in the contexts in question reflect political and personal interests and sometimes even emotions of superiority.¹⁵ Alongside ignorance, Tahzib lists "the tendency of human beings to proclaim the inherent superiority of their own belief to all other beliefs, and to refuse, accordingly, to accept the equal dignity and worth of adherents of other beliefs" as one of the prime causes of religious discrimination.¹⁶ This is not to blame one party but to highlight a vicious circle in which ignorance leads to insecurity or fear,¹⁷ fear leads to oppressing the perceived attacker, and oppression leads to exclusion, which again contributes to perpetuating ignorance about the oppressed. The pertinent deliberations on headscarves in the workplace, therefore, feature strongly in this thesis.

More generally, anti-religious rhetoric is often employed by politicians and media for ulterior purposes¹⁸ and should therefore be avoided. This is even more the case in diverse societies, in which the additional factor of majority-minority relations comes into play. Consistent with Benito's idea of 'unity in diversity', this research promotes an understanding of equality that does not demand uniformity. Benito profoundly believes that the "equal dignity owed to all

¹² Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L303/16.

¹³ Tahzib BG, *Freedom of Religion or Belief – Ensuring Effective International Legal Protection* (The Hague/Boston/London: Martinus Nijhoff Publishers, 1996), at 29.

¹⁴ *Ibid.*, at 32-33.

¹⁵ Origins of expressing superiority can be twofold, either superficial, as a reaction to doubts about one's culture etc., or, as Burke suggests, because confidence in one's culture, etc. results in a lack of interest in other paradigms.

Burke P, *Cultural Hybridity* (Cambridge: Polity Press, 2009), at 87.

¹⁶ Tahzib BG, *Freedom of Religion or Belief – Ensuring Effective International Legal Protection*, at 30.

¹⁷ Leigh and Ahdar convey that the French headscarf ban (in schools) is a response to the threat posed by Islam.

Leigh I and Ahdar R, *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2005), at 5, 'hijab' meaning headscarf in this case; Tahzib adds that such ignorance can lead to the ready use of stereotypes and that it "breeds suspicion, fear, hostile images, misunderstandings and mistrust".

Tahzib BG, *Freedom of Religion or Belief – Ensuring Effective International Legal Protection*, at 30.

¹⁸ Such as finding a scapegoat to divert attention from actual issues.

Tahzib BG, *ibid.*, at 32-33.

seeks respect for the differences in the identity of each person. It is in absolute respect for the right to be different that we find authentic equality”.¹⁹ A concept of equality that simultaneously encourages unity and diversity can eradicate intolerance and discrimination as well as increase healthy human interaction.²⁰ Unity and societal integration can, moreover, be cultivated with the help of religion, as long as no one is officially excluded.²¹ This thesis envisages an accordingly wide purpose of anti-discrimination law that would support substantive equality in line with the idea of transformation as defined by Albertyn.²² By overcoming societal norms and stereotypes, a transformative approach to equality works to disestablish systemic, economic and social inequality, the latter by encouraging personal identity and abilities.²³ Thus, this approach exceeds mere inclusion and accommodation schemes.²⁴ Such a transformative strategy is commendable since it reflects the recognition of both individual choice and the allocation of resources to achieve a real choice in order to increase the opportunities for those who suffer continual disadvantage.²⁵ The desired transformation of society naturally provides for diverse lifestyles and so maximises respect for human dignity. Accordingly, transformative equality particularly suits the protection of religious beliefs as fundamental components of identity.

Provided that there is equitable interaction amongst those who differ in viewpoints and/or lifestyles, a diverse experience will inevitably deepen education, ideally leading to insights into socio-political connections at local, national and international levels. Therefore, religious diversity should be supported by law and policies in the work environment as an important place of human interaction. Only if law operates even-handedly for adherents of all religious beliefs can a sound basis for education be created. This can most of all be achieved by omitting prejudicial considerations and, instead, demanding a high degree of objective justification in cases of discrimination. Ideally, such conditions are sourced by interfaith dialogue, which can be a powerful, even necessary, instrument in educating those concerned.²⁶ Because a significant number of individuals’ interactions tend to take place at

¹⁹ Benito EO, Study of the Current Dimensions of the Problems of Intolerance and of Discrimination on Grounds of Religion or Belief, UN Doc E/CN4/Sub2/1987/25 (1986), at 17.

²⁰ Tahzib BG, *Freedom of Religion or Belief – Ensuring Effective International Legal Protection*, at 18.

²¹ Habermas J, “Religion in the Public Sphere”, (2006) 14(1) *European Journal of Philosophy* 1, at 13;

Laudrup C, “A European Battlefield: Does the EU have a Soul? Is Religion out of Place in the European Union?”, at 56.

²² Albertyn S, “Substantive Equality and Transformation in South Africa”, (2007) 23(2) *South African Journal on Human Rights* 253, at 257.

²³ *Ibid*, at 256-257.

²⁴ *Ibid*, at 257.

²⁵ Hepple B, *Equality – The New Legal Framework* (Oxford and Portland, Oregon: Hart Publishing, 2011), at 21;

in relation to religious discrimination in particular, Spinner-Halev J promotes similar concepts and details the prerequisites for a ‘real choice’ of individuals, “Liberalism and Religion: Against Congruence”, (2008) 9(2) *Theoretical Enquiries into Law* 553.

²⁶ Thus, there is interdependency between law and dialogue in the given field. With regard to dialogue as a primary tool to overcome prejudice, see *ibid* at 29-34.

work, a religiously diverse workforce can contribute to formal and informal dialogue. By comparing the systems in the UK, France and Germany, this thesis hopes to identify a legal approach to religious discrimination that is unbiased towards adherents of all religions and that can thus avoid the undesirable outcomes described above.

II. The Scope of the Thesis

This thesis strives to clarify, analyse and compare the law on religious discrimination in the UK, France and Germany, as well as to establish their respective conformity with EU law and the law of the ECHR. The aim of this research is to highlight the specific advantages and shortcomings of the law and to advance proposals to improve the law with respect to employees' protection as well as to highlight the wider implications involved. By virtue of the cases and commentary available on this topic, this is an open-ended quest. Accordingly, the thesis will have to follow certain confinements.

1. Coverage of Jurisdictions

This thesis examines religious discrimination law under five umbrellas: the law in the UK, France and Germany and the legal regimes of the EU and the CoE. Geographically, this creates a particularly European context.²⁷ Although strictly speaking, there is more than one jurisdiction within the UK, this state's law is referred to as one jurisdiction to avoid linguistic somersaults unless otherwise indicated. Due to the difference in religious composition in Northern Ireland and its specific history, the law from this part of the UK usefully displays a different character. For instance, Northern Irish case law almost entirely addresses conflicts amongst Catholic and Protestant Christians, whereas French and German cases mostly relate to minority, non-Christian religions, and interestingly, British cases centre on both majority and minority religions. In addition, the four nations of the UK embrace differing church-state paradigms, and this setting promised further insights as to whether and how this variety impacts religious discrimination. Thus, the inclusion of all UK jurisdictions is seen as an additional marker of potentially fruitful comparison.

Two main reasons led to the choice of the UK, France and Germany as the jurisdictions of study. The key reason behind this choice was the realisation that although the three states must abide by relevant EU and CoE law and as a result contain fairly similar legal rules, the outcomes in the national courts are strikingly different. This finding called for a more detailed inquiry. The second main reason that led to the choice of these jurisdictions had to do with

²⁷ The inclusion of the legal framework under the auspices of the UN was initially considered, but was discarded because of limited space and because the relevant CoE and EU regimes are more compelling and tend to develop more rapidly.

the linguistic skills of the author: the relevant legal texts could be read in the original by the author of this thesis. In addition, with the UK, France and Germany being amongst the most populous and influential states in Europe, these strongly impact the rest of Europe and thus affect a significant proportion of the EU population. An initial enquiry led to the discovery that most of the contentious case law in the considered jurisdictions contained decisive arguments surrounding the relationships between church and state. It then appeared to be particularly relevant to investigate the subject matter from the perspective of church-state paradigms. This choice of analytical framework made the selection of jurisdictions all the more appropriate given that these three jurisdictions have adopted clearly distinctive models: England's established church system (separate from other parts of the UK), a seemingly strict separation of church and state in France and a hybrid construction in Germany.

2. Coverage of Subject Matter

This thesis predominantly comprises an assessment of the law dealing with religious discrimination in the workplace in the UK, France and Germany based on these states' case and statutory law. Consequently, there is no specific mention of the several limitations that discrimination law suffers that stem from other factors.²⁸ Initially, the thesis sets up the analytical framework by examining church-state relations in the three jurisdictions and the potential points of intersection with religious discrimination. Towards the end of testing the compatibility of the national law with the legal frameworks of the CoE and the EU, the relevant law of the latter will be examined beforehand. By relating national case law to supranational and international obligations to which the UK, France and Germany have committed, the thesis will strive to answer the questions of if and how far these duties call for a particular approach.

The various forms of religious discrimination, ranging from restrictions on working time to requiring or prohibiting particular activities, clothing or other items, are a particularly fruitful area for comparison because there are considerable differences across the three jurisdictions. From a legal perspective, these differences are based on currently irreconcilable attitudes towards the scope of religious freedom. The fundamental question consequently arises as to the quality of legal argument behind the differing legal solutions in the three jurisdictions examined. This thesis supports an approach that remains objective

²⁸ For general limitations of discrimination law, see Fredman S, *Discrimination Law* (Oxford: Oxford University Press, 2002), at 161-175.

towards the treatment of different religions, free from prejudicial considerations, to discuss all types of discrimination cases.

This work focuses on employment in both the private and the public sectors. A sensible separation of the two sectors could not be made in this particular comparative analysis because the character of a workplace may be assigned to private employment in one jurisdiction and to public employment in another.²⁹ Consequently, law relating to all employment spheres will be analysed as a whole where possible, although the outcomes will also be commented on in view of potential differences between the treatment of public and private sector employees within each jurisdiction. Although there is relevant case law with regard to employment within religious organisations, this thesis will not consider this area in particular, since such an investigation would demand sufficiently significant technical explanations and background knowledge as to deserve a thesis of its own.³⁰

In addition to religious discrimination, members of religious groups are sometimes also subjected to additional forms of discrimination because of other characteristics they may necessarily or frequently share. Such problems of multiple or intersecting discrimination³¹ are not specifically addressed in this thesis. It is, nevertheless, acknowledged that the overall exposure to discrimination in these cases can be considerably severe and commonplace, and any concerns in this respect should be accounted for both by statutory law and in court. Notably, since religious discrimination is more easily justified from the employers' perspective, cases that may in fact be based on or affect other or combined grounds are often heard as religious discrimination cases. This thesis focuses on the religious discrimination elements of these cases, however, it also reveals the intersectional characteristics of these cases that often formed parts of the decisive arguments used. This is of interest from a comparative perspective because primarily French and German employment cases seemingly effect intersectional discrimination.

Law relating to freedom of religion is also relevant to religious discrimination, specifically where rights that are not termed as non-discrimination may still act in practice to alleviate

²⁹ Consistent terminology alone proves difficult, as seen when describing employees as public agents, civil servants or public sector employees, because each of these has contractually differing definitions in the UK, France and Germany, respectively.

³⁰ For an introduction to this field of law, see Sandberg R, *Law and Religion* (Cambridge: Cambridge University Press, 2011), at 119-128.

³¹ See, for instance, D Schiek and A Lawson (eds), *European Union non-Discrimination Law and Intersectionality* (Farnham: Ashgate, 2011); as research shows, the most likely forms of intersectional or multiple discrimination in conjunction with religion have been sex/gender or ethnic/race discrimination.

the disadvantages experienced by particular groups.³² For that reason, cases are included that were not brought under a discrimination heading by an employee, for instance, claiming a violation of freedom of religion. Selection of these cases was made whenever there were clear elements of religious discrimination based on the facts of the case, even if, for technical or other reasons, a discrimination claim was not explicitly made. The law taken into consideration relates to the period from after the Second World War until the present.

3. Integration of Elements from Disciplines other than Law

A holistic, interdisciplinary approach finds support in the relevant methodological, subject-specific literature. Örüçü and Errera explain that law is a mirror of the social system it emerged from, and hence, reference to the relevant backgrounds of society, culture, economy, religion and politics is a useful addition to purely legal assessments.³³ Similarly, Harding and Leyland advocate multidisciplinary accounts in the context of comparative constitutional law, which in their opinion should range across law and the contexts in which the constitution was developed to enable a real appreciation.³⁴

Religious discrimination can be framed in specific, often overlapping contexts, such as citizenship,³⁵ post-colonialism,³⁶ feminism,³⁷ migration,³⁸ identity, security and terrorism,³⁹

³² McColgan A, "Principles of Equality and Protection from Discrimination in International Human Rights Law", (2003)(2) *European Human Rights Law Review* 157, at 163.

³³ Örüçü E, "Developing Comparative Law", in E Örüçü and D Nelken (eds), *Comparative Law- A Handbook* (Oxford/Portland, Oregon: Hart Publishing, 2007), at 53;

Errera R, "The Use of Comparative Law before the French Administrative Courts", in G Cavinet, M Adenas and D Fairgrieve (eds), *Comparative Law before the Courts* (London: BIICL, 2004), at 154.

³⁴ Harding A and Leyland P, "Comparative Law in Constitutional Contexts", in E Örüçü and D Nelken (eds), *Comparative Law- A Handbook* (Oxford/Portland, Oregon: Hart Publishing, 2007), at 331;

as regards human rights also: Coomans F, Grünfeld F and Kamminga MT, "Methods of Human Rights Research – A Primer", (2010) 32(1) *Human Rights Quarterly* 179, at 186.

³⁵ Modood T, Triandafyllidou A and Zapato-Barrero R (eds), *Multiculturalism, Muslims and Citizenship – A European Approach* (Abingdon: Routledge, 2006).

³⁶ Barskanmaz C, "Das Kopftuch als das Andere – Eine Notwendige Postkoloniale Kritik des Deutschen Rechtsdiskurses", in S Berghahn and P Rostock (eds), *Der Stoff, aus dem Konflikte sind – Debatten um das Kopftuch in Deutschland, Österreich und der Schweiz* (Bielefeld: transcript, 2009), at 361-392; Ghannoushi S, "Many Faces of Islamism", *The Guardian*, 5 October 2005, <http://www.guardian.co.uk/world/2005/oct/05/religion.uk> (accessed 15 March 2014).

³⁷ Monjezi Brown I, "Muslimische Frauen und das Kopftuch – Hijab und Islamischer Feminismus", in S Berghahn and P Rostock (eds), *Der Stoff aus dem Konflikte sind – Debatten um das Kopftuch in Deutschland, Österreich und der Schweiz* (Bielefeld: transcript, 2009), at 437-463.

³⁸ Bowen J, "Nothing to Fear – Misreading Islamic Immigration in Europe", (2010) (January/February) *Boston Review* 27, at 28.

³⁹ Hancock C, "Spatialities of the Secular – Geographies of the Veil in France and in Turkey", (2008) 15(3) *European Journal of Women's Studies* 165; Rehman J, "Islam, 'War on Terror' and the Future of Muslims in the UK: Dilemmas of Multiculturalism in the Aftermath of the London Bombings", (2007) 29(4) *Human Rights Quarterly* 831.

integration,⁴⁰ immigration, Islamophobia,⁴¹ economics,⁴² globalisation,⁴³ multiculturalism,⁴⁴ and nationalism,⁴⁵ to name a few that, in their turn, appear in various disciplines. This array of overlapping accounts in the thesis' subject matter indeed leads to a certain complexity, summed up in an insightful way by Knights, who comments that in the context of the legal treatment of religious symbols, one finds "the complex interaction of a variety of factors including historical context, relationship between Church and State, post-colonial policy, patterns and attitudes towards immigration, and concepts of citizenship and national identity", these leading to differently framed political agendas on identity, integration and difference throughout Europe.⁴⁶

The above overview of the thesis' topic has already contextualised religious discrimination at work in its historic, sociological and political contexts. It is, however, impossible to provide a full account that integrates all disciplines relevant to religious discrimination in employment in the span of this thesis. Accordingly, interdisciplinary elements will only be occasionally embedded in the analysis as necessary. Regrettably, the size of this thesis does not allow for a more comprehensive integration of these disciplines, although the research at least provides ideas for future research in these areas.

III. Research Objectives, Analytical Framework and Research Questions

This thesis examines the law on religious discrimination at work by comparing the conditions under which this discrimination is found and the underlying attitudes found in the UK, France and Germany, as well as under the law of the ECHR and the EU. Indicators of religious discrimination in the workplace are discovered in an assessment of church-state relations and national statutory and case law, as well as in the countries' respective compliance with the ECHR and EU law. In this venture, the overarching purpose that the research questions

⁴⁰ Choudhury T (ed), Report: "British Muslims – Discrimination, Equality and Community Cohesion" (Budapest: Open Society Institute, 2005).

⁴¹ Allen C, *Islamophobia* (Farnham: Ashgate, 2010);

Githens-Mazer J and Lambert R, Report "Islamophobia and Anti-Muslim Hate Crime: A London Case Study", (University of Exeter: European Muslim Research Centre, 2010);

Vertovec S, "Islamophobia and Muslim Recognition in Britain", in Y Haddad (ed), *Muslims in the West: From Sojourners to Citizens* (Oxford: Oxford University Press, 2002), 19-35.

⁴² European Commission DG Employment, Social Affairs and Equal Opportunities, "The Business Case for Diversity – Good Practices in the Workplace", 2005; for the macro-level, see Ziegler J, *La Haine de l'Occident*.

⁴³ Sacks J, *The Dignity of Difference – How to avoid the Clash of Civilisations* (London/New York: continuum, 2002), who *inter alia* argues that the central question of a globalised age is the space and recognition for 'otherness', at 61.

⁴⁴ Abbas T, "British Muslim Minorities Today: Challenges and Opportunities to Europeanism, Multiculturalism and Islamism", (2007) 1 *Sociology Compass* 720; Modood T, *Ethnic Minorities in Britain – Diversity and Disadvantage – The Fourth National Survey on Ethnic Minorities* (London: Policy Studies Institute, 1997);

Parekh BC, *Rethinking Multiculturalism – Cultural Diversity and Political Theory* (Basingstoke: Palgrave Macmillan, 2000).

⁴⁵ Kymlicka W, "Liberal Nationalism and Cosmopolitan Justice", in S Benhabib (ed), *Another Cosmopolitanism* (Oxford: Oxford University Press, 2006), 128-144.

⁴⁶ Knights S, "Religious Symbols in the School: Freedom of Religion, Minorities and Education", (2005) *European Human Rights Law Review* 499, at 499.

below strive to serve is to critique the current solutions provided by national law and to propose specific measures for reform. To frame this broad task in a palpable manner, the thesis will commence by establishing the relevant national church-state relations in its first chapter. Throughout the thesis' examination, the findings of Chapter 1 are then tested against the controversies arising with the pertinent law and particular attention is paid to its interplay with majority-minority relationships.

Within the chosen analytical framework, the central questions this thesis strives to answer are: (i) how the in the UK, France and Germany deals with situations in which individuals may experience a disadvantage in the workplace for reasons related to their religion and (ii) whether the law in these jurisdictions is in accordance with the ECHR and EU legal frameworks. First, the thesis investigates these situations at the level of the CoE and the EU, and then it moves on to assert whether the law that addresses religious discrimination in employment in the UK, Germany and France respect these standards. Each chapter of this thesis also addresses specific (sub-) research questions, which are presented within the Structure (VII) below.

IV. Methodology

1. Framing Comparative Law as a Methodology

The methodology chosen to address the above research questions is a comparative legal doctrinal micro-analysis. Micro-comparisons investigate rules, the groupings thereof, or institutions below the benchmark of an entire legal family.⁴⁷ Whereas some argue that comparative law is not a methodology but a subject area because many methods can be used to compare,⁴⁸ another view asserts that the status of methodology can be claimed since the goal is the explanation or assessment of areas of law using a combination of strategies.⁴⁹ More confusion is added by the problem that comparative law theory and traditions have not been coherently developed and, correspondingly, have lost a common language and now expose parallel rather than opposing arguments.⁵⁰ Methodology is hence to be understood in a loose sense.

⁴⁷ Vespaziani A, "Comparison, Translation and the Making of a Common European Constitutional Culture", (2008) 9 German Law Journal 547, at 555.

⁴⁸ Gambaro A, "The Trento Thesis", (2004) 4(1) Global Jurist Frontiers, Article 2, at 4; Özüçü E, "Developing Comparative Law", at 44-45.

⁴⁹ Butler WE, "Unravelling the Mysteries of Comparative Law", (2006) 1(1) Journal of Comparative Law 207, at 208-209; Kahn-Freund O, "Comparative Law as an Academic Subject", (1966) 82 Law Quarterly Review 40, at 40;

Widner J, "Comparative Politics and Comparative Law", at 744; Özüçü E, *The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century* (Leiden/Boston: Martinus Nijhoff, 2004), at 61.

⁵⁰ Adenas M and Fairgrieve D, "Introduction: Finding a Common Language for Open Legal Systems", in G Cavinet, M Adenas and D Fairgrieve (eds), *Comparative Law Before the Courts* (London: BIICL, 2004), at xxix;

Butler WE, *ibid*, at 208;

Widner J, *ibid*, at 739 and 744.

Applied comparisons are the mainstream choice in current comparative law scholarship. This thesis falls under this category, which entails analyses with the precise aim of finding the best solution for a problem or a problem area.⁵¹ Under this framework, a social problem that exists in two or more jurisdictions is identified, and the solutions endorsed in each jurisdiction are evaluated from a philosophical or judgmental stance.⁵² This thesis endorses an applied comparison, since the law on religious discrimination at work is relevant to society owing to the severe consequences to which said discrimination may give rise.

A phenomenon that becomes apparent in the literature on comparative law is the absence of publications that focus on explaining how to compare law in a technical sense. Unlike the preceding debates concerning the rationales, benefits and drawbacks of comparative law, there seems to be no match in recommendations for actual procedures. Instead, practical guidance often comprises little more than contexts or lists of subjects that can be compared.⁵³ Zweigert and Kötz provide an explanation of how the goal of a best legal solution can be achieved. According to these authors, comparative law should detail the different approaches to an issue to show the arguments that underpin the approaches and, ultimately, to highlight a preferred best solution for a problem.⁵⁴ Despite some criticism,⁵⁵ this approach is well-suited to this thesis' goal of discovering such solutions for religious discrimination in employment. Unlike Örüçü,⁵⁶ I do not see functionalism as preventing the use of other disciplines because these are used precisely to clarify the arguments underlining the legal approaches in question.

2. Advantages and Disadvantages of Applied Comparative Law as a Methodology

Referring to comparative constitutional law, Leyland and Harding describe its role as a "contribution to a happy, fair and stable future for the broad majority of humanity under enlightened government nationally and internationally" since a comparison can assist in

⁵¹ Szabó I, "Les Buts et les Méthodes de la Comparaison du Droit", *Rapports Généraux au IX Congrès International de Droit Comparé* 1977, at 163; Widner J, *ibid*, at 739, where she highlights that comparative law is a necessity due to political reality.

⁵² Vespaziani A, "Comparison, Translation and the Making of a Common European Constitutional Culture", at 558.

⁵³ Freedland M, "Introduction: Comparative and International Law in the Courts", at xvi;

Teitel RG, "Book Review: Comparative Constitutional Law in a Global Age", 117 *Harvard Law Review* 2570, at 2584;

Choudhry S, "Globalisation in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation", (1999) 74 *Indiana Law Journal* 819, at 838-839 and "The Lochner Era and Comparative Constitutionalism", (2004) 2 *International Journal of Constitutional Law* 1, at 50-52.

⁵⁴ Zweigert K and Kötz H, *An Introduction to Comparative Law*, 3rd ed (Oxford: Oxford University Press, 1998; translated by Weir T), at 23.

⁵⁵ Sacco R, "Legal Formants: A Dynamic Approach to Comparative Law", at 2. The term "legal life world", as adopted from Habermas J, *The Theory of Communicative Action Vol.2 – Lifeworld and System: A Critique of Functionalist Reason* (Boston: Beacon Press, 1987), at 124, to mean a collation of "rules, principles, precedents, institutions, but also comprehensions, background assumptions, metaphors, cryptotypes and paradigms that sustain a legal culture". Vespaziani A, "Comparison, Translation and the Making of a Common European Constitutional Culture", at 549, 559 and 555.

⁵⁶ Örüçü E, "Developing Comparative Law", at 53.

alleviating oppression from and incompetence by governments.⁵⁷ Amongst the numerous benefits of this method are, for instance, the development of critical thinking that accompanies comparative ventures,⁵⁸ leading to ideas that may thus become more sophisticated and hence, improve weak legal arguments. These improved arguments can then be used to justify corrections to any law, thus providing an integral tool for both the solution of internationally shared societal, economic and political problems and the harmonisation and development of law.⁵⁹ Any assessment of human rights law today should therefore supposedly consider relevant law beyond the national sphere, especially if it touches on the jurisprudence of the CJEU and the ECtHR.⁶⁰ Accordingly, comparing compliance with international and supranational law appears to be a particularly fertile encounter.

Nevertheless, it is important to recognise that applied comparisons carry the risk of becoming judgmental or subjective and, thus, of losing credibility. In order to prevent subjectivity, Zweigert and Kötz famously state that the “question must be posed in functional terms, the problem stated without any reference to the concepts in one’s own legal system”.⁶¹ In spite of the deeper-level questions addressed in this thesis, and beyond pure law, it is hoped that potential pitfalls caused by subjectivity are sufficiently mitigated through the adoption of this functionalist approach. Fentiman also identifies the difficulty in gaining sufficient appropriate knowledge of the jurisdictions one is less familiar with compared with obtaining the same knowledge from within one’s own jurisdiction.⁶² Sacco fundamentally disagrees with this argument and claims that an outsider is more likely to expose gaps between operative and commonly stated rules.⁶³ Both arguments are valuable and require attention in this comparative project. Translation is another identified pitfall of comparative

⁵⁷ Harding A and Leyland P, “Comparative Law in Constitutional Contexts”, at 313.

⁵⁸ Freedland M, “Introduction: Comparative and International Law in the Courts”, in G Cavinet, M Adenas and D Fairgrieve (eds), *Comparative Law Before the Courts* (London: BIICL, 2004), at xvi.

⁵⁹ Freedland M, *ibid*, at xvi.; Das Basu D, *Comparative Constitutional Law* (New Delhi: Prentice-Hall of India, 1984), at 1-2; Vespaziani A, “Comparison, Translation and the Making of a Common European Constitutional Culture”, at 559, 569, 570-571.

⁶⁰ Butler WE, “Unravelling the Mysteries of Comparative Law”, at 209; Errera R, “The Use of Comparative Law before the French Administrative Courts”, at 162; Freedland M, *ibid*; Lenaerts K, “Interlocking Legal Orders or the European Variant of *E Pluribus Unum*”, in G Cavinet, M Adenas and D Fairgrieve (eds), *Comparative Law Before the Courts* (London: BIICL, 2004), at 100 and 105;

Örücü E, “Developing Comparative Law”, at 51-56; Vespaziani A, *ibid*, at 547;

Walker N, “Post-national Constitutionalism and the Problem of Translation”, in JHH Weiler and M Wind (eds), *European Constitutionalism beyond the State* (Cambridge: Cambridge University Press, 2003).

⁶¹ Zweigert K and Kötz H, *An Introduction to Comparative Law*, at 34.

⁶² Fentiman RG, “Foreign Law in National Courts”, in G Cavinet, M Adenas and D Fairgrieve (eds), *Comparative Law Before the Courts* (London: BIICL, 2004), at 14;

Örücü E, “Developing Comparative Law”, at 51;

Samuel G, “Comparative Law and the Courts”, in G Cavinet, M Adenas and D Fairgrieve (eds), *Comparative Law Before the Courts* (London: BIICL, 2004), at 254.

⁶³ Sacco R, “Legal Formants: A Dynamic Approach to Comparative Law”, at 29-30.

law.⁶⁴ Often, one will simply not find a topic discussed in the same depth in a language other than the one of the relevant jurisdiction. It should, however, be one of the roles of comparative law to expand knowledge across languages.

V. Contribution to Knowledge and Originality

This research reveals similarities but foremost differences in the law related to religious discrimination in employment in the UK, France and Germany. The comparative analysis involved shows not only the differences in law but also the underlying, determining factors, in particular church-state relations. A comprehensive comparison involving this topic in the three particular jurisdictions has not previously been undertaken. Furthermore, this thesis produces scholarship concerned with the compatibility of the relevant law in the UK, France and Germany with the law of the ECHR and the EU, which, perhaps owing to the hypothetical nature of this undertaking, has been cautious and scarce so far.

In its original analysis based on church-state relations, this thesis fills several gaps in the literature. It is the first comparative account of religious discrimination in employment law in the UK, France and Germany, with reference to compatibility with the ECHR and the EU law. More precisely, the thesis covers the three jurisdictions in relation to both majority and minority religious practice in employment, whereas the existent literature has focused either on issues of minority religions in the three states or in Europe⁶⁵ or on religious discrimination in employment in only one of the jurisdictions.⁶⁶ Chapters 2 and 6, in addition, combine the findings in the central and much discussed 'headscarf debate',⁶⁷ drawing from a particularly wide range of sources in different languages. Apart from a few exceptions,⁶⁸ there is,

⁶⁴ Sacco R, *ibid*, at 10; differently Butler WE, "Unravelling the Mysteries of Comparative Law", at 208.

⁶⁵ Fetzter JS and Soper JC, *Muslims and the State in Britain, France and Germany* (Cambridge: Cambridge University Press, 2005);

Knights S, *Freedom of Religion, Minorities and the Law* (Oxford: Oxford University Press, 2005);

McGoldrick D, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Oxford: Hart Publishing, 2006);

Modood T, "The Place of Muslims in British Secular Multiculturalism", in N Ganeva (ed), *The Challenge of Religious Discrimination at the Dawn of the New Millennium* (Leiden and Boston: Martinus Nijhoff, 2003);

Berghahn S and Rostock P (eds), *Der Stoff, aus dem Konflikte sind – Debatten um das Kopftuch in Deutschland, Österreich und der Schweiz* (Bielefeld: transcript, 2009).

⁶⁶ Delsol X, Garay A and Tawil E, *Droit des Cultes* (Paris: Dalloz, 2005);

Vickers L, *Religious Freedom, Religious Discrimination, and the Workplace* (Oxford: Hart Publishing, 2008);

Wege D, *Religion im Arbeitsverhältnis: Freiheitsgarantien und Diskriminierungsschutz in Kooperation* (Berlin: Duncker & Humblot, 2007).

⁶⁷ Campenhausen A von, "The German Headscarf Debate", (2004) 29(2) Brigham Young University Law Review 665;

Gerstenberg O, "Germany: Freedom of Conscience in Public Schools", (2005) International Journal of Constitutional Law 94;

Schiek D, "Just a Piece of Cloth? German Courts and Employees with Headscarves", (2004) 33(1) Industrial Law Journal 68.

⁶⁸ Berthou K, "The Issue of the *Voile* in the Workplace in France: Unveiling Discrimination", (2005) 21(2) International Journal of Comparative Labour Law and Industrial Relations 281;

Bowen J, *Why the French don't like Headscarves – Islam, the State, and Public Space* (Princeton: Princeton University Press, 2007);

Laulom S, "French legal Approaches to Equality and Discrimination for Intersecting Grounds in Employment Relations", in D Schiek and V Chege (eds), *European Union Non-Discrimination Law – Comparative Perspectives on Multidimensional Equality Law* (London and New York: Routledge-Cavendish, 2009), 279-293;

Laurence J and Vaisse J, *Integrating Islam – Political and Religious Challenges in Contemporary France* (Washington DC: Brookings Institution Press, 2006).

furthermore, a particular lack of scholarship available in English that addresses religious discrimination in employment in France. Thus far, attention has been paid mainly to religious discrimination against pupils in French state schools.⁶⁹ Thus, this thesis also expands on the knowledge in these two regards by taking into consideration the relevant circumstances in French employment and French publications. This comparative framework allows for insights into the problematic, politically charged nature of many religious discrimination claims, but it also provides a sound basis for potential solutions that have successfully been applied in one jurisdiction and can be transferred to another, or at least inspire and inform 'better' legal solutions. A comparative account is furthermore provided regarding the underlying attitudes that are decisive for the law on religious discrimination in employment. These attitudes *inter alia* inform the crucial debates on the justification of indirect discrimination on religious grounds. In summary, the study of the topic from the perspective of church-state relations within the context of three national jurisdictions and two international/supranational frameworks, as well as the consideration of non-English literature, makes this thesis an original contribution to knowledge.

VI. Limitations of the Research

Considering the broad setting of this thesis, there are specific limitations that need to be accounted for. Essentially, the limitations stem from the relative brevity to be observed in a thesis. Whereas selecting a number of cases that illustrate the major findings is manageable, the same cannot be said for the accompanying literature. Considering that the research relates to three national jurisdictions, as well as to the law of the CoE and the EU, and that it incorporates findings written in languages other than English, not all relevant materials could be appreciated in the discussions. Fruitful sources for gaining a more detailed understanding of adjunct topics are therefore, at times, highlighted in footnotes as relevant reading. Another aspect that could have been discussed is the statistics on the domestic courts' numbers of cases of religious discrimination, to portray the extent of religious discrimination faced by employees in the UK, France and Germany.⁷⁰ Such

⁶⁹ Baubérot J, Bouzar D and Costa-Lascoux J, *Le voile, que cache-t-il?* (Paris: Les Éditions de l'Atelier, 2004); Laborde C, *Critical Republicanism – The Hijab Controversy and Political Philosophy* (Oxford: Oxford University Press, 2008); Poulter S, "Muslim Headscarves in School: Contrasting Legal Approaches in England and France, (1997) 17(1) Oxford Journal of Legal Studies 43; Wiles E, "Headscarves, Human Rights, and Harmonious Multicultural Society: Implications of the French Ban for Interpretations of Equality", (2007) 41(3) Law & Society Review 699.

⁷⁰ Such an assessment would, nonetheless, be of limited value given that court statistics alone do not fully reflect the number of instances of religious discrimination at work.

quantitative information is, however, seemingly only collated in Great Britain.⁷¹ Therefore, a comparative account in this regard was not possible.

In addition, there are technical limitations, namely, the disproportionately low representation of French commentary and case law. This is due to a lack of accessible resources that is frequently experienced when conducting comparative law research. General limitations related to the chosen methodology, as discussed above, may also apply.

VII. Structure of the Thesis

Chapter 1 of this thesis commences the analysis from a national perspective and explores the legal relationships between law and religion, in particular, church-state relations in the UK, France and Germany. This starting point was chosen to build the historical and topical foundations of the standing of religion under the law of each jurisdiction, given that church-state relations are often cited in discrimination case law to justify distinctions between the treatment of adherents of certain religious faiths. In this chapter, the preferred characteristics of church-state relationships are identified. Subsequently, these characteristics will be tested in relation to religious discrimination at work and thus serve as the analytical framework of this thesis. Chapter 1 addresses the following questions:

- How does the law organise the relationship between the state and religious organisations (church-state relations)?
- What are the previous and current interpretations of the church-state relationships?
- What questions and discussions do church-state relations currently pose?
- Are there any discriminatory components in the way these relationships are organised?
- Are there any implications of church-state relations for religious discrimination in the workplace?
- Are there any actual or potential links between church-state relations and the impact on religious minorities?
- Is there a model of church-state relations that is seemingly best suited to protect against religious discrimination in the workplace? Which characteristics found in

⁷¹ For England, Wales and Scotland, see 2009-2010 employment tribunal statistics at <http://www.justice.gov.uk/publications/statistics-and-data/tribunals/employment-tribunal-and-eat-statistics-gb.htm>. In Northern Ireland statistics do not explicitly refer to religious discrimination, see Annual Reports at http://www.employmenttribunalsni.co.uk/index/publications_statistics/publications.htm (all accessed 15 March 2014).

church-state models are decisive in protecting against religious discrimination at work?

Chapters 2 and 3 answer the following questions as regards the governed by the CoE and the EU:

- What are the rules related to religious discrimination in employment and their possible interpretations?
- How has jurisprudence to date addressed religious discrimination cases?
- What arguments have been used to justify indirect discrimination on the grounds of religion?
- How comprehensive is the legal protection against religious discrimination at work?
- Does the law particularly impact religious minorities?
- Have any arguments justifying religious discrimination involved church-state relations?
- Do the ECHR and EU law call for a particular approach at the national level, in particular regarding church-state relations?

Chapters 4 to 6 continue the analysis with an examination of the relevant UK, French and German statutory and case law, the latter aligned along different themes within which religious discrimination occurs in the work context. These chapters thus offer a clear account of the rules, types and extent of religious discrimination experienced in the three jurisdictions. Ultimately, the chapters provide an assessment of the law in the UK, France and Germany in light of their compatibility with the ECHR and EU law. Accordingly, Chapters 4 to 6 inspect:

- What are the statutory provisions governing religious discrimination at work?
- How effective are these rules?
- What are the courses of action of which employees can avail themselves to pursue instances of religious discrimination?
- Which are the main cases that have addressed religious discrimination in employment?
- What arguments are used in order to justify indirect religious discrimination?
- How valuable are these arguments in terms of intentions and effects?
- What attitudes do the arguments reveal?
- Is there a particular impact on religious minorities?
- In what ways are church-state relations employed as a basis for arguments?

- To what extent does the preferred model of church-state relations identified in Chapter 1 serve to protect from religious discrimination in employment?
- Are there any solutions to the dissatisfactory outcomes of case law?
- When relevant incidents of religious discrimination have not been subjected to scrutiny under the CoE and EU regimes, what would be the potential outcomes of the problematic scenarios identified at national levels?
- To what degree have the laws in the UK, France and Germany complied with the parameters set by the ECHR and EU levels? With regard to EU law, has the Employment Framework Directive been successfully incorporated into the law in the UK, France and Germany?

Chapter 7, the final chapter, provides a direct comparison of the findings, in accordance with the chosen methodology.

- What does a comparison of the three jurisdictions reveal in view of statutory law?
- What does the comparison of the three jurisdictions' case law reveal?
- Does the comparison suggest any preferred approaches to the contentious issues surrounding religious discrimination in the three jurisdictions?
- Does the outcome of the comparison support the choice of a preferred model for church-state relations?
- Does the respective compatibility with the ECHR and EU law deliver additional insights, in general, or with respect to preferences for church-state models?

The **Conclusion** attends to the answers to the research questions, summing up the findings and contrasting the lines of reasoning found in the relevant jurisdictions. It evaluates if and to what degree the preferred church-state paradigm serves to solve the dilemmas found in the law in the UK, France and Germany. In addition, the Conclusion attempts to answer:

- What accounts for the differences in the outcomes of religious discrimination cases in employment in the UK, France and Germany?
- What measures would suitably enhance employees' protection against religious discrimination (proposals for reform)?
- Is there a link between the relationship between church and state and religious discrimination? Are arguments based on church-state relations detrimental to religious minorities? Does the research support the choice of a preferred church-state model?

- What further research would enhance protection against religious discrimination in the workplace?

VIII. Summary

This thesis provides an original account of religious discrimination at work in the UK, France and Germany by means of an applied micro-comparison. The first chapter constructs the analytical framework for the research by identifying a preferable model for relating church and state. Chapters 2 and 3 respectively scrutinise the legal provisions with which the CoE and the EU member states must comply regarding religious discrimination in employment. The next three chapters analyse the respective national law, including their underlying assumptions and a critique. These findings then link to the examination of the domestic laws' compatibility with the law governed by the CoE and the EU. By virtue of a critical comparative account of the law in the UK, France and Germany, the final chapter strives to propose a preferable church-state paradigm or characteristics and particular solutions for reform. Also, this thesis makes use of scholarship in other languages than English, and to a small extent, draws insights from other disciplines, such as history and sociology, where this is conducive to improve the understanding of the subject matter.

CHAPTER 1 • Church-State Relations in the UK, France and Germany

I. Introduction

This opening chapter discusses the formal relationship between religion and the state in the UK, France and Germany in order to provide an analytical framework for this thesis. Uncovering the models intended to connect or separate the church and state in each of the legal systems is a necessity in order to fully understand non-discrimination on grounds of religion (as well as the right to freedom of religion) in any jurisdiction. Firstly, legislation determining the rules on freedom of religion must, per se, take into account superior law, such as the principles on which the state is based and rules of international and supranational law. Thus, all law ought to be in line with the pertinent higher provisions laying down the relationship between church and state. In some cases an understanding of these may be a prerequisite to interpret law and to assess its compliance. Notably, religious rights may also set the boundaries for permissible church-state relations, in conjunction with other factors, such as legal and political ones.¹ Secondly, courts may refer to aspects of church-state-relations when discussing the scope of restrictions to religious practice. The legitimacy of arguments used to interpret limitations to freedom of religion sometimes depends on a correct understanding of the role of the state. Whether the reasoning applied is valid or not can also depend on the use of accurate terminology, which will be shown to be problematic in this area. Thirdly, church-state relations can be an indicator as to the differences between the overall national approaches to religious freedom as well as to religion. Due to these close connecting points between church-state relations and religious discrimination, this thesis will strive to answer the question, of whether any given model is more inclined than others to tackle effectively religious discrimination in the workplace.

For church-state relations as they stand today, history and tradition have played a pivotal role and this chapter strives to engage with their influence on the evolution of the law protecting the rights of religious adherents. The link between the separation of church and state and the individual freedom is that a guarantee for religious freedom is one of the purposes of that separation, rather than the imposition of a single religion. Examples will demonstrate how the church-state divide can indirectly have an impact on exercising religion free from discrimination in the employment context. Various problems surrounding church-state models are identified and portrayed in topical discussions. Although Heinig describes

¹ Evans C and Thomas CA, "Church-State Relations in the European Court of Human Rights", (2006) 3 Brigham Young University Law Review 699, at 699.

the law governing church-state relations as “adverse to theory and resistant to innovation”,² this may not hold true for all national systems. Interestingly, Cavanaugh argues that the national approaches in Europe reflect “increasingly illiberal, secular” thought,³ which hints at current developments in this field.

There are numerous ways in which the relationship between state and church can be arranged. To simplify a later analysis, the main alternatives will be discussed prior to a more refined categorisation of the UK, France and Germany. This chapter will address church-state relations in the face of a relatively suitable model to protect employees from religious discrimination. It will be shown to which extent the church-state divide or connection accounts for the way in which religious discrimination is regulated in a country, including potential domination or favouritism. Throughout the chapter the term ‘church’ is used in a wide sense to include religious institutions and communities in general, unless otherwise indicated.

II. Models of Relating Church and State

In general, a measurement for the connection between a religion and the state is the presence of laws giving preference to some religions over others and the competence of the state to interfere with religious bodies.⁴ If privileges are granted to one religion, this creates doubts as regards the liberty of other denominations,⁵ and in particular whether other outlets of religious discrimination are to be found in the law. On the other hand, the existence of powers of the state to impinge on a specific religion is also problematic in relation to this religion’s freedom,⁶ since duties may be imposed on this entity, that may constitute a structural or financial burden.

Since there are hardly any two jurisdictions, that share exactly the same church-state paradigms, classifications are imprecise and open to criticism. Such models are, therefore, hybrid and categories merely provide approximate labels to simplify any discussion. Such labels are indeed convenient, if not inevitable, once the church-state divide is the subject matter of court cases and, at times, a determining factor of whether religious discrimination can be justified or not in the respective jurisdiction. Accordingly, the choice of terminology hereafter does not claim to be the most correct, as it merely attempts to clarify the

² Heinig HM, “Law on Churches and Religion in the European Legal Area – Through German Glasses”, (2007) 8(6) German Law Journal 563, at 576.

³ Cavanaugh K, “Islam and the European Project”, (2007) 4 Muslim World Journal of Human Rights 1, at 1.

⁴ Ahdar R and Leigh I, *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2005), at 80.

⁵ Ibid.

⁶ Ibid.

characteristics and differences of the models to a point necessary to examine the status of churches in the UK, France and Germany. As there are no theocracies in Europe, this type of establishment will not be discussed. Unlike some authors suggest,⁷ neutrality is not depicted as a church-state model in itself, but rather as a desired characteristic of some forms of secularism. Ahdar and Leigh point out, rightly, that any allocation of competence or neutrality of the state in matters of religion necessarily entails a judgment as to what belongs on each sphere and is thus not neutral.⁸ Consequently, neutrality is a mere claim that secular states draw upon themselves. As a result, the discussion will focus on two main church-state models, those of establishment and secularism, both of which can unfold in many ways. At the end of this section, the concept and understanding of neutrality will be dissected, since it plays a vital role within both the systems with and without an established or official church.

1. Establishment or State Church Systems

The establishment of churches as an official national or state church appears in a number of forms, from merely symbolic to formal legal involvement including enforceable rights and duties.⁹ In Europe an established church is often a secularised national church that acts as a symbol of national identity.¹⁰ Lynch defines establishment as follows: “essentially it involves the endorsement of a church as representing the true religion and securing for it a connection to the temporal governance of the state, by which it will be both protected and privileged”.¹¹ It is equally possible to allocate privileges and duties to more than one church,¹² yet an option that is rare.¹³

One speaks of *de facto* establishment when the state informally prefers one denomination due to its predominance in culture or number of followers.¹⁴ Alternatively, or in addition, *de facto* establishment may be characterised by laws that coincide with religious tenets of a denomination.¹⁵ On the other end of the scale, there may be legal recognition of one church purely to value religion, even though there is no interference on behalf of the state.¹⁶

⁷ Knights S, *Freedom of Religion, Minorities and the Law* (Oxford: Oxford University Press, 2007), at 15.

⁸ Ahdar R and Leigh I, *Religious Freedom in the Liberal State*, at 67.

⁹ Within the EU, Greece and the Scandinavian states are examples of countries that maintain structurally and legally a state church.

¹⁰ Baubérot J, *Histoire de la Laïcité en France*, 4th ed (Paris: Presses Universitaires de France, 2007), at 123.

¹¹ Lynch A, “The Constitutional significance of the Church of England”, in P Radan and D Meyerson (eds), *Law and Religion – God, the State and Common Law*, (London/New York: Routledge, 2005), at 181.

¹² Ahdar R and Leigh I, *Religious Freedom in the Liberal State*, at 76.

¹³ This can arguably be said for the German church-state settings.

¹⁴ Ahdar R and Leigh I, *Religious Freedom in the Liberal State*, at 80.

¹⁵ Ibid, for instance law regarding marriage.

¹⁶ For instance, Belgium and Luxemburg. Ibid, at 82.

Originally, establishment has its roots in the view that it is natural and correct to relate “two divinely ordained institutions”, hence watching over spirituality was considered state competence.¹⁷ In the discrimination context it is debatable if any official recognition of one or more churches is adequate in any jurisdiction, which is marked by the respect for multiple beliefs, including non-religious ones. One of the reasons to retain an established church in such a context, though, may be to prevent a stronger divide between church and state, than in case it had never been established.¹⁸ Perhaps this position may not convince an atheist, who might not see any advantage of cooperation between church and state. Other arguments in favour of establishment are that secular institutions benefit from religious foundations and also that God is the ultimate authority.¹⁹ This again takes non-believers out of the equation and it does not take into account that other social non-public institutions can, up to a certain extent at least, fulfil the role the church plays in society. This is so, even though, admittedly, churches have for long played a major role in complementing social policy and are accordingly experienced in doing so. It has also been submitted that if establishment simply expresses the superiority of one faith, without entailing any disadvantages for minority faith groups, it will not be necessary to abolish its status.²⁰ As a word of warning, others add that discriminating between the established and the faiths of non-European origin “is often left to the discretion of the arbitrary policy-makers” and that familiarity with one religion bears the danger of discriminating against the less known ones.²¹ Balancing between these opposing opinions, Evans and Thomas assert that “[w]hile establishment certainly presents some dangers to religious freedom, and many states with an established religion have very poor protection of religious freedom, it does not follow that establishment will necessarily lead to the oppression of religious freedom for those who do not belong to the established church.”²² This is a sensible account, as it registers both the negative and positive potential inherent in every model for relating church and state due to the very complexity of factors involved.

2. Secularism

In a secular state, politics and religion are officially separated and this separation may appear in various designs, including differing degrees. Separation at the most basic level means, as a consequence, that at least in theory religion is a personal affair and is not

¹⁷ Ibid, at 83.

¹⁸ Ibid, at 83.

¹⁹ Ibid.

²⁰ Ibid, at 84.

²¹ Robert J, “Religious Liberty and French Secularism”, (2003) 2 Brigham Young University Law Review 637, at 639 and 652.

²² Evans C and Thomas CA, “Church-State Relations in the European Court of Human Rights”, at 707.

institutionalised through the state.²³ Within this spectrum, religion can be seen as a completely private affair on the one extreme, or as having a prominent public dimension on the other end of the scale.²⁴

Thorson Plesner describes two main variants of secularism: 'fundamental' and 'liberal'.²⁵ These two models have the common aim of preventing domination and control of religion and politics and *vice versa*.²⁶ The two notions differ, however, where precisely public and private spheres are segregated, as well as to the capacities of state and religion respectively – though in both cases religion is regarded as a private matter, even if from different viewpoints.²⁷ According to Thorson Plesner, 'liberal' secularism excludes a state competence of imposing religious doctrine or conduct and should not identify with a particular religion.²⁸ This again would exclude political influence over religious groups, as far as this would impair individual rights, or actual participation in society.²⁹ Most importantly, in view of religious practice, 'liberal' secularism allows for manifestations of belief in the public sphere, including public institutions.³⁰ In relation to restrictions, this would mean that these undergo a rather strict assessment as to their validity. The notion of pluralism can either be embedded within this liberal model, or be seen as an alternative term for this model. A pluralist view prescribes that different religions should coexist and play a role in a society free from discrimination based on religion or belief.³¹ It is assumed that this coexistence does not impair unity or the well-being of society.³² A liberal and/or pluralist secularism appears to be the most likely to create a level playing field for all religious entities and is thus, at least theoretically, the most suited to prevent and remove discrimination. This is dependent on how well a state succeeds in implementing a neutral attitude towards different faiths into their law.

²³ Knights S, *Freedom of Religion, Minorities and the Law*, at 14.

²⁴ Ahdar R and Leigh I, *Religious Freedom in the Liberal State*, at 84.

²⁵ Thorson Plesner I, "The European Court of Human Rights between fundamentalist and liberal secularism - The Islamic Headscarf Debate and the Future of Freedom of Religion or Belief", Seminar Paper for Strasbourg Consortium, Strasbourg, 28-30 July 2005, at 2, available at <http://www.ius.uio.no/smr/om/aktuelt/arrangementer/historikk/forum/plesnerpaper.pdf> (accessed 15 March 2014);

for an alternative categorisation, see Fernández-Coronado A, "El Derecho de la Libertad de Conciencia en los Países Miembros de la Unión Europea (I)", in A Fernández-Coronado (ed), *El Derecho de la libertad de conciencia en el marco de la Unión Europea: Pluralismo y Minorías* (Madrid: Colex, 2002), especially at 67, 69-70 and 81.

²⁶ Ibid; see also Temperman J, "The Neutral State: Optional or Necessary? A Triangular Analysis of State-Religion Relationships, Democratisation and Human Rights Compliance", (2006) 1(3) *Religion and Human Rights* 269.

²⁷ Thorson Plesner I, *ibid*, at 2.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ahdar and Leigh distinguish between 'principled' and 'practical' pluralism, the former being a utopian strive to make all law neutral and the latter taking into account that equality cannot guarantee an equal treatment of all religions, since the effect may inevitably vary, Ahdar R and Leigh I, *Religious Freedom in the Liberal State*, at 86-87.

³² Ibid, at 86.

In contrast, 'fundamentalist' secularism generally restricts religion in public life, as it views religion as a matter of the private realm.³³ As a consequence, this approach is seen as highly restraining as regards public manifestations of one's denomination, whether it is access to public buildings, or being an employee of a public institution.³⁴ In this category a distinction can be made between a system that completely forbids any religious appearance in public, 'idealistic' or 'transvaluing' separation, and one that forbids manifestations of religion in any sphere that can be related to the state, 'structural' or 'institutional' separation.³⁵ Even if the latter, least restrictive system would apply, employment opportunities may still be impaired, as employers might question the employee's suitability to work in such institutions, if religious affiliation is visible. Such limitations foremost have the aim of creating a state without religious influence and can be, for example, observed in communist regimes.³⁶

A valid point of criticism is raised to the effect that any 'strict' application means secularism as a life choice, which is imposed on those who need or wish to enter the public sphere.³⁷ Such systems are comparable to theocracies, insofar as the adherence to particular beliefs is considered a positive good, taken for granted and the basis for law and policy. If 'fundamentalist' secularism is reflected in law and policy, it is furthermore incompatible with the dual purpose of secularism: namely safeguarding equal rights and "peaceful coexistence in a pluralistic society".³⁸ Modern day state involvement in many spheres of life may well justify such concerns, as states have the power to market non-religious philosophy to its citizens.³⁹ Along this line, it is claimed that in reality secular models are likely to be detrimental to religion, since these mostly create a "policy of unbelief".⁴⁰ Despite the fact that this is not necessarily the case, it needs to be highlighted that secularism is not *per se* a neutral standpoint,⁴¹ no matter in which form it appears. Witte is therefore in favour of a prudential, rather than a categorical application of the principle: "separatism needs to be retained, particularly for its ancient insight of protecting religious bodies from the state and for its more recent insight of protecting the consciences of religious believers from violations

³³ Thorson Plesner I, "The European Court of Human Rights between fundamentalist and liberal secularism - The Islamic Headscarf Debate and the Future of Freedom of Religion of Belief", at 3.

³⁴ Ibid.

³⁵ Ahdar R and Leigh I, *Religious Freedom in the Liberal State*, at 72, on the distinction at 72-75.

³⁶ Ibid, at 74.

³⁷ Thorson Plesner I, "The European Court of Human Rights between fundamentalist and liberal secularism - The Islamic Headscarf Debate and the Future of Freedom of Religion of Belief", at 3.

³⁸ Ibid, at 4.

³⁹ Ahdar R and Leigh I, *Religious Freedom in the Liberal State*, at 75.

⁴⁰ Thorson Plesner I, "The European Court of Human Rights between fundamentalist and liberal secularism - The Islamic Headscarf Debate and the Future of Freedom of Religion of Belief", at 95.

⁴¹ Menendez AJ, "A pious Europe? Why Europe should not define itself as Christian", (2005) 30(1) European Law Review 133, at 138.

by government and religious bodies”.⁴² He concludes that separation of church and state should not be employed as “an anti-religious weapon in the culture wars of the public square, public school and public court”, but “as a shield and not a sword.”⁴³ Finally, an exclusion of religion from the public environment is not realistic without impairing individual rights, because most religions prescribe requirements to their followers that cannot be complied with exclusively in private. Following from these debates surrounding the nature and types of secularism, it appears that secularism in its ‘liberal’ form is best suited to protect from religious discrimination, in general and also in the work environment.

3. The Concept of Neutrality

The concept of state neutrality has also been aptly named ‘equidistance’.⁴⁴ This reinforces the fact that neutrality does not need to entail indifference of the state towards religion, but a gap between the two with a fairly allocated distance to all religions. Neutrality, likewise, includes an abstinence from determining what constitutes religious conduct or doctrine.⁴⁵ According to this wide definition, both secular states and those with an official church can be fully or largely neutral towards religion. In case of an established church, however, this would require the church to be established only in theory without or with few practical implications, or all denominations being embedded into the structures allocated to the established church. Ahdar and Leigh pose an important set of questions, which demonstrate the versatility of neutrality: “Neutrality is not a self-defining concept, but along with its close cousin, equality, requires further amplification and context: neutral in what sense (purpose, effect, opportunity); in which ways (funding, prohibition, exemption, symbolic reception) and for which purposes (to advance separation, religious liberty, civil order and so on)?”.⁴⁶ In order to find answers to these questions, a state’s law and its interpretation in court, as well as government policy, need to be scrutinised. As a description for church-state relations, neutrality thus indeed requires contextualisation and cannot be used to delineate a state’s overall model. As the subsequent discussion confirms, this neutrality is actually of a rather complex nature.

⁴² Witte J, “Facts and Fictions About the History of Separation of Church and State”, (2006) 48(15) *Journal of Church and State*, at at 42.

⁴³ *Ibid*, at 43.

⁴⁴ Ladeur K-H and Augsberg I, “The Myth of the Neutral State: The Relationship between State and Religion in the Face of New Challenges”, (2007) 8(2) *German Law Journal* 143, at 143.

⁴⁵ Cavanaugh K, “Islam and the European Project”, at 7; Ladeur K-H and Augsberg I, “The Myth of the Neutral State: The Relationship between State and Religion in the Face of New Challenges”, at 144.

⁴⁶ Ahdar R and Leigh I, *Religious Freedom in the Liberal State*, at 87.

On the one hand, one might say that religious neutrality is a duty of each secular state.⁴⁷ Reconsidering, on the other hand, neutral states seem utopian. Church-state relations have evolved over centuries and have been shaped by manifold circumstances. Realistically, a fairly distributed distance to all religions is considerably difficult in today's Europe, where a large number of different faiths exists, including significant variations of belief within most of these. To this effect, there are, in most jurisdictions, neutrally phrased rules that are likely to discriminate indirectly against some religious individuals. Some laws in each country will inevitably collide with religious views.⁴⁸ For instance, it is not possible for the law to arrange for the observance of official days of rest set by every single religion on a collective basis. Relating to neutrality, such a shortcoming could be alleviated by an accompanied will to accommodate individual religious needs though. I suggest that, rather than trying to convince of the existence of a neutral state, states ought to set the goal to increasingly overcome disadvantages stemming from religiously partial rules, where, for whatever reasons, law cannot (yet) offer a neutral position. It is, furthermore, proposed that governments are unable to maintain a neutral attitude to all faiths, in the same way as an individual cannot maintain neutral attitude towards religion, as religion is not a value-free topic.⁴⁹ This is perhaps expectable, considering that law and politics are made by individuals, though as a group, which tends to fuse in a variety of value positions. Political decision-making can only be scrutinised as to its neutrality to a degree though. Consequently, at least subconscious partiality towards religious inclinations may not be avoided.

Sub-groupings of neutrality can shed some light on areas where actions may not be easily identified as neutral or partial. Corresponding to the expressions of 'fundamentalist' and 'liberal' secularism, the distinction of 'formal' neutrality and 'substantive' neutrality, or 'neutrality of effects', is a commonly used terminology.⁵⁰ Under a system of 'formal' neutrality, the state treats each citizen as if it were unaware of his or her religion and does not take any belief into account at all.⁵¹ Formally neutral rules have the potential to seriously undermine the right to freedom of religion, since the consequences of the rules may affect one or more religions more negatively than others, despite the neutrality or purpose of the wording.⁵² Thus, the problem of indirect discrimination arises. A specific difficulty found in

⁴⁷ Robert J, "Religious Liberty and French Secularism", at 641.

⁴⁸ Ibid.

⁴⁹ Ibid, at 86.

⁵⁰ Thorson Plesner I, "The European Court of Human Rights between fundamentalist and liberal secularism - The Islamic Headscarf Debate and the Future of Freedom of Religion of Belief", at 12.

⁵¹ See Ahdar and Leigh, who use the expression "religion-blindness" to describe this approach from the state, Ahdar R and Leigh I, *Religious Freedom in the Liberal State*, at 88.

⁵² Ibid.

this framework is that larger religious communities tend to voice more easily the need for exemptions from such rules,⁵³ and the same can be argued for religious groups that have formal representation, as opposed to those which have not. In more general terms, Ogilvie criticises formal neutrality for being value-laden itself, since indifference towards religion entails a low level of importance accorded to religion.⁵⁴ While this argument may hold true in cases where formal neutrality effectively decreases the protection against religious discrimination and freedom of religion and belief, Ogilvie does not offer any alternatives that allow a state to define itself in a manner respectful to all possible belief systems. Just as the perceived low level of importance granted to religion may be of concern to the religious, the opposite proclamation may be of concern for the non-religious. Consequently, I would clarify that the problem of formal neutrality lies in its tendency to cause indirect discrimination, but not in its appearance as disinterest in religion. Any such instance of indirect discrimination is, as Davis states, a violation of separation of church and state,⁵⁵ and thus, cannot be squared with formal neutrality. In any case, states' claims of formal neutrality need to be examined with care, since not many states come to mind that do not culturally or judicially accommodate some form of religious emanation.

Contrarily, 'substantive' neutrality seeks to establish a neutral outcome to all faiths, with a minimum of state interference and a maximum of choice for the individual.⁵⁶ Basdevant-Gaudemet's 'positive' neutrality can be placed within this paradigm, which seems to go further, in that freedom of religion is said to specify positive duties for the state that do not impair the separation of church and state.⁵⁷ She adds that, more recently, pleas for and active facilitation of worship have been heard, allowing for state intervention where necessary to provide these conditions.⁵⁸ Although 'positive' neutrality can be contested on the basis that comprehensive statistics are needed to fairly allocate resources and because it leaves non-believers out of the equation and thus distribution, there appears to be at least a need to actively overcome historical inequality when it comes to provision to faith communities. Any form of 'substantive' neutrality is even harder to achieve than its 'formal'

⁵³ Ibid.

⁵⁴ Ogilvie MH, "Between Liberté and Egalité", in P Radan, D Meyerson and RF Croucher, *God, the State and Common Law* (London/New York: Routledge, 2005), at 160-161.

⁵⁵ Davis DH, "Separation, Integration and Accommodation: Religion and State in America in a Nutshell", (2001) 43(1) *Journal of Church and State* 5, at 16.

⁵⁶ Ahdar R and Leigh I, *Religious Freedom in the Liberal State*, at 89;

Robert J, "Religious Liberty and French Secularism", at 642, naming this type 'positive' neutrality; hence, the debate about formal and substantive neutrality is parallel to the one about formal and substantive equality, see Fredman S, *Discrimination Law* (Oxford: Oxford University Press, 2002), at 4-15.

⁵⁷ Basdevant-Gaudemet B, "Staat und Kirche in Frankreich", in G Robbers (ed), *Staat und Kirche in der Europäischen Union*, 2nd ed (Baden-Baden: Nomos, 2005), at 175.

⁵⁸ Ibid, at 176.

alternative.⁵⁹ Substantive neutrality is, nonetheless, the paradigm this thesis aims to promote in the context of religious discrimination at work. Formal neutrality suffers from several shortcomings. Neutrality ought not to amount to indifference, since there is also the duty of the state to protect freedom and non-discrimination as regards religion and other rights, which may necessitate setting boundaries to some religious activities.⁶⁰ A strict decoupling between religion and the public sphere conflicts with the collective dimension of religion, i.e. would disregard that religion intensively interacts with society and fulfils a function in this way.⁶¹ In most European jurisdictions, faith-based organisations, such as the major Churches, have delivered services to the public for centuries.⁶² In the UK, France and Germany, for example, the claim for intense interaction can be substantiated if one looks at the traditional, official, prominent public functions exercised by faith groups, such as education, healthcare, hospice care, children's services and care for the elderly, disabled and homeless. In addition, there are more subtle connections, such as the arrangement of the working week, public holidays, recreational events and affordable vacations. Regardless of personal faith preferences, individuals will likely draw on faith-based facilities at some point in their lives. It cannot be foreseen that this cooperation will change any time soon, because states often rely on such services, just as much as the relevant groups rely on state support. In view of this interdependence, a positive rather than an indifferent valuation of any organisation providing a service that otherwise would be the responsibility of the state seems appropriate and realistic. Neutrality does not need to be impaired in cooperative systems, as long as it is genuinely possible for any organisation, faith-based or not, to access the privileges that others have had for historical reasons. A typical example would be the establishment of hospitals, care homes or educational institutions. From a collective perspective, substantive neutrality thus suggests itself as the preferable paradigm. This thesis will, throughout, strive to assess the ways in which differing forms of state neutrality affect religious adherents at the individual level in the workplace. This initial assessment suggests that 'substantive' neutrality, or 'neutrality of results', (hereafter referred to as substantive neutrality) will provide best results for religious adherents in the workplace.

⁵⁹ Ahdar R and Leigh I, *Religious Freedom in the Liberal State*, at 92.

⁶⁰ Ladeur K-H and Augsberg I, "The Myth of the Neutral State: The Relationship between State and Religion in the Face of New Challenges", at 148.

⁶¹ *Ibid.*, at 149-150.

⁶² McCrea R, *Religion and the Public Order of the European Union* (Oxford: Oxford University Press, 2010), at 17.

III. Church-State Relations in the UK

1. Church and State in England

a) History

Throughout the UK, there are differing connections between church and state, depending on the country. In England, church and state have been intertwined since the very inception of England as a country, because it was the Archbishop of Canterbury who carried out the coronation and anointment of the first English king in 973.⁶³ Protection was officially granted to the Church of England in the Magna Charta of 1215: "The English Church shall be free, and shall have its rights undiminished and its liberties unimpaired."⁶⁴ Participation of the clergy in parliament dates back to the 13th century and was only interrupted once in 1642.⁶⁵ Even before reformation, the *Ecclesia Anglicana* had maintained some independence from Rome, which resulted in slightly modified canon law.⁶⁶ At the point of its nomination as an official church in the 16th century, the Church of England was a result of Henry VIII's political interest, rather than a dogmatic advancement of the Church's status.⁶⁷ Since then, the Church of England has held a privileged position in politics due to its alliance with the Crown and parliaments.⁶⁸ Henry VIII chose to break the ties with the Apostolic Roman Catholic Church and to make himself Governor of the Church, a role that included a legal submission of the clergy to the king. This happened by authority of the Act of Supremacy in 1534, which also replaced the Pope by the Archbishop of Canterbury in several other matters.⁶⁹ About a decade before, Pope Leo X had presented Henry VIII with the title of *Fidei Defensor*⁷⁰, as a mark of honour which the parliament decided to maintain as a style for future monarchs.⁷¹ After the separation from Rome, bonds between church and state remained strong due to the state's reliance and dependence on the church to influence public opinion.⁷²

Following the Bill of Rights of 1688, the first piece of legislation to grant some protection to religious minorities was introduced: the 1689 Act of Toleration.⁷³ Whereas it is debated why this law was issued, it is an early and significant example of recognition of those who are

⁶³ Ipgrave M, "Fidei Defensor Revisited: Church and State in a Religiously Plural Society", in: N Ghanea (ed), *The Challenge of Religious Discrimination at the Dawn of the New Millennium*, (Boston/Leiden: Martinus Nijhoff, 2003), at 209.

⁶⁴ Ibid.

⁶⁵ Lynch A, "The Constitutional Significance of the Church of England", at 180-181.

⁶⁶ McClean D, "Staat und Kirche im Vereinigten Königreich", in G Robbers (ed), *Staat und Kirche in der Europäischen Union*, 2nd ed (Baden-Baden: Nomos, 2005), at 607.

⁶⁷ Lynch A, "The Constitutional Significance of the Church of England", at 168; McClean D, "Staat und Kirche im Vereinigten Königreich", at 608.

⁶⁸ Ibid.

⁶⁹ 25 Henry VIII (1533/4) c 19, reported in Lynch A, Lynch A, "The Constitutional Significance of the Church of England", at 171-172.

⁷⁰ 'Defender of the Faith' (emphasis added); similar titles were presented to other European monarchs, to create strong bonds with the Catholic Church.

⁷¹ Ipgrave M, "Fidei Defensor Revisited: Church and State in a Religiously Plural Society", at 209 and 210.

⁷² Ibid, at 210.

⁷³ Lynch A, "The Constitutional significance of the Church of England", at 179.

affected by the proximity of church and state. It was the start of a process of decreasing hardships imposed on individuals who wished to refrain from religious exercise, a trend which was continued thereafter, with the only exception left today being that the monarch must be a Protestant and cannot marry a Catholic.⁷⁴ This restriction on royal marriage is an outright case of the state's religious discrimination,⁷⁵ though this does not hinder close cooperation, or affect the relationship of the state with the Catholic Church.⁷⁶ Whereas the Act of Toleration referred to more freedom for Trinitarian Protestants, it was, nevertheless, not until 1846 that the Religious Disabilities Act removed several restrictions imposed on Jews and Catholics.⁷⁷ The Church of England Assembly (Powers) Act 1919 relieved parliament of legislating ecclesiastic laws and gave the Church in the same manner greater jurisdiction in its own matters.⁷⁸

b) Current Status

The Church of England, or Anglican Church, remains the official church in England. The Queen is the supreme Governor of the Church of England as well as the head of state of the UK, and parliament needs to approve church-related legislation.⁷⁹ The latter connection, however, is relatively loose, if one considers that in line with customary law church-related drafts will be presented to Synod and only formal regal agreement is needed thereafter.⁸⁰ Unless contrary to English law, the Queen is expected to approve any canonical provision.⁸¹ There are also no concordats between the Church of England and the state, rather canon law is an integral part of English law.⁸² In return, the secular competence of the Church comprises, for example, of involvement in the coronation and posting of 26 senior bishops ('Lords Spiritual') to the House of Lords.⁸³ Notably, these bishops sit and vote in the House of Lords.⁸⁴ In terms of duties, the Church of England is the only church that must offer all citizens certain services, such as marriages and burials.⁸⁵ Furthermore, there is a heavy

⁷⁴ 1700 Act of Settlement, 12&13 (1700) c 2 and 1772 Royal Marriages Act, as *Ipgrave* rightly comments, a clear case of religious discrimination, although he considers a justification in that the Anglican status of the monarch may be a general occupational requirement, *Ipgrave* M, *ibid*, in his fn.19 at 215, which is questionable. If a case ever arises, it would also be interesting to see whether the prohibition to marry a Catholic could under the changed circumstances be interpreted as applying to followers of other faiths, too. This specific case is not discussed further in this thesis, as the position of monarch is unique and hence considered outside mainstream employment.

⁷⁵ Leigh I, "Freedom of Religion: Public/Private, Rights/Wrongs", in M Hill (ed), *Religious Liberty and Human Rights* (Cardiff: University of Wales Press, 2002), at 129.

⁷⁶ McClean D, "Staat und Kirche im Vereinigten Königreich", at 627.

⁷⁷ *Ipgrave* M, "Fidei Defensor Revisited: Church and State in a Religiously Plural Society", at 212.

⁷⁸ Lynch A, "The Constitutional significance of the Church of England", at 182.

⁷⁹ Ahdar R and Leigh I, *Religious Freedom in the Liberal State*, at 76.

⁸⁰ McClean D, "Staat und Kirche im Vereinigten Königreich", at 611.

⁸¹ *Ibid*, at 611-612.

⁸² *Ibid*, at 624.

⁸³ Ahdar R and Leigh I, *Religious Freedom in the Liberal State*, at 77 and García Oliva J, "Church, State and Establishment in the United Kingdom in the 21st Century: Anachronism or Idiosyncrasy?", (2010) (3) *Public Law* 482, at 492-494.

⁸⁴ Knights S, *Freedom of Religion, Minorities and the Law*, at 14.

⁸⁵ Ahdar R and Leigh I, *Religious Freedom in the Liberal State*, at 78.

involvement in education, through the provision of a large number of schools⁸⁶ and there is a general recognition of “public worship in marking great national events.”⁸⁷ Both secular and ecclesiastical courts administer subjects related to the Church of England.⁸⁸ As one of the consequences, priests cannot claim employment rights before a state court, but are subject to ecclesiastical law.⁸⁹ Prisons, the military and the NHS employ chaplains of different faith groups on their own accord.⁹⁰ In general, there is no formal list of recognised churches, religious communities tend to voluntarily organise and do not gain public status under law.⁹¹

Despite these formal arrangements linking church and state in the UK, there is no general legal union of the two entities. This situation was clarified by the House of Lords in *Parochial Church Council of Alston Cantlow and Wilmcote with Billesley v. Wallbank*.⁹² The Lords held that the Church Council in question was not a public body since it merely received funding for the upkeep of historical buildings,⁹³ and most importantly, that the “relationship, which the state has with the Church of England is one of recognition, not of the devolution to it of any powers or functions of government”.⁹⁴ The judgment further declares that the bond between the Church of England and the state does not include any financial support and is merely intended to aid the Church to implement its own mission.⁹⁵ This lack of position and support to the Anglican Church can be seen as a strong indicator of a mainly theoretical importance of the entity, because financial assistance and political influence are considerably empowering aspects for any religious group to attain. Yet, the Church of England is a public authority under the 1998 Human Rights Act and thus liable for breaches of this law,⁹⁶ and the same is valid for ecclesiastical courts.⁹⁷

In sum, it is proposed to categorise the Church of England as an example of a national church, with its main emanation of non-separation of church and state being the ‘Lords Spirituals’ involvement in politics. Compared to other faith groups, the privileged position of the Church of England paradoxically can limit its autonomy through parliamentary control.⁹⁸

⁸⁶ Ibid.

⁸⁷ Ipgrave M, “*Fidei Defensor* Revisited: Church and State in a Religiously Plural Society”, at 211.

⁸⁸ Lynch A, “The Constitutional significance of the Church of England”, at 183.

⁸⁹ *Diocese Southwark v. Coke*, [1996] ICR 896 (EAT).

⁹⁰ McClean D, “Staat und Kirche im Vereinigten Königreich”, at 624.

⁹¹ Ibid, at 613.

⁹² [2003] UKHL 37, 26 June 2003; [2004] 1 AC 546.

⁹³ Ibid, at 59; for numbers in relation to financing buildings, McClean D, “Staat und Kirche im Vereinigten Königreich”, at 624.

⁹⁴ *Alston Cantlow PCC v. Wallbank* [2001] 3 All ER 393 (402), at 61.

⁹⁵ Ibid, at 156.

⁹⁶ Cumper P, “The Protection of Religious Rights under Section 13 of the Human Rights Act 1998”, (2000) Public Law 254, at 256-7.

⁹⁷ Lynch A, “The Constitutional significance of the Church of England”, at 190.

⁹⁸ McClean D, “Staat und Kirche im Vereinigten Königreich”, at 614.

The Church of England's position thus does not seem clearly advantageous. In particular, the absence of general payments and subsidies other than what is available also to charities,⁹⁹ gives further strength to the idea that its position is a mixed blessing. Nonetheless, the country's nominal support of the Church's "mission", as described in *Cantlow*, warrants a close examination of any favouritism towards the Church of England that creates tangible effects.

c) Trends

There are conflicting opinions on whether the Church of England ought to be disestablished, as well as whether such a venture would be to the advantage or disadvantage of the Church.¹⁰⁰ Apart from the above arguments related to the advantages and disadvantages of the position as national church as such, some specific propositions are made. An important point for this thesis is the unequal representation of faith groups in the House of Lords. Proposed reforms suggesting the allocation of "proper recognition to the non-Church of England faith communities",¹⁰¹ have been dropped. The approach of "diversifying establishment" is, for instance, espoused by Ipgrave, who wishes to see an involvement of all faith communities, facilitated by the Church of England as a host to interfaith activities through permanent organisational structures.¹⁰² In spite of the practical difficulties inherent in such a revolutionary step, he argues that the Anglican establishment has adapted to many changes in society in the past and is thus capable of continuing on this path.¹⁰³ There are many technical and political obstacles to reaching a diversified establishment,¹⁰⁴ but the idea seems worth attempting, if this system was to be based on democratic precepts.

Supportive of a continued participation of the Church in the House of Lords, it is provided "that the spiritual sphere cannot be simply ignored".¹⁰⁵ The Canadian experience indeed shows that erasing the majority religion from the public sphere has possibly relegated religion as such, because all religions compete with secular ideology.¹⁰⁶ This argument is,

⁹⁹ Ibid, at 623.

¹⁰⁰ Copson A and Pollock D, "Religion and the State in an Open Society", in RM Morris, *Church and State – Some Reflections on Church Establishment in England*, at 58;

Lynch A, "The Constitutional significance of the Church of England", at 186-71;

Wolffe J, Conference Proceedings, in M Fraser (ed), *Religion and the State – Common and Divergent Issues in Britain and France* (London: 2005), at 7;

García Oliva J, "Church, State and Establishment in the United Kingdom in the 21st Century: Anachronism or Idiosyncrasy?"

¹⁰¹ 'The House of Lords – Completing the Reform', note 92, paras 84-85.

¹⁰² Ipgrave M, "Fidei Defensor Revisited: Church and State in a Religiously Plural Society", at 220-222, a view also held by the Archbishop of Canterbury. For more details on his idea of 'hospitable establishment', see Carey G, "Holding Together: Church and Nation in the Twenty-First Century", Lecture delivered at Lambeth Palace on 23 April 2002.

¹⁰³ Ipgrave M, *ibid*, at 221.

¹⁰⁴ <http://www.secularism.org.uk/nick-clegg-unveils-lords-reform.html> (accessed 15 March 2014).

¹⁰⁵ Ahdar R and Leigh I, *Religious Freedom in the Liberal State*, at 83.

¹⁰⁶ Ogilvie MH, "Between Liberté and Egalité", at 160.

again, subject to the challenge that not everyone experiences a spiritual sphere in their life and, even if this were the case, it may not be in a religious format, let alone in line with the particular one promoted by the Church of England. Realistically, the more coherent alternative of proportional representation of the population's religious and spiritual mindset will be hard to achieve, unless through election. Nevertheless, it seems that followers of other beliefs, including minority religions, may *de facto* gain advantages, if the clerics in the House of Lords pay due consideration to their needs, which they may well understand better than non-spiritual persons. In the context of involving other religions, the 'Lords Spiritual' have been associated with the concept of 'hospitable establishment'. Its meaning refers to the bishops representing the whole population as regards religious interests and thus a general recognition of religion in society.¹⁰⁷ 'Hospitable establishment' is said to have elevated tolerance and inclusivity in the UK to higher levels than found in many secular states.¹⁰⁸ This again may explain why representatives of other religions hardly criticise the elevated status of the Church of England.¹⁰⁹ An example of output concerning 'hospitable' establishment are the interfaith activities of the former Archbishop of Canterbury, Rowan Williams,¹¹⁰ including his personal support for expanding the jurisdiction of *shari'ah* courts.¹¹¹

In 1994, a comment made by the Prince of Wales in a television documentary led to hopes, that in the future, involvement of other faith communities will materialise under the umbrella of the Anglican Church. Claiming that he wishes to be the "defender of faith" rather than the "defender of the faith" (the original meaning of *Fidei Defensor*) once he will be king, he emphasised that he wishes to represent the multitude of religions present in the UK, with the purpose of defending freedom of religion for all.¹¹² If this idea results in action, it may well contribute towards further, more formalised integration of other religions into the existing church-state paradigm in the future. At this point in time, England is said to imprecisely maintain a Christian self-conception, whilst obliged to tolerate other religions, leading to a loose separation of public and private sector employment, with the public sector not being expressly neutral or secular.¹¹³

¹⁰⁷ Copson A and Pollock D, "Religion and the State in an Open Society", at 53.

¹⁰⁸ Fittall W, "Perspectives from within the Church of England", in RM Morris (ed), *Church and State – Some Reflections on Church Establishment in England*, at 78.

¹⁰⁹ Ibid.

¹¹⁰ <http://www.archbishopofcanterbury.org/articles.php/1579/archbishops-christian-muslim-initiative>, <http://www.archbishopofcanterbury.org/articles.php/2062/archbishop-hosts-annual-lambeth-inter-faith-lecture> (both accessed 15 March 2014).

¹¹¹ <http://news.bbc.co.uk/1/hi/7232661.stm> (accessed 15 March 2014).

¹¹² Igrave M, "Fidei Defensor Revisited: Church and State in a Religiously Plural Society", at 207 and 210.

¹¹³ Freedland M and Vickers L, "Religious Expression in the Workplace in the United Kingdom", (2009) 30(3) *Comparative Labour Law and Policy Journal* 597, at 599.

The involvement of all faith communities through ‘hospitable establishment’, however, is fraught with a number of obstacles. This would have to include a large number of representatives to take heed of all faith communities, including those of non-religious beliefs, representation would have to be proportional to the population’s belief composition and, most of all, this system would raise questions about democratic values if the representatives are not elected. Whether such a reform is realistic, possibly based on findings of the most recent census, or whether it would create further issues, is not foreseeable. For instance, even an inclusion of all major belief groups as listed in the census, can overlook the interests of minority groups within communities. The actual choice of who represents each community would thus, and in general, entail significant difficulties. Whereas ‘hospitable establishment’ may potentially offer workable practical solutions for an interim period at least, these questions remain open and would probably not be answered in a way legally sustainable in a democracy on the long term.

2. Church-State Relations in Wales, Scotland and Northern Ireland

Since 1536, when Henry VIII dissolved the Cistercian abbeys at Valle Crucis and Strata Florida, the influence of the Church of Wales on state affairs had been on the decline. In 1920 the Church of Wales was officially disestablished¹¹⁴ and has since been fully independent and referred to as Church in Wales. Unlike the Church of England, the Church of Scotland does not enjoy any privileges except the protection of its independence, in that its affairs are not to be intervened with.¹¹⁵ The position of the Church of Scotland is described as an anomaly by McClean: on the one hand a state church, on the other hand being given so much autonomy by the 1921 Church of Scotland Act that the status equals a separation of church and state.¹¹⁶ According to Wolffe, the Church of Scotland is, hence, a case of “virtual disestablishment”,¹¹⁷ although it is *de iure*, an established church such as, arguably, the Anglican Church.¹¹⁸ The Church of Ireland had already been disestablished (1871) at the time when Northern Ireland became a political entity.¹¹⁹ Accordingly, there has never been an established, or national church in this part of the UK distinct from Ireland as a whole.

¹¹⁴ Chambers P, *Religion, Secularization and Social Change in Wales* (Cardiff: University of Wales Press, 2005), at 6 and 134; Ipgrave M, “*Fidei Defensor* Revisited: Church and State in a Religiously Plural Society”, at 217.

¹¹⁵ See Appendix to the 1921 Church of Scotland Act; Ahdar R and Leigh I, *Religious Freedom in the Liberal State*, at 82.

¹¹⁶ McClean D, “Staat und Kirche im Vereinigten Königreich”, at 610.

¹¹⁷ Wolffe J, Conference Proceedings.

¹¹⁸ Ahdar R and Leigh I, *Religious Freedom in the Liberal State*, at 80; for a detailed analysis of this debated matter, see García Oliva J, “Church, State and Establishment in the United Kingdom in the 21st Century: Anachronism or Idiosyncrasy?”, at 485-486 and 496-499.

¹¹⁹ McClean D, “Staat und Kirche im Vereinigten Königreich”, at 608.

There is, consequently, a contrast in the UK, in that secular laws apply to regions asymmetrically to the way the official churches (if any) can be aligned to regions. This is to say that, whereas England and Wales, Scotland and Northern Ireland have their own legal systems, church-state relations differ in a more contracted way: a state church in England, the denationalised Anglican Church in Wales and Church of Northern Ireland (the dioceses of which are structured based on Ireland) and the Episcopal Church of Scotland, with the Queen presiding over the Churches of England and Scotland.¹²⁰ This intersection could become relevant, if church-state relations surface as a matter of justifying indirect discrimination. In order to the law to be applied in the same way throughout the UK (or Britain, or England and Wales, or England), any arguments based on the special relationship and bond between church and state in religious discrimination cases would thus stand on fragile ground.

IV. Church-State-Relations in France

1. History

Throughout its history, France has experienced various forms of relations between the churches and the state. The separation of church and state in France is now based on the concept of *laïcité*, which in itself was one of the key elements of the French Revolution in 1789 and thus is related to the specific separation between the monarchy and the Catholic Church at that time in history.¹²¹ Until 1789, the Catholic clergy had a veto and control in all areas of public powers, so their influence was immense.¹²² In 1791 the term of *laïcité* was incorporated into the first constitution of the French Republic, alongside a principle of non-discrimination on grounds of *inter alia* religion. By authority of a decree, the separation of church and state was formalised in 1795 in the name of freedom of religion, though in reality a period of persecution of the Catholic Church followed and continued until Napoleon's concordat with Pope Pius VII in 1801.¹²³ During the 19th century France experienced lively, politically charged interaction between churches and state, leading on to increasingly anticlerical legislation, culminating in the cancellation of diplomatic relations with the Holy See.¹²⁴

¹²⁰ Ibid, at 603 and 606.

¹²¹ Knights S, *Freedom of Religion, Minorities and the Law*, at 15;

McGoldrick D, *Human Rights and Religion – The Islamic Headscarf Debate in Europe* (Oxford and Portland, Oregon: Hart Publishing, 2006), at 34.

¹²² Baubérot J, *Histoire de la Laïcité en France*, at 4.

¹²³ Basdevant-Gaudemet B, "Staat und Kirche in Frankreich", in G Robbers (ed), *Staat und Kirche in der Europäischen Union*, 2nd ed (Baden-Baden: Nomos, 2005), at 173.

¹²⁴ Ibid, at 174.

Article 1 of the Act of 1905 on the Separation of Church and State,¹²⁵ which is still in effect today, reads as follows: “The Republic ensures the liberty of conscience. It guarantees the free exercise of religion, under restrictions prescribed by the interest in public order”. Article 2 continues: “The Republic does not recognise, remunerate, or subsidise any religious denomination.”.¹²⁶ According to the text of these two sections, there are no recognised religions. This leads to a theoretical levelling of all existing religions in the political and legal sphere and religion is hence not a public matter.¹²⁷ The background to 1905 Act is, however, vital, since arguments in court to justify indirect religious discrimination are often based on its provisions. The Act’s origin is to be found in Napoleon’s concordat of 1801 mentioned above. The concordat aimed for a legal reorganisation of the church, as well as decreasing papal involvement and increasing state powers over the church, which lasted for just over 100 years and is still in place in the *département* Alsace-Moselle.¹²⁸ Prior to this, only Catholicism was seen as a social good and thus worthy of public funding and bishops were elected by political bodies.¹²⁹ From 1879 to 1904 the Republicans debated the privileged role of the Catholic Church and this was simultaneous to a growing lack of devotion to be linked with Rome.¹³⁰ Thereafter, it was a deep aversion to Rome leading to the church and state no longer producing rules binding on each other.¹³¹ Against this backdrop, it is argued that the 1905 Act did not intend to move religion away from the public to private life, but that the law’s aim was to avoid religious discrimination and to overcome state interference with church affairs.¹³² Adding to this reasoning, Errera concludes that the Act’s goal was to abolish the special status that the Catholic Church held prior to its enactment.¹³³ It seems difficult to pinpoint the actual nature of the church-state divide created by the 1905 Act, which calls for a more detailed assessment of the instrument’s current status and the practical arrangements made thereunder.

2. Current Status

Nowadays, *laïcité* is still regarded as one of the core principles of the French Republic, found in the preamble of the constitution alongside with, for instance, democracy. The French

¹²⁵ Loi du 9 décembre 1905 concernant la Séparation des Eglises et de l’Etat, JO (11 December 1905), at 7205 and the amended version: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070169&dateTexte=20080306> (accessed 10 January 2013).

¹²⁶ Translation of Robert J, “Religious Liberty and French Secularism”, at 637.

¹²⁷ Ibid, at 640.

¹²⁸ Redor-Fichot M-J, “Laïcité et principe de non-discrimination”, in G Armand (ed), *Cahiers de la recherche sur les Droits Fondamentaux 2005 - Quel avenir pour la laïcité cent ans après la loi de 1905?* (Caen: Presses Universitaires de Caen, 2005), at 90.

¹²⁹ Ibid.

¹³⁰ Ibid, at 8.

¹³¹ Bruley Y, Conference Proceedings, in M Fraser (ed), *Religion and the State - Common and Divergent Issues in Britain and France* (London: 2005), at 7.

¹³² Ibid.

¹³³ Errera R, Conference Proceedings, in M Fraser (ed), *Religion and the State - Common and Divergent Issues in Britain and France* (London: 2005), at 8.

Constitution of 1958 further reinforces that France is a secular state that assures equality before the law for all its citizens without distinction based on origin, race or religion.¹³⁴ None of the French Constitutions have included a reference to religion beyond the right of the individual to religious freedom and equality, the state thereby persistently expressing the wish to avoid any form of links with religion. This means that the 1905 Act is still paramount in providing for the separation between church and state in France.¹³⁵ As a result, there has been little more than considerably old law on the basis of which to evaluate *laïcité*. Therefore, controversial discussions focus on this concept's role today.

Although *laïcité* could be translated into secularism, Thorson Plesner's distinction between *laïcité* and ordinary secularism appears to make sense, as the French church-state model is commonly seen as original.¹³⁶ According to her and Baubérot, the notions of 'open' and 'strict' *laïcité* can be applied: 'open' *laïcité* prohibits the state from identifying itself with a particular denomination for the sake of offering an equal right to freedom of religion to all citizens.¹³⁷ This understanding is also named 'liberal' or 'pragmatic', with particular emphasis on the fact that *laïcité* is open to interpretation.¹³⁸ If credibly applied, open *laïcité* could also lead to pro-active, comprehensive tackling of discrimination issues. For instance, this reading of *laïcité* could then be applied to arrange interfaith relations, perhaps with the help of some public funding. Such frameworks make sense in view of flexibility, seeing the almost incomparable population set-up that *laïcité* has to deal with today, in comparison to the 18th to early 20th centuries. Similarly to any other concepts or rules, such as religious laws, literal adherence to the original consequences attached to *laïcité* may lead to absurd results, if society has changed as regards the relevant aspects. Consequently, I propose a contextualisation that takes into account *laïcité*'s essential message and purpose.

Opposed to the 'open' perception, 'strict' *laïcité* privatises religious conduct or display.¹³⁹ The latter form is predominantly accepted in France and embedded in the law. Ahdar and Leigh consider this understanding of *laïcité* an example of structural separation of church and state, which illustrates a "desire to restrict, if not eliminate, clerical and religious influence, over the state".¹⁴⁰ In respect of their own definitions of 'structural' and 'idealistic' separation,

¹³⁴ Robert J, "Religious Liberty and French Secularism", at 642.

¹³⁵ Basdevant-Gaudemet B, "Staat und Kirche in Frankreich", at 175.

¹³⁶ Thorson Plesner I, "The European Court of Human Rights between fundamentalist and liberal secularism - The Islamic Headscarf Debate and the Future of Freedom of Religion of Belief", at 15.

¹³⁷ Baubérot J, *Histoire de la Laïcité en France*; Thorson Plesner I, *ibid*.

¹³⁸ Frégosi F, *Penser l'Islam dans la Laïcité* (Paris: Fayard, 2008), at 456.

¹³⁹ Thorson Plesner I, "The European Court of Human Rights between fundamentalist and liberal secularism - The Islamic Headscarf Debate and the Future of Freedom of Religion of Belief", at 15.

¹⁴⁰ Ahdar R and Leigh I, *Religious Freedom in the Liberal State*, at 73.

however, a struggle to eliminate religious influence would be closer to ‘idealistic’ separation, which would leave the French model somewhere between the two conceptions. Even if the French model were one of ‘structural’ separation, this form has been criticised for marginalising religion in society - a trend which is in itself a matter of debate.¹⁴¹ Modern day state involvement in most spheres of life may well justify such concerns, as states have the power to market non-religious philosophy to its citizens.¹⁴² This point, however, is valid for all church-state models, as each is capable of propagating particular belief concepts in various contexts and scales. The importance for religious discrimination may thus not lie in the choice of church-state model, but in the detail of its execution.

In the French context, Robert suggests that the state “wisely refused” to collect statistical data on the denominational structure of its population,¹⁴³ seemingly seeing this option as a strongpoint of the state’s efforts to combat discrimination. Whereas Robert’s correlating, affirmative view towards the state’s indifference to religion is well- grounded,¹⁴⁴ France’s strategy to ignore religious composition and data is deceiving, since the actual problem of religious discrimination cannot be denied, or avoided, simply by suppressing tangible numbers. Assertions that the collection of relevant statistics is inappropriate, intruding personal privacy in regard of a not necessarily visible discrimination factor,¹⁴⁵ are flawed, because there is no compulsion to provide personal information in any case. There is also a weakness in the abstinence from data argument, in that such data cannot reasonably be anticipated to lead to additional acts of discrimination. To the contrary, it is rather plausible that law and policy makers address the actual religious discrimination scenarios in the relevant society based on the data. Moreover, the absence of data may be intentionally fabricated to avoid investigations into religious discrimination running deeper. Due to the questionable intentions behind the refusal to know the French population’s religious composition, it can be assumed that there is at least reluctance to actively tackle matters of religious discrimination. This, again, creates suspicion as to the neutrality of any legislative or court’s interpretation of *laïcité* to the end of justifying religious discrimination.

The official, underlying claim, however, is that French *laïcité* is not supposed to be adversarial to religion, but rather in line with a modern democratic state.¹⁴⁶ Debating this

¹⁴¹ Ibid, at 75.

¹⁴² Ibid.

¹⁴³ Robert J, “Religious Liberty and French Secularism”, at 643 and 649.

¹⁴⁴ Ibid, at 637.

¹⁴⁵ Lester A and Uccellari P, “Extending the Equality Duty to Religion, Conscience and Belief: Proceed with Caution”, (2008) 13(5) European Human Rights Law Review 567, at 570.

¹⁴⁶ Robert J, “Religious Liberty and French Secularism”, at 639.

intention, Gunn claims that *laïcité* is only portrayed as neutral and a protection against religious excess, but in reality bears the danger of splitting the population on matters of belief.¹⁴⁷ Most notably, he emphasises that originally *laïcité* referred to limits or eradication of the influence of clerics or religion over the state and its essential component used to be tolerance.¹⁴⁸ In fact, the concept's origins are often part of political rhetoric, when matters of religion are publicly discussed. For instance, Sarkozy has described *laïcité* as a cornerstone of French state principles and “not a belief like others. It is our shared belief that allows others to live with respect for the public order and with respect for the convictions of everyone.”¹⁴⁹ As the implementation of the concept both after the French Revolution and between 1879 - 1907 was marked by violent attacks on clerics and church property, Gunn replies that *laïcité* cannot be the founding principle of tolerance and neutrality, as it is often portrayed.¹⁵⁰ Even if *laïcité* is not the foundation stone to tolerance, it could, nevertheless, be used to this purpose today. Still, as Sarkozy's quote shows this may also not be the case. The fact that he deems *laïcité* a “belief” that he presumes “shared” and in addition links *laïcité* to “respect of the public order”, for instance, are mottos that equal the concept to religion and can be used to create an exclusionary mindset, as well as creating the picture that *laïcité* and public order are closely linked. This sounds as if he already had imagined a situation where seeming conflicts between his interpretation of *laïcité* and public order arise prior to making these statements.

The claim that the 1905 Act necessitates a division of public and private religious practice in the name of public order is hard to square with some existing practicalities. Returning to the Act in light of its implications today, *laïcité* in France is not absolute in the way it is ordinarily portrayed and perceived. In reality, there are a number of remaining links between public functions and religion in France. Since this statute dealt with problems of that particular era and determined rights as regards goods and property for the religions existing in France at the time, these now still have advantages over other denominations.¹⁵¹ Although the 1905 Act ended considerable subsidies paid to the Catholic Church,¹⁵² and church properties fell in the ownership of the state, the latter are still available to the church to use without

¹⁴⁷ Gunn TJ, “Under God but Not the Scarf: The Founding Myths of Religious Freedom in the US and *Laïcité* in France”, at 9.

¹⁴⁸ Ibid [Gunn], at 8, 9, 115, also referring to Voltaire's *Treatise on Tolerance*, which explained *laïcité* in a way clearly contravening current French law and policy.

¹⁴⁹ Sarkozy N, then Minister of the Interior, Speech to the Freemasons, 2003, in Gunn TJ, “Under God but Not the Scarf: The Founding Myths of Religious Freedom in the US and *Laïcité* in France”, at 10.

¹⁵⁰ Gunn TJ, *ibid*, at 12, 13, 15; as regards the conflicts during these periods, see also Baubérot J, *Histoire de la Laïcité en France*, at 15-40 and 71.

¹⁵¹ Robert J, “Religious Liberty and French Secularism”, at 656.

¹⁵² Poulat E, Conference Proceedings, in M Fraser (ed), *Religion and the State - Common and Divergent Issues in Britain and France* (London: 2005), at 9.

charge.¹⁵³ Clerics are also still paid and bishops nominated by the French state in Alsace-Moselle, Bas-Rhin and Haut-Rhin, and the 1905 does not apply in French Guyana, Guadeloupe, Martinique and Réunion.¹⁵⁴ In addition, one of the roles of the French Consul General in Jerusalem is to defend the Catholic and Christian churches in the Holy Land.¹⁵⁵ Along similar lines, an exceptional position of the Catholic Church in the overseas *départments* is maintained, perpetuating a colonial tradition without a clear legal basis.¹⁵⁶ Importantly, the French state also continues to collect taxes on behalf of the Catholic Church¹⁵⁷ and provides pastoral care in prisons, hospitals and the military.¹⁵⁸ Since the Act of 1905 could, in the absence of other faiths, not take into account their practical needs, such as affordable premises, reconsideration of these situations may be a reasonable option,¹⁵⁹ if this is not warranted by *laïcité* in the first place. For as long as factual advantages are granted to the Catholic Church, any limitations to individual rights backed up with the separation of church and state are, accordingly, dubious. In parallel with the special rights enjoyed by the Catholic Church, the indistinct public order restriction in Article 1 of the 1905 Act makes the “free exercise of religion” vulnerable to political interests. Surprisingly, representatives of major religious communities are usually consulted in political debates that relate to ethical issues,¹⁶⁰ a seeming oddity in a state that proclaims to be strictly separated from the church. This thesis will, accordingly, highlight how public order and religious discrimination interact in France and how this relates to France’s church-state settings. Certainly, the French state can neither claim to be completely *laïc* or secular, nor that it deals equally with all denominations in the limited areas where it has religious connection. Considering, in addition, that there are no more threats from the Catholic Church and that exceptions are in fact made for Catholicism (in Alsace-Lorraine),¹⁶¹ McGoldrick rightly questions whether this does not authorise a more open, accommodating church-state relationship in France.¹⁶² Representations of both the opposing interpretations of either open or strict *laïcité* seem to depend on desired political outcomes, in particular as regards majority-minority relations in France.

¹⁵³ Article 4 of the 1905 Act; Gunn TJ, “Under God but Not the Scarf: The Founding Myths of Religious Freedom in the US and *Laïcité* in France”, (2004) 1 *Journal of Church and State* 7, at 14.

¹⁵⁴ Basdevant-Gaudemet B, “Staat und Kirche in Frankreich”, at 184.

¹⁵⁵ Dejammet A, Conference Proceedings, at 12.

¹⁵⁶ Redor-Fichot M-J, “*Laïcité* et principe de non-discrimination”, at 90.

¹⁵⁷ Baubérot J, *Histoire de la Laïcité en France*, at 122.

¹⁵⁸ Basdevant-Gaudemet B, “Staat und Kirche in Frankreich”, at 195 and 197.

¹⁵⁹ Baubérot J, *Histoire de la Laïcité en France*, at 118; Dejammet A, Conference Proceedings, at 12.

¹⁶⁰ Basdevant-Gaudemet B, “Staat und Kirche in Frankreich”, at 184.

¹⁶¹ In this *département* the 1905 Act is not applicable and state finance of recognised religions is therefore continued, Basdevant-Gaudemet B, *ibid*, at 175.

¹⁶² McGoldrick D, *Human Rights and Religion – The Islamic Headscarf Debate in Europe*, at 102-103.

3. Trends

Robert calls for a reapplication of *laïcité* in the spirit of the 1905 Act without detriment to secularism, but taking into account the changes in the demographic composition in relation to existing denominations.¹⁶³ He explains this necessity with the point that it is “terribly complex and difficult to make Islamic communities fit the church mould” that the Act was made for.¹⁶⁴ This refers to the intricate prerequisites that religious groups have to fulfil in order to become public bodies. Muslim and other ‘newer’ religious groups usually resort to forming cultural associations, since cult (=public body) status requires an exclusively religious purpose.¹⁶⁵ Allegedly dangerous groups are usually denied cult status by the courts based on public order.¹⁶⁶ In practice, the achievement of cult status is quite advantageous, because tax law is favourable to public bodies.¹⁶⁷ One could argue that, to some extent, the Sarkozy era (in his role of minister of the interior) rectified some imbalances due to previously favouring the long-standing churches. He not only initiated the establishment of the *Conseil Français du Culte Musulman (CFCM)* in 2003, but also, more importantly, the funding for mosques and Islamic schools.¹⁶⁸ Whereas his intentions may be questionable and the extent of privilege may not amount to equal recognition and financing, this is a necessary step in the right direction, if the French state desires to maintain respect for the principle of *laïcité*.

During the past two decades, nonetheless, an official discussion has also taken place as to the content of French *laïcité*, which officially commenced with an opinion of the *Conseil d’Etat* issued on 27 November 1989.¹⁶⁹ This decision highlighted the strong link between *laïcité* and its service to the principles of neutrality of the state, religious freedom and respect for pluralism. All these concepts are, however, again dependent on their interpretation, which may vary to a large degree. In this light, an important feature of the decision is the esteem for pluralism, which brings religion into the public environment.¹⁷⁰ There are, justly, concerns that this approach was confirmed in later rulings, but is not reflected in the statutory law, causing a profound divergence between these two legal spheres.¹⁷¹

¹⁶³ Robert J, “Religious Liberty and French Secularism”, at 657.

¹⁶⁴ *Ibid*, at 656.

¹⁶⁵ For instance, education may not be an additional purpose if cult status is sought. Basdevant-Gaudemet B, “Staat und Kirche in Frankreich”, at 179-181.

¹⁶⁶ *Ibid*, at 181.

¹⁶⁷ *Ibid*, at 195.

¹⁶⁸ <http://www.euro-islam.info/country-profiles/france/> (accessed 15 March 2014).

¹⁶⁹ Assemblée Générale (Section de l’Intérieur) – n° 346.893 – 27 novembre 1989, later confirmed in: *Un Siècle de Laïcité*, EDCE, no.55, 2004, at 272.

¹⁷⁰ Anseur Z, “Réflexions à propos des Perspectives d’une Laïcité «Postmoderne»”, (2002) *Revue de la Recherche Juridique* 1723, at 1727-1728.

¹⁷¹ Prelot P-H, “Définir Juridiquement la Laïcité”, in Gonzalez G (ed), *Laïcité, Liberté de Religion et Convention Européenne de Droits de l’Homme* (Bruylant: Bruxelles, 2006), at 124

Research has since centred on the question of how the rights of minority religions can be guaranteed without having to compromise or sacrifice the special church-state divide in France.¹⁷² In the light of the legislation prohibiting pupils from wearing religious attire at school,¹⁷³ justified by apparent demands of *laïcité*, doubts are expressed to the effect that the concept is abused to the end of religiously intolerant enforcement of uniformity.¹⁷⁴ The question of religious symbols at school is part of the current debate on *laïcité*, which began in 2003, when Jacques Chirac set up an independent commission to produce a study¹⁷⁵ in relation to the application of *laïcité* in contemporary France. The resulting Stasi Commission, named after its chair Bernard Stasi, was composed of scholars and other persons of official standing from diverse backgrounds. The most controversial of the resulting 26 recommendations was certainly the one prohibiting ostentatious religious insignia in state schools. In favour of this decision is Weil, who was a member of the Stasi Commission, and who explains that there are two reasons why the ban is correct. One is that the 1905 Act was a victorious moment of French history, as it prevented the Catholic Church from interfering in public life and also brought the guarantee to practice religion and to wear religious symbols in private.¹⁷⁶ Weil's second reason is more specific, namely to protect Muslim girls' freedom of religion, who are forced to wear a headscarf, mainly by fellow male pupils.¹⁷⁷ As to the first point, the result does not match the current situation, since minorities cannot be compared to a powerful institution whose impact needed to be diminished as was the Catholic Church prior to the 20th century. Although it is clear that the prohibition of symbols at school does not infringe the right to wear these in private, one may wonder if the ability to practice religion at home can still be seen as a significant enhancement of freedom of religion in a modern context, where significant parts of life take place in employment and education. There is even irony in this case, considering that headscarves are typically worn outside and mostly not needed at home. The French interpretation of religion as a private matter is considered a characteristic of first liberalism, which today may reach the level of 'secular indoctrination' or 'secular fundamentalism'.¹⁷⁸ Such an argument is sustainable for several reasons. For instance, if a state does not permit religious pluralism, with its external

¹⁷² See for example: Armand G (ed), *Cahiers de la Recherche sur les Droits Fondamentaux 2005 - Quel avenir pour la laïcité cent ans après la loi de 1905?* (Caen: Presses Universitaires de Caen, 2005).

¹⁷³ Loi du 15 mars 2004 sur les signes religieux à l'école publique.

¹⁷⁴ Gunn TJ, "Under God but Not the Scarf: The Founding Myths of Religious Freedom in the US and *Laïcité* in France", at 24.

¹⁷⁵ Rapport sur la *Laïcité* dans la République.

¹⁷⁶ Weil P, *La République et sa Diversité - Immigration, Intégration, Discriminations* (Paris: Seuil, 2005), at 65 and 66.

¹⁷⁷ *Ibid*, at 68.

¹⁷⁸ Martínez-Torrón J, "Religious Liberty in European Jurisprudence", in M Hill (ed), *Religious Liberty and Human Rights* (Cardiff: University of Wales Press, 2002), at 126.

practices entailed, this amounts to secularism positioned as a belief superior to others.¹⁷⁹ In addition, restrictions to religious manifestation in the public sphere assumes a distinction of public and private that may be of no relevance to the believer or the belief underlying the religious expression.¹⁸⁰ In particular, enforced assimilation will require acts contrary to one's religious beliefs. It is, therefore, fair to say, along with Wahlstrom, that the concept of assimilation is incompatible with "liberal commitments to autonomy and religious freedom", as well as morally unacceptable.¹⁸¹ Hence, such restrictions completely disregard the needs of adherents of some religions. Weil's second point may be even more unsustainable, despite the fact that it is surely reasonable to act against any religious oppressors. Basically, the weakness of his proposition lies in that the state ought to have other means of preventing bullying at schools rather than discriminating against Muslim girls who wear the headscarf voluntarily, in addition to causing those who do not wear it, another set of difficulties.¹⁸² Devoid of this common sense, the stricter form of *laïcité* promoted by Weil does not seem a plausible choice.

At least in theory, however, France is the only country that claims to provide an absolute division between church and state.¹⁸³ As was shown, even in a *laïcité* or strict secularism framework the state is not perfectly neutral in practice. There is an impression that France effectively privatised religion, which is shown not only in churches' withdrawal of services to the public, but also means that public manifestations of religion can be restricted.¹⁸⁴ French *laïcité* can thereby be directly linked to potential restrictions to religious freedom in the employment context. Whether French secularism, however, is a case of applying its own philosophy of unbelief,¹⁸⁵ is neither clear from the debate on the ban of religious insignia at schools, nor from the laws governing church-state relations in general. If applied to limit freedom of religion in the form of manifestations that do not interfere with the freedoms of others, *laïcité* can trivialise the Constitution by "converting it from a code of cardinal principles

¹⁷⁹ Ibid.

¹⁸⁰ Ahdar R and Leigh I, *Religious Freedom in the Liberal State*, at 125; McGoldrick D, *Human Rights and Religion – The Islamic Headscarf Debate in Europe*, at 102.

¹⁸¹ Wahlstrom AK, *Liberal Democracies and Encompassing Religious Communities: A Defense of Autonomy and Accommodation*, (2005) 36(1) *Journal of Social Philosophy* 31, at 37-38.

¹⁸² For a comprehensive discussion of this topic, see Baubérot J, Bouzar D and Costa-Lascoux J, *Le voile, que cache-t-il?* (Paris: Les Éditions de l'Atelier, 2004);

Akan M, "Laïcité and Multiculturalism: The Stasi Report in Context", (2009) 60(2) *The British Journal of Sociology* 237;

Fehr S, "Intersectional Discrimination and the underlying Assumptions in the French and German Headscarf Debates", in D Schiek and A Lawson (eds), *European Union Non-Discrimination Law and Intersectionality* (Farnham: Ashgate, 2011), at 111-124 and Roseberry L, "The Assimilationist Anti-Discrimination Paradigm and the Immigrant Muslim Woman: Suggestions how to Re-Conceptualise Discrimination Claims", at 191-208, in the same volume.

¹⁸³ Cavanaugh K, "Islam and the European Project", at 8.

¹⁸⁴ Ibid, at 3.

¹⁸⁵ Ahdar R and Leigh I, *Religious Freedom in the Liberal State*, at 95; similarly Ogilvie MH, "Between Liberté and Egalité", at 160.

of national law into a codex of petty precepts of local life”.¹⁸⁶ Complementing this concern, Baubérot emphasises the necessity of *laïcité* to be a fluid concept that can adapt to the needs of the time. If it cannot take into account problems unforeseen when the concept was first developed, *laïcité* will become dogmatic and nostalgic.¹⁸⁷ Furthermore, there is the connected issue of balancing individual rights with state principles, and it can be argued that *laïcité* itself cannot be a more weighty interest than the very freedom of religion it strives to achieve. Along similar lines, Witte reminds that “[a] [c]ourt must be at least as zealous in protecting religious conscience from secular coercion as protecting secular conscience from religious coercion”.¹⁸⁸ The preceding debates indicate that the balance leans towards secular coercion at the moment. Any potential impact in the sphere of religious discrimination in employment will, therefore, have to be tested in this thesis.

Evaluating the general observations, as well as the chosen ‘trends’, I claim that the proponents of open *laïcité* offer a more principled, teleological projection, whereas those promoting strict *laïcité* rely on nationalistic, conservative catch phrases to pragmatically solve any religious discrimination scenarios. Whether this claim holds, will be a matter dealt with in Chapter 5, however, there seems to be a strong impact of the French church-state set-up on religious discrimination.

V. Church-State Relations in Germany

1. History

From the beginning of the Reformation in the 16th century until the Revolution of 1918, the development of church-state relations in the territories now largely constituting Germany was guided by the so-called ‘church regiment of the sovereign’.¹⁸⁹ The sovereign claimed the right to stipulate the denomination of his subjects in accordance to his own will: *cuius regio, eius religio*.¹⁹⁰ During this period the Catholic and Protestant denominations were largely equally recognised.¹⁹¹ In the 19th century, the executive power over the Protestant church was gradually allocated to independent church authorities, in a way that allowed the sovereign to maintain his jurisdiction over the church through the minister for education,

¹⁸⁶ Witte J, “Facts and Fictions About the History of Separation of Church and State”, at 44.

¹⁸⁷ Armand G, “Interview de M. le Professeur Jean Baubérot”, in G Armand (ed), *Cahiers de la Recherche sur les Droits Fondamentaux 2005 – Quel Avenir pour la Laïcité cent Ans après la Loi de 1905?*, at 19.

¹⁸⁸ Witte J, “Facts and Fictions About the History of Separation of Church and State”, at 44, referring to the US-American Supreme Court.

¹⁸⁹ *Landesherrliches Kirchenregiment*; Hesselberger D, *Das Grundgesetz – Kommentar für die Politische Bildung*, 13th ed (Bonn: Bundeszentrale für Politische Bildung, 2003), at 388.

¹⁹⁰ *Ibid.*

¹⁹¹ Robbers G, “Staat und Kirche in der Bundesrepublik Deutschland”, in G Robbers (ed), *Staat und Kirche in der Europäischen Union*, 2nd ed (Baden-Baden: Nomos, 2005), at 84.

whereas the church authority gained a right of participation.¹⁹² Church property and territory, however, had already been taken over by the state and thereby secularised in 1803.¹⁹³ It was not until the instatement of the Weimar Constitution of 1919 (*WRV*) that state and church were separated in principle and a full right to self-determination was warranted to the churches in its Article 137(3), which is still the key norm to devise the relationship between church and state today.¹⁹⁴ During the Weimar Republic the Catholic movement made major contributions to the development of social norms and in this way was politically active and appreciated.¹⁹⁵ The Nazis ended this political cooperation because of the incompatibility with their non-religious ideology.¹⁹⁶

After the 2nd World War, the two German states, the Federal Republic of Germany and the German Democratic Republic (GDR), followed different paths of secularisation. Under the GDR's communist regime churches were not allowed to operate at all beyond the issuing of newsletters¹⁹⁷ and Christians were perceived as citizens of low standing.¹⁹⁸ In contrast, the preamble of the Western German Constitution of 1949 reads as follows: "Being aware of the responsibility before God and the people, willing to serve world peace as an equal element of a united Europe, the German people have provided themselves with this Constitution through the legislative."¹⁹⁹ This reference to 'God' may be seen as symbolic and in any case it is the result of the historical backdrop of the Constitution.²⁰⁰ According to Menendez, "after the holocaust" this choice of wording "could be understood as proper even by non-believers, as some kind of yardstick of individual and collective responsibility".²⁰¹ Indeed, the responsibility for the killing of millions of Jews has subsequently also led to a visible recognition of the Jewish communities in society.²⁰² Regardless of the underlying reasoning, the inclusion of the term 'God' is at least a sign of recognition of monotheist faiths and as such not a reference to Christianity or a particular religion, if it is not also inclusive of all religious faiths.²⁰³ In relation to this it is also advocated that for an establishment of a

¹⁹² Hesselberger D, *Das Grundgesetz-Kommentar für die Politische Bildung*, at 388; Robbers G, "Staat und Kirche in der Bundesrepublik Deutschland", at 84.

¹⁹³ Andersen U and Woyke W, *Handwörterbuch des Politischen Systems der Bundesrepublik Deutschland*, 4th ed (Bonn: Bundeszentrale für Politische Bildung, 2000), at 252; Robbers G, "Staat und Kirche in der Bundesrepublik Deutschland", at 84.

¹⁹⁴ Hesselberger D, *Das Grundgesetz*, at 388; Robbers G, "Staat und Kirche in der Bundesrepublik Deutschland", at 84.

¹⁹⁵ Andersen U and Woyke W, *Handwörterbuch des Politischen Systems der Bundesrepublik Deutschland*, at 253.

¹⁹⁶ *Ibid.*

¹⁹⁷ *Hirtenbriefe*.

¹⁹⁸ Andersen U and Woyke W, *Handwörterbuch des Politischen Systems der Bundesrepublik Deutschland*, at 253.

¹⁹⁹ Prior to the German reunification, this first sentence of the preamble additionally referred to the aspiration to be a unified Germany, however, the remaining content stayed the same as in the original.

²⁰⁰ Menendez AJ, "A pious Europe? Why Europe should not define itself as Christian", at 142.

²⁰¹ *Ibid.*, at 142.

²⁰² Robbers G, "Staat und Kirche in der Bundesrepublik Deutschland", at 84.

²⁰³ Considering that also polytheists may refer to 'God' meaning the main God or a more general spiritual concept.

church or creed, identification and assistance is required, whereas a mere reference in a constitution is per se nothing more than a form of recognition.²⁰⁴ The notion is thus not likely to be severely problematic from the perspective of religious discrimination, although on the face it seems to promote the idea of monotheism only. Combining the above findings and given that assistance is presumably not intentionally granted to specific faith groups, the 'God' of the preamble is perhaps a mere sign of its time. Most crucially, there is no mention of 'God' within the legally binding provisions of the Constitution so that the notion in the preamble may indeed be a blanket expression. Admittedly, such an inclusion may not be welcomed equally in today's context, for instance, by atheists, agnostics, or otherwise neutrally minded individuals.

2. Current Status

The German Constitution does not relegate churches to the private sphere, but accepts their original public mandate.²⁰⁵ By order of Article 140, Articles 137 to 141 of the *WRV* have become part of the German Constitution. The rules of church-state relations of the Weimar Republic were literally incorporated since the parliamentary council drafting the 1949 Constitution could not agree to a differing scheme and the experience with the relevant articles had been positive.²⁰⁶ Article 137(1) *WRV* prohibits an official church or religion.²⁰⁷ This ban of an established church expresses a fundamental separation of church and state. From this is derived that Germany is a secular state and has the duty to neutrality (no tendencies towards any religious or non-religious faith), positive tolerance (obligation to actively create space for religious communities) and parity (equal treatment of all religious communities) in religious matters.²⁰⁸ Although state and church are separated in Germany, the separation is not implemented strictly: space is left deliberately for elements of connection and cooperation. Examples of such elements are religious education in schools, faculties of theology at universities and the services listed in the Constitution.²⁰⁹ Pastoral care in the military²¹⁰ is also included, to grant the benefit of religious care as a minimum guarantee that can be publicly funded. Article 139 *WRV* sets up Sunday as a day of rest, which is seen as a piece of political culture based on the Christian faith, with an aim beyond religion, namely to guarantee a stable weekly rhythm for the benefit of personal health and

²⁰⁴ Ahdar R and Leigh I, *Religious Freedom in the Liberal State*, at 80.

²⁰⁵ Hesselberger D, *Das Grundgesetz*, at 385.

²⁰⁶ *Ibid*, at 384.

²⁰⁷ Since religion and non-religious belief are equated in Article 137(7), the prohibition extends to the state identifying itself with other belief systems.

²⁰⁸ Hesselberger D, *Das Grundgesetz*, at 388; Robbers G, "Staat und Kirche in der Bundesrepublik Deutschland", at 86.

²⁰⁹ *Ibid*; Robbers G, "Staat und Kirche in der Bundesrepublik Deutschland", at 91-93.

²¹⁰ Article 139 *WRV*.

labour.²¹¹ As a result, it can be argued that religious influx exists in many public institutions in Germany. The reasons are historical, cultural and to enable a degree of practice of freedom of religion.

The right to self-determination enshrined in Article 137(3) *WRV* broadly extends to all institutions that carry out church interests²¹² and thereby has a strong impact on employment law, in that religious associations can configure which religious characteristics to require from their employees.²¹³ Still, churches are otherwise bound by secular employment law.²¹⁴ On the other hand, this right to self-determination is also referred to as ‘balancing doctrine’: corporate freedom is enjoyed to a degree, in as much as law is only valid if it takes the particular interests of the faith community in question into consideration, which is measured against its own self-perception.²¹⁵ Within the boundaries, it thereby grants a strong position to churches. Article 137(3) *WRV* further details that the state cannot participate in the nomination of church officials and that the legal status of churches is ordained under civil law, with the exception that only those churches that have thus far been public corporations will remain in this form.²¹⁶

Another significant emanation of the German church-state paradigm is the use of agreements²¹⁷ to cooperate in, for example, the raising of church tax, religious education at state schools and pastoral care in the military, precisely because the state hopes to emphasise its secularity and the legal independence of churches.²¹⁸ These contracts already existed during the Weimar Republic in some federal states and were theoretically continued during the Third *Reich*, even if violated in practice.²¹⁹ This means that, despite the actual separation of church and state in Germany, there are significant areas of collaboration between the two entities, supporting each other in shared tasks in society. Accordingly, it is arguable whether the term “separation” is suitable in the German church-state context. A potential reply is, however, that cooperation is not identification, but only recognition of religious communities’ significance in public life and inclusion of single privileges.²²⁰ In comparison to other European church-state systems Robbers therefore positions the

²¹¹ Hesselberger D, *Das Grundgesetz*, at 390.

²¹² BVerfGE 70, 162.

²¹³ Robbers G, “Staat und Kirche in der Bundesrepublik Deutschland”, at 93-95, who mentions that more than 1 million individuals are employed by the major churches in Germany, at 93.

²¹⁴ Hesselberger D, *Das Grundgesetz*, at 388.

²¹⁵ Heinig HM, “Law on Churches and Religion in the European Legal Area – Through German Glasses”, at 566.

²¹⁶ See Articles 137(4) and 137(5).

²¹⁷ *Konkordate*.

²¹⁸ Hesselberger D, *Das Grundgesetz*, at 385; Robbers G, “Staat und Kirche in der Bundesrepublik Deutschland”, at 85 and 95-97.

²¹⁹ Hesselberger D, *ibid*, at 385-386.

²²⁰ Robbers G, “Staat und Kirche in der Bundesrepublik Deutschland”, at 88.

German one in the middle, between those with a state church and those strictly separating church and state.²²¹

3. Trends

Possibly the main focus of debate is the status of public corporation²²² for religious communities. The relevance of this aspect lies in the fact that only public corporations can require the state to impose taxes on their behalf.²²³ Public tax collection is perhaps the most remarkable advantage²²⁴ that the qualifying bodies enjoy. Additionally, these organisations can apply for a non-for-profit classification, which results in part in tax exemptions. On this account, Ahdar and Leigh call the modern day German model a *de iure* “diluted form of quasi-establishment...in that the three main historical religious communities – Catholic, Protestant and Jewish – are public corporations and qualify for support pursuant to the church tax”.²²⁵ Jehova’s Witnesses are an example, however, of other entities also gaining the privileged status,²²⁶ though this is not the case for all religious communities. Finally, the two Christian denominations benefit from considerable, communally funded allowances for building maintenance, a legacy of several dispossessions by the state of these buildings in the past.²²⁷ Achieving public corporation status may, therefore, have a considerable impact on the financial sustainability of religious undertakings. Despite the immense privileges enjoyed by faith groups qualifying for this status, the notion of “quasi-establishment” seems slightly inflated due to the absence of symbolic endorsement of a particular church, as well as due to the state connecting neither securely, nor exclusively to one faith or church.

The existence of churches as public corporations as a historically induced reality is a good example of the difficulty in separating church and state in practice.²²⁸ In spite of the official character of a public corporation and the privileges attached to the status, this system aims at strengthening the independence and original authority of the churches.²²⁹ Even though this is perhaps the case in Germany, a problem lies in fulfilling the conditions for becoming such a corporation. Applications need to prove the stability of their community (element of consistency), for which its structure and number of members are important indicators, as is

²²¹ Ibid, at 86.

²²² *Körperschaft des öffentlichen Rechts*.

²²³ Article 137(6).

²²⁴ Ahdar R and Leigh I, *Religious Freedom in the Liberal State*, at 81.

²²⁵ Ibid, at 80.

²²⁶ Robbers G, “Staat und Kirche in der Bundesrepublik Deutschland”, at 88.

²²⁷ Ibid, at 95.

²²⁸ Hesselberger D, *Das Grundgesetz*, at 389.

²²⁹ BVerfGE 30, 428.

the recognition of fundamental state principles.²³⁰ Whether the latter indicator requires a general condition of loyalty to the state is contentious.²³¹ On the surface this seems problematic in terms of discrimination, as the state does not collect tax on behalf of other religious groups, for instance, the orthodox churches and several Christian, humanist and Muslim associations. Official recognition of groups representing Islam is being discussed, and the main representative body, the *Zentralrat der Muslime in Deutschland (ZDM)*, favours such a development.²³² Until legislative changes occur, the remaining groups are left with achieving the status of association under private law,²³³ a right that is to be granted to faith communities even if actual legal requirements are not fulfilled.²³⁴ Though this may be a compromise solution, the disadvantages of lacking public corporation status are severe enough to question whether the principles of neutrality and parity are exercised appropriately and sufficiently. It is, accordingly, an urgent matter to statutorily either provide this status to all faith communities by changing the conditions for registration, or to relegate all faith communities to private law associations.

In summary, the relationship between church and state in Germany is one of partnership, characterised by the constitutional provisions and the agreements between churches and state.²³⁵ One could argue with Andersen and Woyke that both church and state serve Christian citizens and the well-being of the general public to strive freely, thus creating dependency on mutual partnership.²³⁶ Considering the above findings, it is questionable if the state intends to support Christians in particular, or if the *de facto* advantages are a product of history which is slowly evolving into a more pluralistic model. Nevertheless, the idea that church and state can complement each other in their achievement for society as a whole is to be welcomed. Overall, the German approach is closest to a form of Thorson Plesner's 'liberal' secularism, as its law appreciates the existence of religion, without domination or identification with a particular religion. The factual, but not necessarily intended advantageous position of some religious communities, is perhaps in itself not sufficient to call Germany's model a "quasi-establishment", for which there is in addition no historical or constitutional basis. Reflecting the above terminology related to neutrality, the German law thus seems to fit the mould of substantive neutrality, but at the same time

²³⁰ Hesselberger D, *Das Grundgesetz*, at 389 under reference to Article 137(5).

²³¹ Federal Administrative Court: yes, Federal Constitutional Court: no.

²³² <http://zentralrat.de/16562.php> (accessed 15 March 2014).

²³³ *Eingetragener Verein*.

²³⁴ Robbers G, "Staat und Kirche in der Bundesrepublik Deutschland", at 88.

²³⁵ Andersen U and Woyke W, *Handwörterbuch des Politischen Systems der Bundesrepublik Deutschland*, at 258.

²³⁶ *Ibid.*

supports the claim that a neutral outcome for all faith groups is difficult to achieve in practice. In terms of religious discrimination at work, the analysis of the German church-state model has not revealed any obviously problematic characteristics.²³⁷ Chapter 6 of this thesis will aim to answer this question.

VI. Comparison

Church-state relations in the UK, France and Germany are remarkably different, to a degree that makes them almost incomparable. This immense disparity in the frameworks and their interpretation is seemingly a product of historical events and today's politics. Historically, England has incorporated a strong bond with the Church of England that has lasted for hundreds of years until now. Calls for reform in the way of partial disestablishment are pursued, however, in a reluctant way, as the reform is perhaps seen as dispensable. Germany separated state and church in the 20th century alongside with a democratisation process, but still embraces a system in which recognised religious communities enjoy significant public privileges. Quite unlike these two jurisdictions, French law has radically divided church and state into two unrelated entities for more than 200 years and developed several understandings of this model, *laïcité*, to describe the neutrality of the state towards the subject of religion. Still, remnants of the former connection between church and state survived and are a matter of debate. The overall picture confirms that in the UK church-state relations are defined by coincidental factors, unlike in France, where these relations are defined by principles.²³⁸ Remarkably, though, the main principle of *laïcité* is far from clearly defined and is interpreted to serve opposing interests.

In accordance with the theoretical classifications described in the chapter's first section (I), the UK has an established or national church, which is loosely connected to the state. In Germany a 'liberal' secular structure was identified that cooperates with faith communities in mutual advantage. The French model is dominated by a superficial complete non-recognition of religion and thus resembles 'fundamentalist' secularism, with the currently dominating interpretation of *laïcité* largely coinciding with 'strict' neutrality. These categories, however, merely describe tendencies observed at this stage of research. To fill the terms with meaning and to apply these with more certainty, Chapters 4 to 6 will first need to determine the actual outcomes of respective church-state relations.

²³⁷ Apart from the potential issues arising from employment for entities with a religious ethos, which is outside the scope of this thesis.

²³⁸ Hardy D, Conference Proceedings, in M Fraser (ed), *Religion and the State - Common and Divergent Issues in Britain and France* (London: 2005), at 8.

The factors, or focus areas, that determine a separation or union between the church and state are also different: in the UK it is the Church of England to unite with the state's English part, in combination with the less prominent models existent in other parts of the state. In France it is, at least officially, religion that causes the separation, and in Germany recognised religious communities can be connected to the state. These elements highlight that in the England there is mainly a connection between the state and the Church of England, not with other religions, although it can be argued that indirectly this amounts to an affiliation with religion in general. As a whole, the UK is not linked to any religion. In France there is no alliance or allusion to religion from the state and therefore no legal, theoretical link. German law arguably displays the strongest link between church and state with regard to practical effects, considering that it collects taxes on behalf of some religious groupings.

Relating the church-state constructs to neutrality, all three countries contain elements, which are partial towards one or more religions. The free-of-charge provision of buildings to the Catholic church in France stands in stark contrast to the claim of *laïc* neutrality towards religion and may in effect impair state neutrality that same ways as does England's upholding of a national church. Although the Church of England is not the church of all the UK, its representation in the House of Lords has an impact on the legislation that has not been devolved to the UK's single countries. In this light, Germany's church-state model may even be the most neutral, since in theory all religious groups can attain corporation status, if they manage to be organised in a particular way. Whether this option will in practice be open to all religious groups is, however, questionable. Still, the German, as opposed to the French claim of neutrality may be more authentic, since connections between state and churches are openly displayed and there is no spirited, political debate on the interpretations of the church-state divide.

These basic foundations already shed a light on how the three states may deal with religious discrimination. In the UK the special standing of the Church of England upholds rules of advantage and disadvantage for this entity. Although the representation of bishops in the House of Lords is probably an "absurd anachronism",²³⁹ there is certain contentment as to the benefits for the status quo of freedom of religion in general and no fear that religious discrimination is more likely to take place under the current regime. Similarly, the German willingness to cooperate with (recognised) religious communities reflects openness to religious issues in general. Still, as depicted above, the existing system is disadvantageous

²³⁹ Phillips A, "In Defence of Secularism", in T Modood (ed), *Church, State and Religious Minorities* (London: Policy Studies Institute, 1997), at 23.

to faiths that cannot qualify for privileges. In the context of religious discrimination in employment the UK and German approaches, nevertheless, do not present themselves as evidently problematic, due to the apparently restricted fields of privilege and interference. To all appearances, this is otherwise under the French church-state regime. Since it rigorously ignores the existence of religion and thereby the reality and needs of a large part of the population, the law may not easily allow for religious requirements. Through this non-recognition the French model circumvents communication and is prone to disseminate religiously neutral rules that discriminate indirectly and are likely to appear in the employment context.

Evans and Thomas think that the UK “has a great deal of religious freedom and religious tolerance—more than many secular countries—despite its established church.”²⁴⁰ This view can be adjoined to the claim that in the UK there is more emphasis on interfaith dialogue and cooperation from within society. Similarly, the general support for religious communities in Germany can be seen as an act of tolerance. As was mentioned as regards the Stasi Report, the ‘fundamentalist’ secularism enforced in France and the possible indirect discrimination entailed, may reflect or effect intolerance towards minority religions. Unresolved conflicts and developments can be witnessed concerning minority or ‘new’ religions on the one hand and the church-state paradigms in France and Germany on the other hand, whereas in the UK no parallel situation has emerged.

It can be asserted that all three states aim for some form of religious neutrality, however, with greatly differing means and outcomes. Similarly, there seems to be agreement, both in the secular frameworks of France and Germany and the partial national church compound of the UK that, regardless of the affinity or antipathy a state has towards a creed, it must refrain from discriminatory treatment. Minority or ‘new’ religions (and thus their adherents) have, however, experienced detriment based on *laïcité*, to a much higher degree than due to German church-state relations. In contrast, the Church of England’s model actively pursues minority interests, even if only for the sake of retaining legitimacy to be a national church.

VII. Conclusions

In Europe a multitude of types of separation between church and state have emerged throughout history²⁴¹ and their actual appearance is subject to social, cultural and political

²⁴⁰ Evans C and Thomas CA, “Church-State Relations in the European Court of Human Rights”, at 707.

²⁴¹ McCrea R, *Religion and the Public Order of the European Union*, at 36-37.

influences and to different legal interpretations. The above assessment of church-state relations in the UK, France and Germany reflects this observation. As several other European states, the UK hosts an official national church, namely in England, as well as different models in Scotland, Wales and Northern Ireland. In France, the principle of *laïcité* dictates a strict separation of church and state in theory and Germany opted for a secular model of cooperation. In practice, all jurisdictions cater for interaction between church and state at various levels and to various degrees. The gap between theoretical foundations of church-state relations and actual treatment of religious communities and adherents due to a variety of interpretations leads to the belief that no preliminary conclusions can be reached as to which church-state system is most favourable towards the protection from religious discrimination.

Nevertheless, this chapter already touched upon the potential impact of the division of church and state on religious discrimination. As a mean to justify restrictions to religious manifestations, church-state settings can, in particular, create incidents of indirect discrimination. The comparison, moreover, highlighted several points that seem particularly relevant to non-discrimination in relation to religion in the UK, France and Germany, and which the subsequent investigations in this thesis strive to answer:

First, church-state relations in the three jurisdictions are subject to interpretation and topical disputes and, accordingly, not clarified. This holds true in particular in France, where no definition for *laïcité* can be found in law, resulting in antithetical positions. Second, in isolation, church-state models are no positive indicator of the status of religious interests, or religion's standing in public life. It seems that it is not simply the legal format of church-state relations that determines its adaptability, but again the attitude of its interpreters.²⁴² Various understandings of one model are importantly "reflective of identity and national political culture".²⁴³ Third, none of these three very different church-state paradigms can claim to be effectively neutral. Remarkably, in the case of France at least, the state seems to impose exactly such neutrality on individuals, despite the state not being neutral in practice itself. Thus, church-state relations undefined at constitutional law level can lead to paradox results. Fourth, in all three jurisdictions, historical imbalances between the state and religious communities are still in the process of being overcome. The struggle to defeat shortcomings experienced by newer religions reflects the fact, that law in this area can only rectify historical

²⁴² Evans C and Thomas CA, *ibid*, at 724, also highlight that it is the adaptation of church-state models, and not the model itself, that determines the occurrence of religious discrimination.

²⁴³ Cavanaugh K, "Islam and the European Project", at 4.

impact in slow transition. Fifth, in terms of the protection of minority religions, the national or established church model that superficially looks most detrimental may in reality interfere least and *vice versa*. Finally, due to diverging evaluations of church-state models in the UK, France and Germany, it can be anticipated that there is no European consensus in the near future over the question as to how to ideally organise the relationship between church and state. These six key findings, or critical points, will be revisited in later chapters of this thesis, whenever relevant to the discussion at hand.

This first chapter has not been able to identify a church-state model most favourable to host safeguards against religious discrimination. Each of the three systems appears sufficiently flexible, subject to interpretation, to be in harmony with employment law that combats religious discrimination. At face value, a promotion of substantive neutrality was identified as the most likely to bring equitable results to employees of all faith groups. The examination of the three national jurisdictions also reflected that substantive neutrality can theoretically be incorporated into any church-state paradigm. Hence, substantive neutrality will be the yardstick that subsequent evaluations of the law protecting against religious discrimination will adopt. These initial conclusions will have to be tested against the five jurisdictions that constitute the substance of this thesis and re-evaluated in the final, comparative chapter. Bearing in mind the framework of church-state relations, the two subsequent chapters will analyse the ECHR and EU legal frameworks, against which the national law will then be measured.

CHAPTER 2 • Religious Discrimination in the Workplace under the Legal Framework of the Council of Europe

I. Introduction

Being an institution that specifically deals with the promotion of human rights, the Council of Europe's (CoE) main enactment, the ECHR, unsurprisingly includes a provision safeguarding the freedom of religion and belief as well as a rule on discrimination, which can (only) be used in conjunction with other Convention rights. The CoE was established soon after the Second World War as a regional actor, with the task to progress political cooperation in the field of human rights, mainly by setting up a treaty guarded by a court.¹ Although the Convention does not deal with employment as a particular field, several judgments of the European Court of Human Rights (ECtHR) have been concerned with human rights violations in this context. In order to realistically predict whether outcomes of religious discrimination cases filed by UK, French and German employees before the ECtHR would be successful or not, it is initially necessary to explore the content of the rules and cases concerned with freedom of religion and discrimination and, to a smaller extent, to evaluate the overall positioning of religious discrimination under the CoE's wider agenda. This chapter then moves on to an analysis of the Court's jurisprudence surrounding religious discrimination in employment in a detailed manner. Referring back to the analytical framework of church-state relations established in Chapter 1, attention will be paid to the ECtHR's position towards arguments based on church-state relations and state neutrality in matters of religion. Together with the parallel findings from EU law, this chapter will form the backdrop against which the compatibility of national law will be tested in Chapters 4, 5 and 6.

II. Religious Discrimination under the Framework of the Council of Europe

1. The Protection of Freedom of Religion under the ECHR

a) The Scope of Freedom of Religion under Article 9 ECHR

Article 9(1) ECHR safeguards the freedom of thought, conscience and religion, including the freedom to change one's religion or belief and the "freedom, either alone or in community with others and in public or private, to manifest...religion or belief, in worship, teaching, practice and observance". After a slow start,² the Court has received a massive influx of

¹ Janis M, Kay R and Bradley A, *European Human Rights Law*, 3rd ed (Oxford: Oxford University Press, 2008), at 12-17.

² *Kokkinakis v. Greece*, Series A, No.260-A, (1994) 17 EHRR 397;

Harris DJ, O'Boyle M, Bates EP and Buckley CM, *Harris, O'Boyle and Warbrick – Law of the European Convention on Human Rights*, 2nd ed (Oxford: Oxford University Press, 2009), at 425. Until 1998 the Commission filtered applications before these could proceed to the Court.

Article 9 cases since the 1990s, potentially due to Europe's changing population and the political significance of religion.³ Thus, ECtHR jurisprudence promises particularly fruitful ground for the purpose of this thesis.

The ground-breaking decision of *Kokkinakis* imparts substantial reasons why the ECtHR should exercise great care in assessing Article 9 cases, not least because of the importance that is allocated to the provision in a minority context. Summed up, the Court held that:

“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, which go to make up the identity of believers and their conception of life, but it is also a precious asset to atheists, agnostics, sceptics and the unconcerned. The pluralism is indissociable from a democratic society, which has been dearly won over the centuries”.⁴

Freedom of religion being an inalienable part of democracy makes this right a paramount public interest.⁵ The *Kokkinakis* judgment, however, reveals a cavity between the principles endorsed and their consequent implementation in jurisprudence,⁶ as this chapter will show.

As regards the ambit of religion as such, the ECtHR has never followed a fixed definition. The term ‘religion and belief’ under Article 9 has been interpreted widely, including, for instance, Scientology,⁷ pacifism,⁸ atheism,⁹ the Divine Light Zentrum,¹⁰ nazism,¹¹ veganism¹² and druidism.¹³ As further guidance, the Court insists that a religion or belief has to “attain a certain level of cogency, seriousness, cohesion and importance.”¹⁴ This qualifier introduces certain vagueness; however, it crucially indicates that there are limits and that determining whether a religion or belief should fall under the scope of Article 9 is not entirely up to the individual. It is perhaps not possible to develop a shared meaning of religion in

³ Ibid, at 424.

⁴ *Kokkinakis v. Greece*, at 31.

⁵ Martínez-Torrón J, “Religious Liberty in European Jurisprudence”, in M Hill (ed), *Religious Liberty and Human Rights* (Cardiff: University of Wales Press, 2002), at 126.

⁶ Taylor PM, *Freedom of Religion – UN and European Human Rights Law and Practice* (Cambridge: Cambridge University Press, 2005), at 349.

⁷ *Pastor X and the Church of Scientology v. Sweden*, Appl.No.7805/77, 16 DR 68 (5 May 1979).

⁸ *Arrowsmith v. UK*, Appl.No.7050/75, 19 DR 5 (1978).

⁹ *Angelini v. Sweden*, Appl.No.10491/83, 51 DR 41 (3 December 1986).

¹⁰ *Omkananda and the Divine Light Zentrum v. Switzerland*, Appl.No.8118/77, 25 DR 105 (19 March 1981).

¹¹ *X v. Austria*, Appl.No.1747/62, 13 CD 42 (1963).

¹² *H v. UK* 16 EHRR CD 44 (1993).

¹³ *Chappell v. UK*, Appl.No.12587/86, 53 DR 241 (14 July 1987).

¹⁴ *Campbell and Cosans v. UK*, Series A no.48, 4 EHRR 293 (25 February 1982).

society applicable to all of Europe, even more so because the understanding of such a concept may be controversially discussed within each state.¹⁵

In contrast to *Kokkinakis* and the generous definition of religion, the Court's reluctance to use Article 9 has been observed,¹⁶ which is said to be founded on an insufficient understanding of the concepts involved.¹⁷ The important question as to whether the *forum internum* merely revolves around the ability to proceed with a belief in one's mind,¹⁸ or if a wider range of interferences is necessary to violate this sphere,¹⁹ is therefore still unanswered. Confusingly, where a religious oath was to be sworn, the Court found a lack of justification of such practice in a democratic society, thus basing the decision on the *forum externum*.²⁰ Accordingly, some assume that possibly only a form of compulsion would plainly infringe the internal sphere of Article 9.²¹

Also, the *Arrowsmith* case²² famously established that religious 'practice' under Article 9(1) "does not cover each act which is motivated or influenced by religion or belief", but mainly "normal and recognised manifestations".²³ The *Arrowsmith* test is considered too restrictive to determine religious manifestation in general and, therefore, is only suitable in limited contexts, such as the military and prisons,²⁴ if that. Otherwise it is palpable that protecting only well-known manifestations that are considered 'normal' by a group of judges poses problems by disproportionately affecting minority religions with little publicity.²⁵ The same can be said for minority religions receiving biased or one-sided publicity, particularly if this is in relation to a specific religious practice. Although the *Arrowsmith* principle is at times warranted for selectivity as regards the sincerity of beliefs, it has correctly been criticised for focusing on the type of manifestation instead of the underlying motivation, bringing "the Court dangerously close to adjudicating on whether a particular practice is formally required

¹⁵ Robbers G, "Religionsfreiheit in Europa", in J Isensee, W Rees and W R  fner (eds), *Dem Staat, was des Staates – der Kirche, was der Kirche ist*, (Berlin: Duncker & Humblot, 1999), at 213.

¹⁶ Ibid, at 213.

¹⁷ Lewis T, "What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation", (2007) 56(2) International and Comparative Law Quarterly 395, at 396.

¹⁸ Evans MD, *Religious Liberty and International Law in Europe* (Cambridge: Cambridge University Press, 1997), at 295.

¹⁹ Pleading for a more careful assessment of manifestations motivated by religion to potentially come under the *forum internum*, are Evans C, *Freedom of Religion under the European Convention in Human Rights* (Oxford: Oxford University Press, 2001), at 72-82, Mart  nez-Torr  n J, "Religious Liberty in European Jurisprudence", at 118-119, and Taylor PM, *Freedom of Religion*, at 199-200.

²⁰ *Buscarini v. San Marinc*, Appl.No.24645/94, (1999) ECHR 7 (18 February 1999);

Harris DJ, O'Boyle M, Bates EP and Buckley CM, *Law of the European Convention on Human Rights*, at 428, contrary to Evans C, *Freedom of Religion under the European Convention in Human Rights*, at 73 and Taylor PM, *Freedom of Religion*, at 130.

²¹ Harris DJ, O'Boyle M, Bates EP and Buckley CM, *ibid*, at 428-429 and Tahzib BG, *Freedom of Religion and Belief – Ensuring Effective International Legal Protection* (The Hague: Martinus Nijhoff, 1996), at 26.

²² *Arrowsmith v. UK*.

²³ ECommHR at paras 19-20, later followed in *Metropolitan Church of Bessarabia and Others v. Moldova*, Appl.No.45701/99, at 117 and *Hasan and Chaush v. Bulgaria*, Appl.No.30985/96, at 78 GC.

²⁴ Taylor PM, *Freedom of Religion*, at 171.

²⁵ Ibid, at 351.

by a religion – a task which judges, given the relevant theological issues, appear ill-equipped to handle”.²⁶ There is, accordingly, also a sizeable risk of the ECtHR imposing a view of what is reasonable or not.²⁷ Unless there is obvious misuse of Article 9 by an applicant, the judges would probably not need to look into ‘reasonable practices’, otherwise there are many questions to be answered first, in particular, what criteria are employed to determine reasonableness and which sources are suitable for guidance.

This critical standpoint is perfectly exemplified in two later rulings, *Valsamis v. Greece*²⁸ and *Efstratiou v. Greece*.²⁹ In these cases, the Court indeed went against its own proposition that content of belief should not be externally determined³⁰ and decided that participation in military parades did not offend the applicants’ pacifist beliefs.³¹ This interpretation could hardly have been anticipated, since other cases found that there is a right not to participate in religious activities.³² Understandably, *Valsamis* and *Efstratiou* have been heavily criticised. Discontent is foremost based on the ECtHR as a secular public authority, evaluating philosophical dogma, thereby effectively determining what is to be reasonably believed.³³ Instead, the Court must protect rights fundamental to personal autonomy, not least as a public interest in a democracy along with the preservation of pluralism.³⁴ It is therefore proposed that religious practice in principle should include all conduct dictated by one’s conscience, using only Article 9(2) (discussed below) as a rectifying device.³⁵ In this way, the state’s burden of proving necessity of interference would be fulfilled and awareness of the need to draw up policies compatible with the rights of minorities would increase.³⁶ This idea is indeed sensible, especially if the ECtHR’s notion of religion is observed whilst excluding frivolous claims.

Consolidating the problems stemming from *Arrowsmith*, *Valsamis* and *Efstratiou*, in *Karaduman v. Turkey*, the Commission rejected a claim by a woman unwilling to have a photo taken without her headscarf, which was a condition for obtaining the graduation

²⁶ Harris DJ, O’Boyle M, Bates EP and Buckley CM, *Law of the European Convention on Human Rights*, at 433.

²⁷ Knights S, “Religious Symbols in the School: Freedom of Religion, Minorities and Education”, (2005) *European Human Rights Law Review* 499, at 516, referring to the Court’s ruling in *Valsamis v. Greece*.

²⁸ Appl.No.21787/93, (18 December 1996).

²⁹ Appl.No.24095/94, (18 December 1996).

³⁰ *Serif v. Greece*, Appl.No.38178/97, 31 EHRR 561 and *Hasan and Chaush v. Bulgaria*, at 79.

³¹ *Valsamis v. Greece*, at 31 and *Efstratiou v. Greece*, at 32.

³² *Darby v. Sweden* (1990), 187 ECtHR (A), at 45; *Buscarini v. San Marino*, Appl.No.24645/94, (18 February 1999).

³³ Martínez-Torrón J, “Religious Liberty in European Jurisprudence”, at 125.

³⁴ *Ibid*, at 125-126; Thorson Plesner I, “Legal Limitations to Freedom of Religion or Belief in School Education”, (2005) 19(2) *Emory International Law Review* 557, at 571 and 575.

³⁵ Martínez-Torrón J, *ibid*, at 124.

³⁶ *Ibid*.

certificate of the university she had attended.³⁷ By virtue of how secularism is interpreted in Turkey, the state was hence permitted to protect university students from being pressurised to comply with religious dress code. The Commission (ECommHR) reached its decision merely by pointing at its previous findings that Article 9 “does not always guarantee the right to behave in the public sphere in a way which is dictated by such a belief”.³⁸ This rather inadequate response is rightly criticised as amounting to an “avoidance of a proper *Arrowsmith* analysis of manifestation, rather than a refinement thereof”,³⁹ effectively ignoring the applicant’s rights.⁴⁰

Similarly, in another case the ECtHR used *Arrowsmith* to argue that the state measure in question was not based on the applicant’s religion or belief, but on his “conduct and attitude”, without even qualifying the link between the two.⁴¹ Until the Court modifies its approach to religious doctrine, it is appropriately criticised for focussing Article 9 interpretation on the inconsistently used *Arrowsmith* test, the scope and application of which is unsure.⁴² Indeed, this programme provides little legal certainty to potential and actual applicants.

b) Justifiable Limitations to Freedom of Religion under Article 9 ECHR

The right to freedom of religion can be restricted in accordance with Article 9(2) on the basis of a law⁴³ and the necessity “in a democratic society in the interests of public safety, for the protection of public order, health or morals or for the protection of the rights and freedoms of others”. Relevant case law has taken into account the character of the right at stake, the extent of the interference measured by proportionality to the legitimate aim, and the type of public interest at stake and the extent to which it demands protection in the actual circumstances.⁴⁴ In addition, most Convention rights, including Article 9, can be limited in cases of war or public emergencies subject to further conditions.⁴⁵ Compared to other rights, such as freedom of expression, Article 9 has one of the shortest lists of exceptions,⁴⁶ indicating its particular importance within the ECHR framework. The question of necessity

³⁷ *Karaduman v. Turkey*, Appl.No.16278/90 (1993) 74 D&R 93; also *Araç v. Turkey*, Appl.No.9907/02 (23 December 2008).

³⁸ *Şahin v. Turkey*, 2005 IX, 44 EHRR 99, at 108, making reference to *Arrowsmith v. UK*, and *C v. UK*, Appl.No.10358/83 (1983) 37 D&R 142.

³⁹ Taylor PM, *Freedom of Religion*, at 215.

⁴⁰ Marshall J, “Conditions for Freedom? European Human Rights Law and the Islamic Headscarf Debate”, (2008) 30(3) Human Rights Quarterly 631, at 643; Taylor PM, *Freedom of Religion*, at 254.

⁴¹ *Kalaç v. Turkey*, Appl.No.20704/92, (1997) 27 EHRR 552 (1 July 1997), at 27; Taylor PM, *Freedom of Religion*, at 217.

⁴² Evans C, *Freedom of Religion under the European Convention in Human Rights*, at 201-202; Knights S, “Religious Symbols in the School: Freedom of Religion, Minorities and Education”, at 516; Taylor PM, *Freedom of Religion*, at 234.

⁴³ Harris DJ, O’Boyle M, Bates EP and Buckley CM, *Law of the European Convention on Human Rights*, at 435, noting *Hasan and Chaush v. Bulgaria*, at 86, which set the standard of non-arbitrary law by demanding transparency and reasonable expectation. The cases of *Poltoratskiy v. Ukraine*, 2003-V, 39 EHRR 916 at 170 and *Kuznetsov v. Russia*, Appl.No.184/02 (2007) added that legal prescription requires a legal basis and the permission of legally granted rights.

⁴⁴ *X and Church of Scientology v. Sweden*, Appl.No. 7805/77, 16 EurCommHR 78 at 5 (1997).

⁴⁵ Article 15 ECHR includes this exception.

⁴⁶ Ovey C and White CA, *The European Convention on Human Rights*, 4th ed (Oxford: Oxford University Press, 2006), at 222.

in a democratic society, however, has often triggered controversial discussions in Article 9 cases.

Public order has, for instance, been successfully invoked by states to curb religious emanations such as activities and festivals⁴⁷ and to deny a prisoner access to a religious book containing martial art instructions.⁴⁸ It therefore appears that public order can be applied to a wide range of restrictions. The public health ground can, according to the ECtHR, for example, be used to make a Sikh clean the floor of his prison cell, a conduct by religion not permitted to a member of his caste,⁴⁹ as well as to require motorcycle helmets to be worn.⁵⁰ A national security defence was discarded due to partiality, when the state could not substantiate which objectives of the religious community constituted a threat to national security and territorial integrity.⁵¹

Finally, a striking example of balancing freedom of religion with the rights of others can be found in the subject of proselytism. In two cases, *Kokkinakis* and the later *Larissis*, the Court held that it was unnecessary to forbid converting others through “proper means”, such as “true evangelism”, and that only the use of “undue pressure” and “harassment” in a hierarchical structure would justify restrictions of religious freedom.⁵² “Improper” was to mean corrupted or aiming to gain an advantage other than conversion, exercising undue pressure on vulnerable people.⁵³ At times it is difficult to reconcile other rights with freedom of religion,⁵⁴ and assessment *inter alia* looks into the violation of the spirit of tolerance, which is also a characteristic of a democratic society.⁵⁵ States’ invocation of “the rights and freedoms of others” is, however, rightly described as “the most nebulous of the Article 9(2) criteria”,⁵⁶ leading to a broad spectrum of justifiable conduct, such as planning control for places of worship, religious clothing and compulsory car insurance.⁵⁷

⁴⁷ *Håkansson v. Sweden*, No.9820/82, 5EHRR 297 (1983) and *Chappell v. UK*.

⁴⁸ *X v. UK*, No.6886/75, 5 DR 100.

⁴⁹ *X v. UK*, No.8231/78, 28 DR 5 (1982), at 38.

⁵⁰ *X v. UK*, No.7992/77, 14 DR 234 (1978), contrary to the national level, where the exception for those wearing a turban had been granted whilst the case was pending in Strasbourg.

⁵¹ *Metropolitan Church of Bessarabia v. Moldova*, at 116 and 125.

⁵² *Kokkinakis v. Greece*, at 48 and *Larissis and others v. Greece*, Appl.Nos. 23772/94, 26377/94, and 23678/94, Judgment of 24 February 1998 (1999), 27 EHRR 329.

⁵³ *Kokkinakis v. Greece*, at 48.

⁵⁴ Confirmed in *Wingove v. UK*, 1996-V, 24 EHRR.

⁵⁵ As was reflected in *Kokkinakis v. Greece*, and *Ottc-Preminger-Institut v. Austria*.

⁵⁶ Harris DJ, O’Boyle M, Bates EP and Buckley CM, *Law of the European Convention on Human Rights*, at 436.

⁵⁷ *Vergos v. Greece*, Appl.No.65501/01, 41 EHRR 913;

Johannische Kirche and Peters v. Germany, 2001-VIII, *Dahlab v. Switzerland*, Appl.No.42393/98, 2001-V DA and *X v. Netherlands*, Appl.No.2988/66, 10YB 472 (1967).

The assertion that the ECtHR applies strict scrutiny in assessing if interferences with a right are justified and interprets the exceptions narrowly,⁵⁸ is questionable in light of the far-reaching possibilities for states to restrict freedom of religion. This problem is exacerbated by the generous use of the margin of appreciation doctrine granting states discretion in interpreting their laws,⁵⁹ a subject which has received much commentary.⁶⁰ The underlying reasoning for discretion afforded to states is the proximity enjoyed by elected representatives in relation to domestic affairs and the corresponding lack of democratic legitimacy of the ECtHR.⁶¹ From an insider perspective, making any judicial body responsible for more than 40 states act as a first instance tribunal of fact is purportedly a “sheer physical impossibility”.⁶² According to this analysis, the margin of appreciation serves to maintain a shared minimum protection of human rights across Europe.⁶³

In relation to religion specifically, it is professed that the margin’s width depends on the presence of a European-wide agreement on the issue at stake, as well as its intricacy and political susceptibility.⁶⁴ Notably, the ECtHR recognises that it is “not possible to discern throughout Europe a uniform conception of the significance of religion in society”.⁶⁵ In a multi-religious Europe, where respect is due to many religions, and concerning such an emotive subject as religion, these considerations may be a plausible motivation to leave the final decisions to the signatory states.⁶⁶ It may also be hard for the Court to appropriately assess practice of religions that have existed only for a few decades within Europe due to a gap in understanding.⁶⁷ The recommendation to use authoritative UN materials for the ECtHR to appropriately appraise cases dealing with minority religious beliefs,⁶⁸ however, would indeed be accessible and valuable in determining where states are better placed to resolve an

⁵⁸ Ovey C and White CA, *The European Convention on Human Rights*, at 222.

⁵⁹ *Handyside v. UK*, Appl.No. 5493/72, Judgment of 7 December 1976, at 48-49.

⁶⁰ Arai-Takahashi Y, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerpen, Oxford, New York: Intersentia, 2001);

Brauch JA, “The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law”, (2004-2005) 11 *Columbia Journal of European Law* 113;

Greer S, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge: Cambridge University Press, 2006);

Hutchinson MR, “The Margin of Appreciation Doctrine in the European Court of Human Rights”, (1999) 48(3) *International and Comparative Law Quarterly* 638;

Letsas G, “Two Concepts of the Margin of Appreciation”, (2006) 26(4) *Oxford Journal of Legal Studies* 705;

Lewis T, “What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation”;

see the seminal case *Belgian Linguistics v. Belgium* (No.2), Appl.No.1474/62, (1979) 1 EHRR 252 at 52 and 53 and *Rasmussen v. Denmark*, (1985) 7 EHRR 371, at 40.

⁶¹ Wheatley S, “Minorities under the ECHR and the Construction of a ‘Democratic Society’”, (2007) *Public Law* 770, at 777 and 780.

⁶² Wildhaber L, “A Constitutional Future for the European Court of Human Rights?”, (2002) *Human Rights Law Journal* 161, at 162.

⁶³ *Ibid.*, at 162.

⁶⁴ Greer S, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge: Cambridge University Press, 2006), at 224; *Rasmussen v. Denmark*, at 40.

⁶⁵ *Otto-Preminger-Institut v. Austria*, at 57.

⁶⁶ Harris DJ, O’Boyle M, Bates EP and Buckley CM, *Law of the European Convention on Human Rights*, at 440-441.

⁶⁷ *Ibid.*, at 441.

⁶⁸ Taylor PM, *Freedom of Religion*, at 351.

issue. Accordingly, when investigating state neutrality, UN materials may also provide esteemed information.

Looking back to the analysis of church-state relations in Chapter 1, their indefinable, contentious and individualistic nature would undeniably provide an impossible task for any international court to fully appreciate in the course of forming a decision on an individual's application. A wide range of church-state settings has been permitted by the ECtHR, such as national and state churches,⁶⁹ the Court thus embracing the diversity of church-state systems found across its member states.⁷⁰ Since neutrality can be incorporated under any model, the more decisive question remains how the court deals with state measures that reflect a non-neutral approach towards one or more religions. As regards neutrality, the Court has specified member states to have a "role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs" and a "duty of neutrality and impartiality".⁷¹

A general theme of favouring the member states' margin of appreciation over individuals needs to manifest religion has surfaced in a number of Article 9 applications.⁷² Conspicuous examples of this phenomenon are the refusal to consider a request for *kosher* food of a prisoner⁷³ and the plea of a student to wear a headscarf at university.⁷⁴ As a result, remarkable leeway is given to member states to justify their conduct. Taking into account the wide perception of the concepts of religion and belief, this interpretation might be regarded as a necessary counter-balance. This point, however, is of little use to anyone with a genuine claim who deserves an assessment of his or her rights. Arguing that the lack of member states' uniformity as regards religion affords a wider domestic margin, resulting in a low level of protection under Article 9, forfeits the purpose of the provision, and contravenes the view of religious pluralism as a precious asset, as declared in *Kokkinakis*.⁷⁵ Hence, religious freedom should be compromised merely to suit the current political climate. The non-uniformity argument also hinders the advancement of human rights in general, as a uniform, non-contentious issue of law across Europe is not that likely to result in applications before the ECtHR in the first place. Expectably, the below case law on religious

⁶⁹ *Darby v. Sweden* (9 May 1989), at 45.

⁷⁰ Evans C and Thomas CA, "Church-State Relations in the European Court of Human Rights", (2006) 31(3) Brigham Young University Law Review 699, at 723.

⁷¹ *Refah Partisi v. Turkey*, Appl.No.41340/98, 41342/98 and 41344/98 (13 February 2003), at 72.

⁷² Evans C, *Freedom of Religion under the European Convention in Human Rights*, at 200.

⁷³ *X v. UK*, Appl.No.5947/72 (5 March 1976).

⁷⁴ *Şahin v. Turkey*, Appl.No.44774/98 (10 November 2005).

⁷⁵ *Kokkinakis v. Greece*, at 31.

discrimination at work will touch on aspects of church-state relations and this is where further assessment is needed to determine in how far their politicisation and dissimilarity obstructs the protection of individuals.

c) Article 9 and its Application in the Work Environment

Article 9 encompasses freedom of religion in the workplace. Since the ECHR is aimed at states, this means that it applies to the state in its role as employer, as well as to the state's role as provider of employment law that needs to comply with the Convention's provisions. Early examples of case law already stemmed from the sphere of work environments and show the benchmarks. This will be discussed in detail below.

Problematically, however, the Court and Commission have severely limited the application of the ECHR to workplaces by regularly highlighting the voluntary nature of work in the context of Article 9. *Stedman*⁷⁶ and *Ahmad*,⁷⁷ for instance, are both cases that dealt with working time arrangements clashing with religious duties, in which the admissibility assessment considered as a determining factor that the applicants could stop working in their relevant jobs. Also, in the *Kalaç* case, ignoring the facts, the Court referred to the voluntary nature of the employment in the armed forces, which entails a specific choice of foregoing a number of rights, and more discipline than is acceptable in civil professions.⁷⁸ This incorrectly presumes that all employees who seek to practice their religion have a "real" choice in a competitive labour market.⁷⁹ and perhaps implies that the Strasbourg judges do not expect employers to accommodate any religious requirements. These cases may, however, be redundant since a case concluded in 2007 found a violation of Article 9 in a dismissal case without any mention of options to change employers.⁸⁰

2. The Protection from Religious Discrimination

a) The Scope of Discrimination under Article 14 ECHR

Interferences with religious practice are often inherently discriminatory, but some of these cases have been assessed under Article 9 ECHR only, since Strasbourg bodies often do not draw a clear line between the rights under Article 9 and rights derived from Article 9 in conjunction with Article 14. The Court has intensely commented on freedom of religion, but

⁷⁶ *Stedman v. UK*, Appl.No. 29107/95, European Commission of Human Rights, 9 April 1997 (Admissibility), 89-A, (1997) D&R 104, at 169.

⁷⁷ *Ahmad v. UK*, (1982) 4 EHRR 126, at 135.

⁷⁸ *Kalaç v. Turkey*, at 28.

⁷⁹ Leader S, "Freedom and Futures: Personal Priorities, Institutional Demands, and Freedom of Religion", (2007) 70(5) *Modern Law Review* 713.

⁸⁰ *Ivanov v. Bulgaria*, Appl.No.52435/99 (12 April 2007).

has not always pursued an examination of Article 14 following a finding of violation of Article 9, even if the applicants and the Commission had proposed this.⁸¹

Article 14 ECHR states that the “enjoyments of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

Although Article 14 is not a self-standing non-discrimination provision, it can be invoked due to discrimination as regards a Convention right even when the ECtHR has not asserted a violation of the right in question.⁸² Hence, cases alleging impairment to religious freedom that fail to succeed under Article 9 ECHR can still be assessed as discrimination claims in their own right. In this way, the discriminatory conduct of the state can be subject to scrutiny, even if a relevant level of violation of the right to freedom of religion itself is not reached, a fact that is often overlooked.⁸³ Indirectly, anti-discrimination law under the Convention can also serve the protection of *forum internum* rights, since their direct guarantee under Article 9 has provided difficulties for claimants.⁸⁴

Nevertheless, the fact that discrimination cases rely on a substantive right has often been criticised. The dependence on touching the scope of another Convention right, in conjunction with the judges frequently abstaining from an Article 14 assessment altogether, even in cases where discrimination is fairly obvious, indeed depreciates Article 14.⁸⁵ Accessing employment in the civil service, for instance, would not fall under the ambit of Article 14, a remarkable deficiency considering that large parts of discrimination law surround the socio-economic sphere.⁸⁶ Whereas Article 14 has made a huge impact in relation to discrimination on other grounds,⁸⁷ this cannot be said as regards religion. So far religion has not been classified by the Court as a “suspect category” for discrimination,⁸⁸ though the ECommHR usefully emphasised in its report on the *Abdulaziz* case that the presence of treaties under international law dealing specifically with a form of discrimination

⁸¹ *Smith v. Grady*, (2000) 29 EHRR 493 (27/09/1999) and *Lustig-Prean v. UK*, (2000) 29 EHRR 548 (27 September 1999).

⁸² *Abdulaziz, Cabales and Balkandali v. UK*, Appl.No.9214/80, 9473/81 and 9474/81 (28 May 1985).

⁸³ For a comprehensive discussion of the understanding of Article 14, see Baker A, “The Enjoyment of Rights and Freedoms: A New Conception of the ‘Ambit’ under Article 14 ECHR”, (2006) 69(5) *Modern Law Review* 714 and Partsch KJ, “Wertet die neuere Straßburger Judikatur das Diskriminierungsverbot auf?”, in O Due, M Lutter and J Schwarze (eds), *Festschrift für Ulrich Everling* Vol.II (Baden-Baden: Nomos, 1995).

⁸⁴ Taylor PM, *Freedom of Religion*, at 198.

⁸⁵ Leach P, *Taking a Case to the European Court of Human Rights*, 2nd ed (Oxford: Oxford University Press, 2005), at 346 and Partsch KJ, “Wertet die neuere Straßburger Judikatur das Diskriminierungsverbot auf?”, at 1056.

⁸⁶ Harris DJ, O’Boyle M, Bates EP and Buckley CM, *Law of the European Convention on Human Rights*, at 580.

⁸⁷ *Ibid.*, at 578.

⁸⁸ Unlike sex, sexual orientation, illegitimacy and nationality.

is decisive in allocating suspect grounds, a particular role being potentially identified for the ones expressly listed in Article 14.⁸⁹ In this respect religion may be given a more elevated status in the future.

Rasmussen was the first judgment to bring clarity in relation to what an examination involves.⁹⁰ Setting Article 14's requirements as entering the scope of Article 14, differential treatment, an analogy in situation, and no objective and reasonable justification. The seminal *Belgian Linguistics* case⁹¹ refined the *Rasmussen* definition, and the Court has predominantly adhered to the definition of discrimination established therein. According to this case, discrimination for the purpose of the ECHR is a differentiation of individuals in the enjoyment of Convention rights without "objective and reasonable justification".⁹² Within later decisions, slight variations of these prerequisites can be found.⁹³

Importantly, there have been also hints that indirect discrimination is *a priori* outside Article 14's scope,⁹⁴ whereas newer jurisprudence indicates its inclusion under Article 14.⁹⁵ For example, it was held that general measures disproportionately affecting a specific group falls under the ambit of Article 14, even if these do not target the affected group: "a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group".⁹⁶ Likewise, other decisions had already explained that indirect discrimination could emanate from a *de facto*, general or neutral situation.⁹⁷ Taking into account the clear stance the EU takes on tackling indirect discrimination and the tightening interaction between ECtHR and CJEU,⁹⁸ it is likely that these will influence each other.

On the matter of substantive equality and affirmative action, the ECtHR held in *Thlimmenos*, that Article 14 "is violated when States treat differently persons in analogous

⁸⁹ Harris DJ, O'Boyle M, Bates EP and Buckley CM, *Law of the European Convention on Human Rights*, at 590, quoting Lord Hoffmann in *R v. Secretary of State for Work and Pensions ex p Larson* [2005] UKHL 37 at 17.

⁹⁰ *Rasmussen v. Denmark*.

⁹¹ *Belgian Linguistics Case*.

⁹² *Ibid*, at 10.

⁹³ A difference of treatment between two persons in comparable situations in *Fredin v. Sweden*, (1991) 13 EHRR 784 and less favourable treatment to comparable group, the state's measure having to be reasonable and rational in *Abdulaziz, Cabales and Balkandali v. UK*, at 74-83, or "relevantly similar situations" in *Zarb Adami v. Malta*, 44 EHRR 49 at 71 and in *Willis v. UK*, 2002-IV 35 EHRR 547 at 48.

⁹⁴ *Dahlab v. Switzerland*, Appl.No.42393/98 (15 February 2001);

Efstathiou and Valsamis v. Greece; *Choudhury v. UK*, Appl.No.17439/90, (1991) 12 HRLJ 172.

⁹⁵ *DH and Others v. Czech Republic*, Appl.No.57325/00 (13 November 2007) and *Thlimmenos v. Greece*, Appl.No.34369/97, (2001) 31 EHRR 411.

⁹⁶ *DH and Others v. Czech Republic*, at 175 and 184 GC, under reference to *Hugh Jordan v. UK*, 2001-III, 37 EHRR 52 at 154, *Zarb Adami v. Malta*, at 76.

⁹⁷ *Zarb Adami v. Malta*, at 76; *Valsamis v. Greece*.

⁹⁸ Bowers J and Lewis J, *Special Report: Employment Law and Human Rights* (London: Sweet & Maxwell, 2001), at 115;

Lenarts K, "Fundamental Rights in the European Union", (2000) 25(6) European Law Review 575; European Agency for Fundamental Rights and Council of Europe, Handbook on European Non-Discrimination Law (Luxembourg, July 2010). <http://fra.europa.eu/en/publication/2011/handbook-european-non-discrimination-law> (accessed 15 March 2014).

situations...when States...fail to treat differently persons whose situations are significantly different.”⁹⁹ In this aspect, *Thlimmenos* is a landmark ruling with regard to substantive equality being openly included under Article 14. A permission and even potential duty for affirmative action under Article 14 has been confirmed in several cases. Positive obligations are derived from the wording “shall be secured” in Article 14, and are topical where a European-wide agreement exists or emerges.¹⁰⁰ The Court promisingly ascertained the legitimacy of such policies, as “certain legal inequalities tend only to correct factual inequalities”.¹⁰¹

Problematically, the applicant has to show most elements of discrimination, with the state only needing to respond. Unlike under EU law there is no reversal of the burden of proof provided to the applicant. The requirement to show an “analogous or similar situation” where others are treated better, and that this difference in treatment is discriminatory,¹⁰² is considerably demanding and deterrent. At least the state’s intention does not seem to be a matter to be proven by the applicant any more.¹⁰³

b) Justifying Religious Discrimination under Article 14 ECHR

A violation of Article 14 is established where a distinction is not objectively and reasonably justified in relation to the aim and effect of the distinction or there is not a proportional link between the means and the aim,¹⁰⁴ and “weighty reasons” must be found to justify any difference of treatment.¹⁰⁵ States are often merely required to show the legitimate aim justifying the measure under scrutiny.¹⁰⁶ Worryingly, a general acceptance of states’ reasoning can be observed, unless there is clearly no reasonable basis.¹⁰⁷ In *Belgian Linguistics*, for example, the implementation of language policies based on the strife for unity was held a legitimate aim.¹⁰⁸ In another case, naming the protection of the labour market and of public order was deemed a sufficient account by the state,¹⁰⁹ the same as “general measures of economic or social strategy”.¹¹⁰ A differentiating measure is only not justifiable

⁹⁹ *Thlimmenos v. Greece*, at 426.

¹⁰⁰ Harris DJ, O’Boyle M, Bates EP and Buckley CM, *Law of the European Convention on Human Rights*, at 610.

¹⁰¹ *Belgian Linguistics* at 10 PC and *Stec v. UK*, Appl.No.65731/01, (2006) ECHR 393, at 51.

¹⁰² *Tekeli v. Turkey*, Appl.No. 29865/06, (16 November 2004), at 49.

¹⁰³ *DH and Others v. Czech Republic*, at 194.

¹⁰⁴ *Belgian Linguistics* (Merits), at 5, confirmed in *Abdulaziz, Cabales and Balkandali v. UK*.

¹⁰⁵ *Hoffmann v. Austria*, (1993) 17 EHRR 293, similar to other grounds of discrimination.

¹⁰⁶ *Darby v. Sweder*, at 33;

Harris DJ, O’Boyle M, Bates EP and Buckley CM, *Law of the European Convention on Human Rights*, at 587.

¹⁰⁷ *James v. UK*, A 98 (1986), 8 EHRR 123 at 46 GC and *Stec v. UK*, at 52 GC.

¹⁰⁸ *Belgian Linguistics*, at 7 PC.

¹⁰⁹ *Abdulaziz, Cabales and Balkandali v. UK*, at 78 and 81 PC.

¹¹⁰ *Burden v. UK*, Appl.No.13378/05, (2008) 47 EHRR 38, at 60 GC.

if its essence relates to religion alone;¹¹¹ however, this has been asserted in a judgment reached by a majority of just five over four votes.¹¹² Consequently, it emerges that almost any “reasonable” explanation suffices to prove a legitimate aim.

In contrast, applicants are left to the harder task to show a lack of proportionality, and the ECtHR has also highlighted its subsidiary role compared to the national legislator.¹¹³ The margin of appreciation available to states has, therefore, also been subject to commentary with regard to Article 14. It appears that in case of proportionality of the measure to the aim, the margin will be reinforced, especially if there is no common European ground as to how the area should be regulated.¹¹⁴ Thus, the Court readily accepts arguments offered by the respondent and further narrows down the application of Article 14.

It has been observed that, in the future, the ECtHR may follow a stricter assessment of justifications for indirect religious discrimination, the same way it has evolved in relation to indirect sex discrimination.¹¹⁵ This move was achieved by claiming a consensus amongst the member states, though this was surprisingly contentious, even as regards sex equality.¹¹⁶ Due to a much more obvious lack of agreement concerning religious equality, it is perhaps unlikely that this area will measure up to jurisprudence on sex discrimination any time soon. Still, another influence in that direction may emerge because of the ECtHR’s *Demir and Baykara*¹¹⁷ case that is understood to require national law to comply with international law for the purposes of protecting individual rights.¹¹⁸ Although this case related to ILO instruments, non-discrimination law in particular has been extensively developed by the CJEU and through Directives, thus reflecting specialised expertise, as well as shared values of the EU MSs. The ECtHR may well, correspondingly, recall this section of *Demir and Baykara* and consider CJEU jurisprudence on the matter.

3. Protection from Discrimination under Protocol 12

Due to the shortcomings of Article 14, Protocol 12¹¹⁹ was added to the Convention in 2000 and ECHR signatory states are free to opt into it. In its preamble it emphasises the importance of the principle of equality before the law and lays down the intention to improve

¹¹¹ *Hoffmann v. Austria*.

¹¹² *Ibid.*

¹¹³ *Belgian Linguistics*, at 10 PC.

¹¹⁴ *Rasmussen v. Denmark*.

¹¹⁵ Ellis E, *EU Anti-Discrimination Law* (Oxford: Oxford University Press, 2005), at 321, providing the example of *Burghartz v. Switzerland*, Series A, Vol.280 (28 January 1994), where weighty reasons were demanded to justify a distinction, not just reference to traditions.

¹¹⁶ *Burghartz v. Switzerland*, dissenting opinions of Judges Vilhjansson, Pettiti and Valticos.

¹¹⁷ *Demir and Baykara v. Turkey*, Appl.No.34503/97 (12 November 2008).

¹¹⁸ Ewing KD and Hendy J, “The Dramatic Implications of *Demir and Baykara*”, (2010) 39(1) *Industrial Law Journal* 2, at 31.

¹¹⁹ Protocol No.12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No.177, 4 November 2000.

equality. The main difference in relation to the ECHR is found in its main provision, Article 1, in that it requires public authorities to guarantee a discrimination-free enjoyment of all rights “set forth by law”, as opposed to “set forth in this convention” under Article 14 ECHR. Consequently, this right can be employed together with any law, no longer only in conjunction with another Convention right. Noteworthy, this provision does not primarily aim to possess an indirect horizontal effect.¹²⁰ Moreover, the duty to “secure” the right under Article 1 of the Protocol has the potential of obliging the state to take pre-emptive measures or to provide remedies between private persons, only if “a failure to provide protection from discrimination in such relations might be so clear-cut and grave that it might engage clearly the responsibility of the state”.¹²¹

Nonetheless, this Protocol is deemed relevant at least for those areas usually regulated by law, for which the state is responsible, such as, for example, protection from arbitrary denial of access to employment.¹²² Protocol 12 can also generally help to raise the status of anti-discrimination in the CoE, which may lead to the clarification of the types of discrimination to be covered and any other factor of ambiguity produced by Article 14 jurisprudence.

For entry into force ten member states needed to sign this Protocol, a number reached in 2005. Regarding the considerable scope and the unforeseeable impact of Article 1 of Protocol 12, the continuing reluctance of the UK, France and Germany to ratify the document is not surprising, but still disappointing.¹²³ The French decision not to embrace Protocol 12 surprises, considering that France now has a strong body of anti-discrimination statutes and accordingly ought to be able to fulfil the demands of public international law with relative ease. This may point to French anti-discrimination law not being based on intentions as serious as statutory law suggests.

4. The Protection of Minorities

Under the instruments provided by the CoE, minority rights do not feature as prominently as, for instance, within the UN treaties. In particular, the ECHR does not contain a rule specifically protecting individuals belonging to a minority. After the Second World War, the “republican” view that minority rights would lead to the amplification of ethnic and religious division prevailed.¹²⁴ This formally neutral perspective often links equality to the cultural

¹²⁰ Explanatory Report to Protocol 12, at 24.

¹²¹ Ibid, at 26.

¹²² Ibid, at 25-28.

¹²³ Status on 25 March 2014, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=8&CL=ENG> (accessed 25 October 2012); just under half of the CoE member states have so far ratified Protocol 12, and Germany has at least signed.

¹²⁴ Greer S., *The European Convention on Human Rights*, at 31.

identity possessed by a state's majority population.¹²⁵ Article 14 does, however, mention "association with a national minority" as a category and case law covering the past two decades has at times dealt with the relevance of minority religions requiring protection in the context of democratic societies.¹²⁶ Overall, minorities have had to face serious obstacles to show that states do not fulfil their potential obligations to enable full enjoyment of Convention rights.¹²⁷ Nevertheless, it was held that laws regulating places of worship need to be non-arbitrary and may not be directed against minorities.¹²⁸ Ideally, the Court would transfer this specification of state neutrality towards religious manifestations, thus achieving a result of substantive neutrality. Religious minority issues often being interlinked with delicate and controversial political topics,¹²⁹ it is, however, expected that the Court continues to exercise jurisdiction over such disputes with restraint. By using authoritative UN materials, once more, the ECtHR could at least appraise cases dealing with minority religions more appropriately.¹³⁰

One unusual example of a politically sensitive minority issue, however, reflects that under certain circumstances the Court is willing to exercise some leadership over a state on a sensitive matter. The *DH* case determined that discrimination of Roma children in education had occurred. This finding might be context-specific, which is hinted at by the dissenting opinions, invoking the application's "ulterior purposes", undue consideration of statistical evidence and fear of "negative consequences for Europe".¹³¹ As way of explanation, the relevant dissenter added that a state's social context was beyond the examination by the ECtHR, which should confine itself to its judicial role.¹³² To the contrary, the majority called for an effective use of Article 14, which would be at hazard if the general picture at national level was to be neglected in the assessment of the facts of the case.¹³³ The majority also highlighted the need for compliance with EU law as a decisive factor for the outcome.¹³⁴ Prior to the judgment, the violation of Roma rights in Europe had gained some prominence in the political sphere. Perhaps the situation of Muslims in Europe will one day be seen as comparable to the one of the Roma communities, in response to reports of increasing

¹²⁵ Ibid.

¹²⁶ Wheatley S, "Minorities under the ECHR and the Construction of a 'Democratic Society'".

¹²⁷ Harris DJ, O'Boyle M, Bates EP and Buckley CM, *Law of the European Convention on Human Rights*, citing *Belgian Linguistics* as an example.

¹²⁸ *Manoussakis v. Greece*, 1996 IV, 23 EHRR 387, where the applicants had waited for more than ten years for authorisation of premises for worship.

¹²⁹ Wheatley S, "Minorities under the ECHR and the Construction of a 'Democratic Society'", at 780.

¹³⁰ Taylor PM, *Freedom of Religion*, at 351.

¹³¹ *DH and Others v. Czech Republic*, Judges Zupančič, Jungwiert and Borrego Borrego.

¹³² Ibid, Dissenting Opinion, Judge Borrego Borrego, at 5.

¹³³ Ibid, at 186 GC.

¹³⁴ Ibid, at 81-91.

Islamophobia.¹³⁵ In this case, judges may also argue in favour of effective human rights protection so that there could be a significant impact within employment law. Currently, though, in relation to freedom of religion and religious discrimination, minorities seem to have no special standing under the CoE framework.

5. The European Social Charter

Set up under the auspices of the CoE, the 1961 European Social Charter¹³⁶ (ESC) occupies itself with economic and social rights and relates to employment from the angle of working conditions and collective organisation. Being a non-enforceable instrument, the rights included are subject to a supervision process, within which signatories report every two years and receive the corresponding expert recommendations.¹³⁷ Since its revision in 1996, the ESC has also accepted collective complaints from undertakings,¹³⁸ adding to international organisations, NGOs and national workers' representatives already made eligible by virtue of an additional protocol.¹³⁹ That said, only the original Charter was ratified by the UK, France and Germany, whereas the subsequent versions still await ratification by the UK and Germany.¹⁴⁰

Article E of Part V demands assurance of the Charter's rights without discrimination based on *inter alia* religion and, in addition, the ESC aims to achieve the realisation of dignity at work. Article 26 ESC demands the ensuring of dignity by promoting consciousness and pre-emptive measures to be reached as regards "recurrent reprehensible or distinctively negative and offensive actions directed against employees", however, according to the Appendix Article 26 does not require legislation to be enacted. While the ESC contributes little additional substance to anti-discrimination provisions, it sympathetically broadens the vision and detail of where these rules are particularly relevant.¹⁴¹ The unfortunate reluctance of states to ratify the Charter's revised version, however, empties this device of its significance and potential prominence. Likewise, the ECtHR has not made extensive reference to the Charter in its judgments relating to employment law, further limiting the role of the ESC at present.

¹³⁵ Vertovec S, "Islamophobia and Muslim Recognition in Britain", in Y Haddad (ed), *Muslims in the West: From Sojourners to Citizens* (Oxford: Oxford University Press, 2002); Taylor PM, *Freedom of Religion*, at 3.

¹³⁶ European Social Charter of 18 October 1961, CETS No.35 and European Social Charter (Revised) of 3 May 1996, CETS No.163.

¹³⁷ Articles 21-29.

¹³⁸ Article D Part IV European Social Charter (Revised).

¹³⁹ Additional Protocol to the European Social Charter Providing for a System of Collective Complaints of 9 November 1995, CETS No.158.

¹⁴⁰ As of 3 March 2010, http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/SignatureRatificationIndex_en.asp (accessed 15 March 2014).

¹⁴¹ As regards EU law, Ellis E, *EU Anti-Discrimination Law*, at 324.

III. ECtHR Jurisprudence dealing with Religious Discrimination at Work

1. Discrimination based on Religious Appearance – *Dahlab v. Switzerland*

The application of *Dahlab v. Switzerland*¹⁴² surrounded a teacher who started wearing a headscarf after her conversion to Islam. No complaints were ever voiced by the school, colleagues, parents, or pupils. Still, four years later, a school inspector reported Ms Dahlab for wearing the headscarf at school and she was dismissed by the relevant authorities. Before the courts, the authorities fruitfully insisted that the removal of the teacher was necessary to maintain harmonic religious co-existence at the school and to protect public safety and order. No law prohibited dress codes informed by religious beliefs, but the national court of last instance proclaimed that only small jewellery was permitted to teachers and her appeal was accordingly dismissed.¹⁴³

In essence, the ECtHR followed the national court and replied that the application was manifestly ill-founded and therefore inadmissible. The reasoning provided is both remarkable and telling, stating that:

“it is very difficult to assess the impact that a powerful external symbol such as wearing 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.”¹⁴⁴

The judges continued, explaining that it seemed hard to reconcile “the wearing of an Islamic headscarf with the message of tolerance, respect for others, and above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.”¹⁴⁵ Resulting from this, the Court deemed the dismissal reasonable and within the state’s discretion.

A highly problematic aspect considered by Smith is that the ECtHR saw the teacher’s headscarf as a manifestation of faith, rather than mandated by her faith, which would give

¹⁴² Appl.No.42393/98, ECHR 2001-V.

¹⁴³ *Xv. Conseil d'Etat du canton de Genève*, (1997) BGE 123 I 296 at 456-457.

¹⁴⁴ *Dahlab v. Switzerland*, Appl.No.42393/98 (15 February 2001), at 17.

¹⁴⁵ *Ibid*, at 13.

her an absolute right to wear it.¹⁴⁶ According to Evans, the first limb of Article 9 has thus been narrowed down so much by the ECtHR that it has resulted in a trivialisation of the right.¹⁴⁷ It is conceivable to argue that a headscarf is an inherent demonstration of faith, as its primary purpose from a religious perspective is not to symbolise adherence to Islamic beliefs, but to preserve one's dignity and modesty. Muslim women, hence, at large wear the headscarf for the same reasons for which some female feminists abstain from emphasising their beauty. In most cases, one's perception of dignity and modesty will show externally, but this external dimension is, arguably, very secondary to the underlying intention. Moreover, an attached problem is identified, namely the Court's interference with the important opportunity of individuals to build their self-identity and autonomy through religion.¹⁴⁸ Comprehensive criticism followed the *Dahlab* judgment disclosing the many facets of the ECtHR's reasoning. It is well worth examining these points in detail, since parallel debates have taken place in France and Germany.

a) The Proselytism Argument

Plainly, one could concur with Leigh and Ahdar that the judgment omits a clear explanation of the way in which Switzerland's responsibility to protect the rights of others authorises a limitation to an individual religious display and its necessity in a democratic society.¹⁴⁹ *Dahlab* indeed starkly reflects the judges' failure to detail in which manner exactly a headscarf could influence or even proselytise children. Contemplating the hierarchical structure between teachers and pupils at school, particular care would certainly have to be applied in determining what amounts to pressure or harassment in this particular context. Upon questions from pupils, however, as to why she wore the headscarf, she made an excuse of keeping her ears warm,¹⁵⁰ thus showing alertness not to discuss her religious affiliation with children.¹⁵¹ This illustrates the lack of evidence of proselytism, but, to the contrary, that the claimant did not mention her religious affiliation.¹⁵² Thus, the judges diffused the reality that there was no occurrence of proselytism over the full period of four years by invoking unperceivable effects of the headscarf.¹⁵³ By doing so, the ECtHR cunningly discharged the defendant state from the burden of showing the necessity in a

¹⁴⁶ Smith RKM, "Unveiling a role for the EU? The 'Headscarf Controversy' in European Schools", (2007) 19 *Education and the Law* 111, at 113; also Evans C, *Freedom of Religion under the European Convention in Human Rights*, at 201, and Taylor PM, *Freedom of Religion*, at 216.

¹⁴⁷ Evans C, *Freedom of Religion under the European Convention in Human Rights*, at 201.

¹⁴⁸ *Ibid.*

¹⁴⁹ Leigh I and Ahdar R, "Post-Secularism and the European Court of Human Rights: Or how God never really went away", (2012) 75(6) *Modern Law Review* 1064, at 1076.

¹⁵⁰ *Dahlab v. Switzerland*.

¹⁵¹ Evans C, "The 'Islamic Scarf' in the European Court of Human Rights", (2006) 7(1) *Melbourne Journal of International Law* 52, at 59.

¹⁵² *Ibid.*, at 62.

¹⁵³ *Ibid.*; Thorson Plesner I, "Legal Limitations to Freedom of Religion or Belief in School Education", at 573.

democratic society of the limitation imposed.¹⁵⁴ Any policy goal such as maintenance of public order cannot be apprehended in Ms Dahlab's case.¹⁵⁵ Even in view of primary school pupils' disposition to influence by teachers, it seems unrealistic that Ms Dahlab's pupils would convert to Islam to resemble her, whilst the parents can explicitly persuade the children on religious matters followed other beliefs.¹⁵⁶

Along with Plesner, one can also doubt the objectivity and reason behind the distinction the Court made between a cross and a headscarf, according to which the former was deemed less likely to influence pupils.¹⁵⁷ The reference to effect on young children is also questionable, pursuant to the later *Lautsi* ruling, where the ECtHR declared a cross on a classroom's wall to be a passive symbol, from which no obvious influence emerges.¹⁵⁸ Equally justified is Taylor's astonishment that the ECtHR's reasoning that a headscarf "cannot be outright denied...some kind of proselytising effect" is officially phrased as a mere speculation.¹⁵⁹ These issues are to be taken seriously, since such subjectivity has already been identified in other rulings.¹⁶⁰ Criticism also includes the fact that the ECtHR did not deal with the relevance of the age of the pupils, the wide definition ascribed to proselytism as to include inactive behaviour, and the lack of actual detriment to the pupils.¹⁶¹

All in all it can be argued that the judges went to great lengths in their quest to link proselytism at all to the case in question. In reality, it seems most unlikely that a headscarf would even appeal to children, taking into account the current fashion and the related peer pressure, in addition to the inconvenience it causes to the person wearing it.

Evans presents an accurate proposition that in "the course of a single sentence in *Dahlab*, Ms Dahlab transforms from a woman who needs rescuing from Islam to an Islamic woman from whom everyone else needs rescuing",¹⁶² presuming both elusive rights of others and conduct by the teacher.¹⁶³ Thus, two kinds of stereotype are perpetuated by the Court, with the overarching thread of danger uniting the two.¹⁶⁴ In the same vein, Vakulenko exposes the creation of a vision of the headscarf as a "powerful religious symbol", contrary to Ms

¹⁵⁴ Evans C, "The 'Islamic Scarf' in the European Court of Human Rights", at 63; Thorson Plesner I, *ibid*, at 573.

¹⁵⁵ Thorson Plesner I, *ibid*, at 574.

¹⁵⁶ Evans C, "The 'Islamic Scarf' in the European Court of Human Rights", at 64.

¹⁵⁷ Thorson Plesner I, "Legal Limitations to Freedom of Religion or Belief in School Education", at 575.

¹⁵⁸ *Lautsi and Others v. Italy*, Appl.No.30814/06 (18 March 2011), at 45.

¹⁵⁹ Taylor PM, *Freedom of Religion*, at 255-256.

¹⁶⁰ For a detailed exposition of the Court's partiality in the *Refah* case, see Evans C and Thomas CA, "Church-State Relations in the European Court of Human Rights".

¹⁶¹ Langlaude S, "Indoctrination, Secularism, Religious Liberty and the ECHR", (2006) 55(4) *International and Comparative Law Quarterly* 929, at 933.

¹⁶² Evans C, "The 'Islamic Scarf' in the European Court of Human Rights", at 73.

¹⁶³ *Ibid*, at 61.

¹⁶⁴ *Ibid*, at 72-73.

Dahlab's proposition to take it "in the same way as any other perfectly inoffensive garments that a teacher may decide to wear for his or her own reasons".¹⁶⁵

b) The Sex Equality Argument

Furthermore, there are severe flaws in the ECtHR's assumption that headscarves appear "to be imposed on women" and "by a precept...laid down in the Koran".¹⁶⁶ By using the term "imposed", the judgment provides a rare negative connotation to what could be said of almost any religious practice, regardless of whether it is addressed to either one or both of the sexes.¹⁶⁷ Moreover, by using a vague notion of "precept" without specifying the actual Qur'anic verses, or underlying interpretations thereof, the ECtHR underscores commonly held stereotypes in relation to oppressed Muslim women.¹⁶⁸ Such stereotypes are hard to align with Ms Dahlab's professional, educated standing and her plausible assertion that she adopted the head-covering voluntarily.¹⁶⁹ The absence of any specification of the mentioned "precepts" also stands in contrast to the *Cha'are Shalom* judgment, where seven paragraphs were dedicated to the description of requirements for *kosher* meat.¹⁷⁰

Clarification is also needed as to where the difficulty in reconciliation of headscarf and sex equality exactly lies,¹⁷¹ otherwise the ECtHR's relevant assumption raises questions as to neutrality towards religion. Sometimes, it is proposed, issues related to sex equality are employed to augment other arguments, in cases where cultural practice of minorities is perceived as a threat.¹⁷² Ms Dahlab's own claim for sex discrimination due to Muslim men being able to teach¹⁷³ is simply rebutted with the statement that she is not dismissed as a woman, and that male teachers would be treated in the same way.¹⁷⁴ This formal approach to equality overlooks the fact that most male teachers would not face such treatment, or at least there seemingly has been no such case in Europe. Accordingly, there seems to be a double standard that she is expected to comply with the Court's ideas on sex equality whilst not being able to claim protection from indirect sex discrimination by the state.

¹⁶⁵ Vakulenko A, "Islamic Dress in Human Rights Jurisprudence: A Critique of the Current trends", (2007) 7(4) Human Rights Law Review 717, at 735, and *Dahlab v. Switzerland*.

¹⁶⁶ *Dahlab v. Switzerland*, at 10.

¹⁶⁷ Evans C, "The 'Islamic Scarf' in the European Court of Human Rights", at 65.

¹⁶⁸ Ibid; Shadid W and van Koningsveld PS, "Muslim Dress in Europe: Debates on the Headscarf", (2005) 16(1) Journal of Islamic Studies 35, at 42.

¹⁶⁹ Evans C, *ibid*, at 65 and 66.

¹⁷⁰ The Jewish Liturgical Association *Cha'are Shalom Ve Tsedek v. France*, Appl.No.27417/95 (27 June 2000), at 13-19.

¹⁷¹ Evans C, "The 'Islamic Scarf' in the European Court of Human Rights", at 66, also naming this argument as regards the *Şahin* judgment, where a medical student was similarly evaluated.

¹⁷² Marshall J, "Conditions for Freedom? European Human Rights Law and the Islamic Headscarf Debate", at 634.

¹⁷³ *Dahlab v. Switzerland*, at 7-8.

¹⁷⁴ Ibid, at 17.

Further, one could also say more pointedly that the factual diversity within Europe demands a less naive interpretation of equality.¹⁷⁵ At a practical level, the decision's outcome is counterproductive, in that it impairs Muslim women's access to and choices in employment.¹⁷⁶ Indeed, one can contend that a headscarf ban violates the principle of sex equality in that it constitutes indirect sex discrimination by seriously impairing Muslim women's opportunities in employment.¹⁷⁷ Despite the fact that in theory a ban would likely also cover religious dress worn by men such as turbans, *kippahs* and *jilbab*, these are hardly worn in Europe overall, in particular not in Switzerland, so that the claim of indirect sex discrimination could potentially be sustained. This avenue is highly relevant, in particular due to the said potential to increase social exclusion of and economic disadvantages to Muslim women.¹⁷⁸

In light of the Convention providing protection as such against sex discrimination, the ECtHR could have at least admitted the *Dahlab* case to investigate this matter. The fact that it did not, may be another hint that cases related to minority religion are not well considered or politically too sensitive. Paying little attention to the serious impact violations may have on the applicant's rights, the Court too willingly replaces examining necessity with the state's margin of appreciation.¹⁷⁹ The judges ought to recall their Article 8 rulings emphasising autonomy as a starting point to construe the ECHR's rights,¹⁸⁰ instead of focussing on speculations about individual applicants' status in terms of sex equality. Cases like *Dahlab* (and *Valsamis* and *Efstratiou*) illustrate how a perspective of accommodating, rather than one of prohibiting or merely permitting religious beliefs in the workplace, could avoid unnecessary deviations towards either irrelevant or inappropriate reflections of an applicant's autonomy, particularly unsuitable when issued by a secular institution such as the Court. Hence, whilst vouching for a formal conception of neutrality, the ECtHR fails to stay neutral itself in *Dahlab*.

¹⁷⁵ Marshall J, "Conditions for Freedom? European Human Rights Law and the Islamic Headscarf Debate", at 650.

¹⁷⁶ Thorson Plesner I, "Legal Limitations to Freedom of Religion or Belief in School Education", at 573

¹⁷⁷ Britz G, "Das verfassungsrechtliche Dilemma doppelter Fremdheit: Islamische Bekleidungs Vorschriften für Frauen und Grundgesetz", in C Müller-Magdeburg (ed), *Unsere Aufgaben im 21. Jahrhundert, Festschrift für LM Peschel-Gutzei*, (Baden-Baden: Nomos 2002), at 97-98.

¹⁷⁸ Freedland M and Vickers L, "Religious Expression in the Workplace in the United Kingdom", (2009) 30(3) *Comparative Labour Law and Policy Journal* 597, at 615;

Sacksofsky U, "Religion and Equality in Germany – The Headscarf Debate from a Constitutional Perspective", in D Schiek and V Chege (eds), *European Union Non-Discrimination Law – Comparative Perspectives on Multidimensional Equality Law* (London and New York: Routledge-Cavendish, 2009), at 362.

¹⁷⁹ Thorson Plesner I, "Legal Limitations to Freedom of Religion or Belief in School Education", at 585.

¹⁸⁰ Marshall J, "Conditions for Freedom? European Human Rights Law and the Islamic Headscarf Debate", 636 and 641, referring to *Pretty v. UK*, 35 EHRR 1 at 61 (2002), *Goodwin v. UK*, 35 EHRR 18 (2002), at 90 and *I v. UK*, Appl.No.25680/94 (2002) at 70.

c) The Intolerance Argument

Another vital reason given for the decision was that “it appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance” expected of teachers.¹⁸¹ Conclusively added by Plesner, the fact that intolerance is made part of the picture in *Dahlab* is ironic in view of the decision’s effect on women and of not tolerating signs specific to one religion.¹⁸² A critique by Taylor appears particularly appropriate:

“Even if a message at some level is conveyed by the religious dress in these circumstances, the presence of teachers representing more than one religion must surely be symptomatic of genuine pluralism in society. It may be questioned whether genuine pluralism exists in a country where teachers are not tolerated for disclosing their religious beliefs in simple forms of dress. If teachers, particularly of minority religions, are prohibited from wearing religious dress, the message is likely to be a powerful one of intolerance towards the religion concerned”.¹⁸³

Quite the opposite of the Court, preference should be given to teachers bringing proof of existing pluralism to the school environment.¹⁸⁴ Seemingly, a genuine wish for pluralism only exists if any of its forms of appearance is reflective of what the majority considers acceptable. The true religious pluralism necessary to and incorporated in democratic societies protected by the Court¹⁸⁵ remains absent.

Reversely, the dismissal of a teacher for wearing religiously motivated attire can send a far stronger message to children,¹⁸⁶ especially since her conduct as a teacher had been impeccable.¹⁸⁷ In Evans’ opinion, “the Court seems oblivious to the coercive nature of state intervention and any messages that this action might send about intolerance and discrimination”.¹⁸⁸ Edge also notes the issue of wider impact, who asks the ECtHR to be more receptive of the impact of its interpretation of pluralism.¹⁸⁹

Furthermore, the finding of intolerance stands in stark contrast to the *Gunduz* case, where a religious leader was successful in claiming an Article 10 violation due to Turkey prohibiting

¹⁸¹ *Dahlab v. Switzerland*, at 13.

¹⁸² Thorson Plesner I, “Legal Limitations to Freedom of Religion or Belief in School Education”, at 573.

¹⁸³ Taylor PM, *Freedom of Religion*, at 255-256.

¹⁸⁴ Martínez-Torrón J, “Religious Liberty in European Jurisprudence”, at 121 in fn.64; Taylor PM, *Freedom of Religion*, at 255.

¹⁸⁵ *Metropolitan Church of Bessarabia v. Moldova*, at 114.

¹⁸⁶ Evans C, “The ‘Islamic Scarf’ in the European Court of Human Rights”, at 64.

¹⁸⁷ *Ibid.*, at 65.

¹⁸⁸ *Ibid.*

¹⁸⁹ Edge PW, *Legal Responses to Religious Difference* (The Hague/London/New York: Kluwer Law International, 2002), at 127.

his radical anti-secular views.¹⁹⁰ The underlying reason for the difference between the rulings' outcomes may well be the Court's acceptance of the view that control won by women symbolises achievement in a cultural clash between secular and Muslim structures,¹⁹¹ which would explain why there is less interest to restrict male conduct.

Another forceful relevant argument is made: denying non-Christians their rights degrades human rights and undermines religious freedom and pluralism by means of employing stereotypes and prejudice, and refusing to absorb the intricacy of modern pluralism.¹⁹² Likewise, headscarf bans impacting counterproductively on already widespread anti-Muslim discrimination throughout Europe is highlighted.¹⁹³ It is indeed true that the systematic use of hypothetical arguments that vilify a religion is particularly damaging to human rights, if this concerns a minority. In this case, the problem is intensified by this minority already being a toy in the hands of the media, a reality aggravated by such jurisprudence adding a sense of legitimacy. Finally, there is also incongruity between the Court's propositions of intolerance emanating from the headscarf, on the one hand, and the CoE's "All Different – All Equal" campaign¹⁹⁴ that praises diversity and participation.

d) The State Neutrality Argument

Importantly, this judgment, in conjunction with others,¹⁹⁵ sends a clear sign that the neutrality of the state is accepted as a valid argument to set limits to those individuals who are reckoned unable to comply with it. Although similar claims from other member states may be treated differently because of the different conception of the principle of secularism (and their margin of appreciation), the *Dahlab* case seems to generalise by abstaining from any examination of neutrality under Swiss church-state relations. Agreeing with the final national level ruling that any exposition of religious affiliation can be a breach of neutrality, the ECtHR implicitly endorses formal neutrality as a viable argument for restricting freedom of religion.

Considerable sensible arguments are provided as to why the Court should have narrowed Switzerland's margin of appreciation as regards neutrality in *Dahlab*. Britz, for instance, counters that pupils can distinguish between a teacher wearing a religious symbol and this

¹⁹⁰ Highlighted by Evans C, "The 'Islamic Scarf' in the European Court of Human Rights", at 70, *Gunduz v. Turkey* (2003) XI EurCtHR 259, 262-266, 41 EHRR 59, at 61-65.

¹⁹¹ Evans C, *ibid*, at 71.

¹⁹² *Ibid*, at 73.

¹⁹³ Marshall J, "Conditions for Freedom? European Human Rights Law and the Islamic Headscarf Debate", at 643, naming the European Commission Against Racism and Intolerance's 2004 Annual Report, at 6.

¹⁹⁴ http://www.coe.int/t/dg4/youth/IG_Coop/CDEJ_en.asp and European Steering Group of the CoE youth sector, Call for Support and Active Involvement, DJS/CAMP/NCCI/(2006)/O/E, 3 (2006) at http://www.coe.int/t/dg4/youth/coe_youth/adae_campaign_EN.asp (both accessed 15 March 2014).

¹⁹⁵ *Karaduman v. Turkey*; *Şahin v. Turkey*.

not being a symbol of the state, unlike in the case of crosses being attached to a public building.¹⁹⁶ Along this line, Vickers argues that it is “questionable whether the wearing of a religious symbol by an individual member of staff in the public sector can really be said to imply state endorsement of these beliefs”.¹⁹⁷ Correctly, it is also stated in this context that a headscarf is not even a central symbol of a faith, but a secondary emanation.¹⁹⁸ Unlike, for instance, the Christian cross, the Jewish star and Muslim crescent that officially symbolise a particular religion, the headscarf is a piece of clothing worn in many varieties across religions. Accordingly, it is submitted that a teacher’s headscarf is absolutely not attributable to a state as endorsing Islamic beliefs.

Complaints are also voiced that too much leeway has been afforded to Switzerland in deciding on ‘necessity’ in the *Dahlab* decision, since there was no evidence of secularism or religious peace abstractly or concretely being interfered with.¹⁹⁹ The Court’s almost exclusive use of imprecise conditions for neutrality, marked out by the majority to justify limitations to Article 9, effectively facilitated the violation of minority rights, thus contravening neutrality’s and non-discrimination’s objectives.²⁰⁰ In any case, a mere reference to protecting secularism is not convincing, since the concept does not in itself prevent religious affiliations from translating into external signs.²⁰¹ The ECtHR could have, instead, filtered the element of neutrality from the church-state relationship and assessed whether the manner in which it is applied in Switzerland is compatible with the Convention, to ensure that the state really is the “neutral and impartial organiser of the exercise of various religions”, as stipulated in *Refah*.²⁰²

Furthermore, it is reckoned that the ECtHR’s overall attitude in *Dahlab* may reveal an unfavourable view of headscarves or Islamic precepts in general.²⁰³ Considering the choice of words in the decision, this is almost self-evident and presents a problem of religious neutrality in international adjudication. The imposition of judges’ personal views on matters of religion, equality and state neutrality²⁰⁴ contradicts another case where the ECtHR had

¹⁹⁶ Britz G, “Das verfassungsrechtliche Dilemma doppelter Fremdheit”, at 96; similarly, Czermak G, “Kopftuch, Neutralität und Ideologie”, at 944.

¹⁹⁷ Vickers L, *Freedom of Religion, Religious Discrimination and the Workplace* (Oxford and Portland, Oregon: Hart Publishing, 2008), at 160.

¹⁹⁸ Czermak G, “Kopftuch, Neutralität und Ideologie”, at 944.

¹⁹⁹ Martínez-Torrón J, “Religious Liberty in European Jurisprudence”, at 121 in fn.64; Thorson Plesner I, “Legal Limitations to Freedom of Religion or Belief in School Education”, at 572.

²⁰⁰ Thorson Plesner I, *ibid*, at 585.

²⁰¹ Knights S, “Religious Symbols in the School: Freedom of Religion, Minorities and Education”, at 514, in the context of *Şahin v. Turkey*.

²⁰² At 91, 94 and 128.

²⁰³ McGoldrick D, *Human Rights and Religion: The Islamic Headscarf Debate* (Oxford and Portland, Oregon: Hart Publishing, 2005), at 131; Smith RKM, “Unveiling a role for the EU? The ‘Headscarf Controversy’ in European Schools”, at 114.

²⁰⁴ Knights S, “Religious Symbols in the School: Freedom of Religion, Minorities and Education”, at 516; Langlaude S, “Indoctrination, Secularism, Religious Liberty and the ECHR”, at 944.

required information in curricula to be objective, critical and pluralistic.²⁰⁵ Also, in contrast to *Dahlab*, the *Lautsi* judgment offered a substantive approach to neutrality for the benefit of the state.²⁰⁶ Whether such a transformation regarding neutrality will take place remains to be seen in upcoming case law, as well as whether this will be applicable even-handedly. *Lautsi* may either indicate favouritism to the advantage of majority religion, or remarkably, a change of mind that substantive neutrality is preferable to its formal counterpart.²⁰⁷ As Leigh and Ahdar propose, the issue in *Lautsi* was not coercion exercised through the cross, but Italy's non-neutral preferential treatment of one religious community, creating an insider-outsider dichotomy.²⁰⁸ This factor, once again, casts a shadow over the Court's own neutrality regarding religion.

e) Further Considerations pursuant to *Dahlab* – The *Şahin* Judgment

In *Şahin*, a medical student was unable to continue her studies in Turkey, because the (public) university she attended prohibited students from wearing religious symbols on their premises, in particular headscarves and long beards.²⁰⁹ The decision reiterated the verdict found in *Dahlab* on sex equality, this time vehemently opposed by Judge Tulkens, who disapproved of the Court's appraisal of the headscarf as antagonistic to sex equality, tolerance, respect and non-discrimination.²¹⁰ Her view has been widely applauded,²¹¹ with particular praise for exposing the Court's paternalistic approach, imposing its viewpoint of the headscarf on the applicant whilst ignoring women's voices as to a headscarf's meaning. Judge Tulkens also criticises that the Court offers no indication as to how the ruling will improve sex equality and that it disregards the harm it inflicts on women who will be excluded from work and education.²¹² This pragmatic, case-by-case outlook is certainly preferable for the reasons stated with regard to *Dahlab*. The refusal to address Ms Dahlab's and Ms Şahin's claims of sex discrimination to their disadvantage reflects a formal equality approach, looking at the implications of religion for sex equality in abstract, rather than for certain

²⁰⁵ *Folgerø v. Norway*, 46 EHRR 1147, at 84 GC.

²⁰⁶ Leigh I and Ahdar R, "Post-Secularism and the European Court of Human Rights", at 1094.

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*, at 1095.

²⁰⁹ *Şahin v. Turkey*, Appl.No.44774/98 (10 November 2005).

²¹⁰ *Ibid.*, Judge Tulkens at 12.

²¹¹ Evans C, "The 'Islamic Scarf' in the European Court of Human Rights", at 68-69; Knights S, "Religious Symbols in the School: Freedom of Religion, Minorities and Education";

Martínez-Torrón J, "Religious Liberty in European Jurisprudence";

McGoldrick D, *Human Rights and Religion: The Islamic Headscarf Debate*;

Vakulenko A, "Islamic Dress in Human Rights Jurisprudence: A Critique of the Current Trends".

²¹² Evans C, *ibid.*, at 68-69, under reference to Tulkens para 12 and Marshall J, "Conditions for Freedom? European Human Rights Law and the Islamic Headscarf Debate", at 649.

women in particular,²¹³ without the theological expertise that would be warranted to make such assertions. Interestingly, the Turkish judgment that led to *Şahin* may have simply been motivated by the will to demonstrate an unmistakable line on sex equality, in order to improve chances of joining the EU.²¹⁴

In *Şahin*, the judges reiterated²¹⁵ a vital comment on the margin of appreciation given to States within the framework of Article 9: it is impossible to conceive a homogeneous understanding of the significance of religion in society due to varying rules based on traditions and, therefore, a wide discretion is required.²¹⁶ Employing discretion in favour of the state in *Şahin* is even more absurd than in *Dahlab*, since the Court disregarded the fact that at university level there is a high level of consensus in Europe that religious dress is permitted.²¹⁷ Therefore, the dissenting judge coherently argued that Turkey's margin of appreciation needed to be reduced due to uniformity across Europe.²¹⁸ Leaving the decision to the discretion of the national authorities is also, again, viewed as watering down Article 9, in particular in comparison to other rights and freedoms.²¹⁹

Similarly to Ms Dahlab, the applicant in *Şahin* had explicitly detailed the compatibility of the headscarf with the principle of secularism.²²⁰ A majority of judges chose to follow the Turkish government's counter-argument that headscarves can be associated with religious fundamentalism, thereby threatening secular values.²²¹ Consequently, a substantial denotation was affixed to the headscarf and its effect on others,²²² and it became possible to construct the presence of 'necessity' in a democratic society. A decisive reason for the case's outcome being church-state relations, the ECtHR expressed understanding for the university's promotion of a secular environment and concern with the existence of "extremist political movements" imposing their values on Turkish society.²²³ On the surface, the argument of extremism appears stronger than the mere issue of exposure to a religious symbol in its purely religious role, due to the potential effects being of a severer nature. It is, however, exceptionally far-fetched to link any standard religious symbol with any form of

²¹³ Vakulenko A, "Islamic Dress in Human Rights Jurisprudence: A Critique of the Current Trends", at 731.

²¹⁴ Wiles E, "Headscarves, Human Rights, and Harmonious Multicultural Society: Implications of the French Headscarf Ban for Interpretations of Equality", (2007) 41(3) Law & Society Review 699, at 710.

²¹⁵ See previous remarks in *Ottc-Preminger Institut v. Austria* and *Müller v. Switzerland*.

²¹⁶ *Şahin v. Turkey*, at 109.

²¹⁷ Evans C, "The 'Islamic Scarf' in the European Court of Human Rights", at 57-58.

²¹⁸ Dissenting Judge Tulkens, *Şahin v. Turkey*, at 3-5.

²¹⁹ Lewis T, "What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation", at 399.

²²⁰ *Şahin v. Turkey*, at 85.

²²¹ *Ibid*, at 90-93.

²²² Harris DJ, O'Boyle M, Bates EP and Buckley CM, *Law of the European Convention on Human Rights*, at 437.

²²³ *Şahin v. Turkey*, at 115-116.

extremism, so that Turkey's claim makes no sense in the first place. Ms Şahin had, in addition, also stated that she had no connection to political Islam and assured her dedication to the Turkish constitution.²²⁴ Again, the woman's own account does not seem to affect the outcome of her case. Doubts are raised as to the reasonableness and oversimplification of the decision, as statistics seem to reflect that about 77% of Turks favour the existing secular model and roughly the same percentage of households involve at least one woman who wears a headscarf.²²⁵ Allowing the Turkish government's submission of the state neutrality argument, the Court, once again, supported any kind of conceivable interpretation of secularism. It is a useful example, at least, that even secularism with a formal form of neutrality, in this case arguably amounting to fundamentalist secularism, is as such permissible under the ECHR. The result is, however, unsatisfactory since Article 9's scope of protection is narrowed down significantly. It therefore stands to reason that the Court unconvincingly used the margin of appreciation principle in this case.²²⁶

The ECommHR also suggested that, in jurisdictions with a majority religion, the appearance of symbols and rites associated with this religion can pressurise others.²²⁷ From this, one could draw the reverse conclusion when the exercise of minority religions is at stake, so that in these cases there would be no such pressure and therefore less ground for restrictions to such manifestations. Seemingly, any such considerations were, however, not on the mind of the judges reaching a decision such as in *Dahlab*. Although the ECtHR underlined that the analysis adopted in *Şahin* is not transferable to other national contexts,²²⁸ one should contend that other strictly secular states such as France have subsequently applied a similar rhetoric in their judgments, possibly in anticipation to comply with Strasbourg jurisprudence.²²⁹

²²⁴ Ibid.

²²⁵ Human Rights Watch, "Memorandum to the Turkish Government on Human Rights Watch's Concerns with Regard to Academic Freedom in Higher Education and Access to Higher Education for Women who wear the Headscarf", 29 June 2004, www.setav.org/ups/dosya/24491.pdf (accessed 15 March 2014), argued by Wiles E, "Headscarves, Human Rights, and Harmonious Multicultural Society: Implications of the French Headscarf Ban for Interpretations of Equality", at 710.

²²⁶ Evans C, "The 'Islamic Scarf' in the European Court of Human Rights", at 58.

²²⁷ Commission, *Şahin v. Turkey*.

²²⁸ *Şahin v. Turkey*.

²²⁹ *Doğru v France*, Appl.No.27058/05 (4 December 2008);

Aktas v. France, Appl.No.43563/08;

Bayrak v. France, Appl.No.14308/08;

Gamaleddyn v. France, Appl.No.18527/08;

Ghazal v. France, Appl.No.29134/08;

Singh v. France, Appl.No.25463/08;

R Singh v. France, Appl.No.27561/08;

contrary to Wiles E's expectation, who had taken into consideration that the context-specific point in *Şahin* may have hinted at another outcome in a potential application from France, bearing in mind that fundamentalist Islam is more likely to pose a threat in Turkey than in France, Wiles E, "Headscarves, Human Rights, and Harmonious Multicultural Society: Implications of the French Headscarf Ban for Interpretations of Equality", at 729.

This case further indicates that the Court is willing to compromise individual rights, seemingly by way of arguing that any principle of secularity or neutrality prevails over religious freedom, thus following its opinion in *Dahlab*. The judges' opinion that perceptions about church-state relations differ appears to be correct; however, this is a very abstract view of an umbrella term, which includes many subtopics that require a separate assessment.²³⁰ Dissenting Judge Tulkens thus advises that in a democracy the tenets of secularism, equality and freedom need to be reconciled and not traded off one for the other.²³¹

Deservedly, the Court received substantial disapproval following this ruling, in relation to the lack of assessment of the arguments presented by the respondent regarding secularism and proportionality to the aim, amongst several other points.²³² Not only these arguments need to be considered, but also weighty emphasis needs to be placed on the effect of such jurisprudence, such as the imposition of fundamentalist secularism, the exacerbation of the detriment experienced by Muslim women, and the depiction of Islam and democracy as irreconcilable.²³³ Otherwise, the insincere reasoning of the Court in both *Dahlab* and *Şahin* may indeed foster a negative and extremist response from groups seeking power through those frustrated by such cases and yielding followers of their views, who would otherwise take little or no interest in such politics. In the light of the severity and coherence of criticism, the Court's rulings on religious dress have arguably received the most negative appraisal of all areas of jurisprudence.²³⁴

With regard to this thesis' assessment of compatibility, the religious dress cases will also be particularly decisive, though perhaps not transferable to the UK, French and German contexts. *Şahin* can be seen as symptomatic of a Turkish setting only, where secularism surfaces in a particularly intense form. Still, French secularism appears very close to the Turkish form. In effect, the *Şahin* ruling clearly approves and reinforces the ECtHR's stance in *Dahlab*, making a different outcome in future cases improbable. Yet, regarding the overwhelming support in the literature for Ms Dahlab's cause, as well as Judge Tulkens opinion in *Şahin*, results in other cases may well depend on the individual judges' willingness to deflect from existing jurisprudence.

²³⁰ Evans C, "The 'Islamic Scarf' in the European Court of Human Rights", at 58.

²³¹ Judge Tulkens, *Şahin v. Turkey* at 5.

²³² Knights S, "Religious Symbols in the School: Freedom of Religion, Minorities and Education", at 513 and 514; Lewis T, "What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation", at 408.

²³³ Evans C, "The 'Islamic Scarf' in the European Court of Human Rights", at 52-73 and Vakulenko A, "'Islamic Headscarves' and the European Convention on Human Rights: An Intersectional Perspective", (2007) 16(2) *Social & Legal Studies* 183, at 190.

²³⁴ Harris DJ, O'Boyle M, Bates EP and Buckley CM, *Law of the European Convention on Human Rights*, at 438.

More recently, the Parliamentary Assembly of the CoE issued a Resolution in reaction to some member states' new or scheduled legislation banning the *burqa* or *niqab* in public spaces.²³⁵ This document declares that a prohibition of the two items may be necessary in refined contexts, such as security-related and professional surroundings.²³⁶ However, it goes on to clarify that a generally applicable ban constitutes a violation of the women's right to cover their face.²³⁷ More specifically, the Assembly considers a general ban in public as preventing equal opportunities through further alienation from work and education.²³⁸ This reaction is highly relevant, since it proclaims agreement with women who cover their faces to be employees. Whether the Court would follow this proposition is another matter.

f) Wearing Crosses in the Workplace – The Rulings in *Eweida* and *Chaplin*

An issue linked to headscarves may be the wearing of Christian crosses, since both items are visible markers for adherence to a particular religion. The ECtHR jointly decided on jewellery crosses in the workplace in the cases of *Eweida and Chaplin*.²³⁹ The *Eweida* case involved the wearing of a cross attached to a necklace by a member of British Airways ground staff. Uniform policy at the time stated that mandatory religious accessories or clothing were allowed in conjunction with the airline's uniform, if these cannot by nature be hidden. In practice, this meant that, for instance, Muslim headscarves and Sikh turbans in certain colours were permitted, as were Sikh bracelets and *kirpan*.²⁴⁰ Ms Eweida wore the cross under her clothing, but then decided to show commitment to her faith by revealing it. Upon request she refused to hide her cross, leading to suspension, and refused the offer of an alternative, equally paid position without customer contact.²⁴¹ After considerable media coverage British Airways decided to amend the uniform policy to allow for Christian crosses and the star of David to be worn visibly.²⁴² Ms Eweida returned to work, but was not compensated for her loss of earnings. National level courts of all three instances found no case of discrimination as such,²⁴³ and therefore, did not arrive at an assessment of proportionality.

²³⁵ Parliamentary Assembly, Council of Europe, Resolution 1743 (2010), "Islam, Islamism and Islamophobia in Europe" (23 June 2010).

²³⁶ *Ibid*, at 16.

²³⁷ *Ibid*.

²³⁸ *Ibid*, at 17.

²³⁹ *Eweida and others v. UK*, Appl.No. 48420/10, 59842/10, 51671/10 and 36516/10 (15 January 2013).

²⁴⁰ *Ibid*, at 10–11.

²⁴¹ *Ibid*, at 12.

²⁴² *Ibid*, at 13.

²⁴³ For details of the domestic court decisions, see Chapter 4.

The ECtHR decided in favour of Ms Eweida based on a violation of Article 9. The judges considered visibly wearing a cross at work a religious manifestation,²⁴⁴ and also found an interference with her right of freedom of religion in that she was not permitted to work for several months.²⁴⁵ On the question of whether the domestic law sufficiently secured Ms Eweida's rights, the Court deemed the relevant courts had offered a detailed examination in the absence of law on religious clothing or items carried at work.²⁴⁶ The Court's assessment of proportionality, however, determined that a fair balance had not been struck. Emphasising the importance of Article 9, the judgment commenced, a "healthy democratic society needs to tolerate and sustain pluralism and diversity...also because of the value to an individual who has made religion a central tenet of his or her life to be able to communicate this belief to others".²⁴⁷ Corporate image was as such a legitimate aim, but had been accorded too much weight in comparison to Ms Eweida's desire to manifest her religious belief. Regarding the latter aspect, the judges took into account the discreet nature of her cross that did not impair her professional appearance, the lack of evidence that other religious clothing had caused relevant problems, and the ability of the employer to amend the policy which showed that previous rules were dispensable.²⁴⁸ Finally, since no interests of other individuals were invaded, the national authorities had breached their positive obligation to protect Ms Eweida.²⁴⁹

Still, no loss of earnings were awarded because of refusing alternative work and covering expenses from other sources during the relevant time (including donations), but damages included only legal expenses and €2,000 non-pecuniary damage for "anxiety, frustration and distress".²⁵⁰ This level of compensation and the substantive findings in *Eweida* are to be praised. The contested policy's aim to promote a certain image as such is credible, however, not in this case where the image is intact despite other, comparable items indicating employees' religious affiliation. The element of "mandatory" was therefore unnecessary to consider, especially since this positioned the company in a place, where it had to decide on religious dogma.

The *Chaplin* case also involved an employee's wish to wear a cross on a chain whilst working. This case related to the redeployment of a nurse whose employer's health and

²⁴⁴ *Eweida and others v. UK*, at 89.

²⁴⁵ *Ibid*, at 91.

²⁴⁶ *Ibid*, at 92.

²⁴⁷ *Ibid*, at 94.

²⁴⁸ *Ibid*.

²⁴⁹ *Ibid*, at 95.

²⁵⁰ *Ibid*, at 114.

safety policy did not permit necklaces to prevent cross-infection. Religious and cultural items were subject to approval, which should not be unreasonably withheld. Evidence showed that other nurses were not permitted to wear *kirpans*, bangles and only close-fitting headscarves were approved.²⁵¹ Ms Chaplin in the Court's view credibly argued that the removal of the cross amounted to a violation of her faith (including the biblical duty to evangelise and enhanced personal accountability).²⁵²

For the same reasons as in *Eweida*, the Court held that there had been an Article 9 manifestation, as well as interference. The crucial difference to *Eweida*, nevertheless, were the undisputed health and safety reasons specified by Ms Chaplin's employer.²⁵³ The importance of being able to wear the cross was still high, but the reasons for removal far weightier than in *Eweida*. Since the hospital was better placed to make clinical decisions than the Court, a wide margin was appropriate.²⁵⁴ Hence, the judges swiftly established a proportional measure, necessary in a democratic society based on balancing these factors, this excluding both a violation of Article 9 and Articles 14 and 9 in conjunction.²⁵⁵ Considering the clear health and safety concerns of Ms Chaplin's employer, it is surprising that she attempted to raise her case in Strasbourg. Perhaps this action was due to support from a lobby group, but even then remains the question of why this group would have supported a fairly clear-cut case. It is almost inconceivable that the ECtHR could have come to another conclusion than it did.

The *Eweida* and *Chaplin* cases both show that the Court passes plausibly argued religious duties as manifestations, whether traditional or not, as manifestations as protected under Article 9, possibly exceeding the "normal and recognised" forms as per *Arrowsmith*. Unlike the UK's proposition, the Court rightly refrained from denying interference because of the choice to resign as has been done in older jurisprudence.²⁵⁶ *Eweida* and *Chaplin* provided the ECtHR with the opportunity to reinforce its more sophisticated, nuanced approach as surfaced in *Lautsi*, with a careful assessment in terms of justification.²⁵⁷ Although the ruling had deliberated that there is no uniformity in regulation of religious symbols at work across

²⁵¹ Ibid, at 19.

²⁵² Ibid, at 18 and *Chaplin v. Royal Devon & Exeter Hospital NHS Foundation Trust*, ET 172886/2009 (21 April 2010).

²⁵³ *Eweida and others v. UK*, at 98.

²⁵⁴ Ibid, at 99.

²⁵⁵ Ibid, at 100-101.

²⁵⁶ *Eweida and Chaplin* Respondent's Observations, "Observations of the Government of the United Kingdom", Foreign and Commonwealth Office (14 October 2011), at 11.

²⁵⁷ Leigh I and Ahdar R, "Post-Secularism and the European Court of Human Rights: Or how God never really went away", (2012) 75(6) *Modern Law Review* 1064, at 1078.

Europe, this issue being largely unregulated,²⁵⁸ the judges sufficiently explored the interests at stake and, thus, engaged in an authentic examination of the facts at hand. Accordingly, they cannot be accused of having used the margin of appreciation doctrine to undermine Article 9 protection. This is, perhaps, due to the absence of politically contentious subject matter in the two cases, however, in effect has led to suitably differentiated, workable solutions.

2. Religious Discrimination related to Hours of Work

Two cases may tentatively show the position of the Commission related to a subsequent adjustment of working time on religious grounds, however, neither was declared admissible and therefore conclusions are limited. In *Stedman*²⁵⁹ the employer had not accepted a refusal to sign up for work on Sundays, this being on grounds of religious requirements of the employee's Christian faith. She was dismissed and did not succeed before the national courts in establishing unfair dismissal. Despite their recognition that there was a religious motive behind her conduct, the Commissioners declined an examination of Article 9, because they saw the dismissal as being based on her refusal to sign the amended contract and not based on her religion.²⁶⁰ The Commission also found no discrimination, due to a lack of differential treatment, thus seemingly disregarding the possibility of indirect discrimination. Instead, the Commissioners highlighted that her dismissal was due to her refusal to work specific hours, not the refusal to work on Sundays. This outcome seems almost absurd, being based on twisting words. It is seen as dissatisfactory, since the alternative to resign is not personally or economically viable for most employees and thus does not constitute a realistic choice.²⁶¹ Taking this into account, the possibility of resigning is not suitable as a marker for non-assessment of a case's facts in the work context.²⁶² It seems that the Commission tried to escape having to assess the issues at hand by highlighting a technical detail that would apply in any applicant's case. *Stedman* may also show, in conjunction with the use of the margin doctrine in cases related to religion, that the Strasbourg actors are generally reluctant to decide on applications with a potentially political flavour.

²⁵⁸ *Eweida and others v. UK*, at 47.

²⁵⁹ *Stedman v. UK*.

²⁶⁰ *Ibid*, at 2; the same conclusion was reached in *Konttinen v. Finland*, Appl.No.24949/94, (1996) 87-A DR 68.

²⁶¹ Hambler A, "A Private Matter? Evolving Approaches to the Freedom of Manifesting Religious Convictions in the Workplace", (2008) 3(2) Religion and Human Rights 111, at 115-116.

²⁶² Collins H, "The Protection of Civil Liberties in the Workplace", (2006) 69(4) Modern Law Review 619, at 626.

In the second case of *Ahmad*, an Article 9 application was also not admitted, where a Muslim schoolteacher had asked for an extension of his Friday lunch break to be able to attend congregational prayer.²⁶³ The ECommHR first determined whether the school had attempted reasonable accommodation. Still, it did not go into the substance of the claim and was satisfied with the school's arguments in this regard. Thus, considerable discretion was awarded to the employer to timetable classes in a way that prevented the teacher from attending Friday prayers.²⁶⁴ Hence, the *Stedman* and *Ahmad* cases are examples of the difficulty in bringing a claim for indirect discrimination due to working hour arrangements under certain circumstances.²⁶⁵ These cases are also a sign of the absence of substantial discussion around possible accommodation of employees' religious needs, although the consideration of accommodation despite the ECHR's silence on the matter is a sign of progressive interpretation.

Based on a dissimilar rationale, another case saw the Commission rejecting the claim of a Seventh Day Adventist who required leaving work early on occasional Fridays to observe *shabbat*. There was no admission due to lack of difference in treatment, for the reason that, under Finnish law, Sunday had been assigned as a day of rest, to the end that all communities can have a guaranteed day of rest.²⁶⁶

The outcome of these cases is unfortunate, since the accommodation of working hours and days of rest can sometimes be a simple and realistic option to reconcile the interests involved.²⁶⁷ Had the cases been admitted to the Court, the outcome may have been more advantageous for the employees.

Caution is, nevertheless, called for in view of the above cases and perhaps also the *Kosteski* judgment, in which absence to comply with a religious holiday was not accepted as a religious manifestation due to the employee not having "substantiated the genuineness of his claim to be a Muslim".²⁶⁸ Doubting the religious affiliation of a person can pose an insurmountable hurdle for any applicant. The particular facts in the *Kosteski* case, however, may have warranted caution, as the applicant had not only taken Christian holidays, but also refused to provide evidence of his religious adherence.²⁶⁹ Whereas one may debate the

²⁶³ *Ahmad v. UK*, (1982) 4 EHRR 126.

²⁶⁴ Taylor PM, *Freedom of Religion*, at 240.

²⁶⁵ Taylor PM, *Freedom of Religion*, at 189 as regards *Stedman v. UK* and *Konttinen v. Finland*.

²⁶⁶ *Konttinen v. Finland*.

²⁶⁷ A detailed discussion of accommodation as a legal concept will follow in Chapter 4.

²⁶⁸ *Kosteski v. Former Yugoslav Republic of Macedonia*, Appl.No. 55170/00 (13 April 2006), 45 EHRR 712, at 39.

²⁶⁹ *Ibid.*

Court's acceptance of these arguments, the applicant besides had given only a day's notice of his absence during a busy week, which poses an unreasonable practical burden on employers in this situation.

In contrast, some discern a rearrangement of this jurisprudence in more recent decisions towards a more creative interpretation.²⁷⁰ In view of the newer judgment in *Thlimmenos*, comparable future cases may indeed find a different end, since now the failure to differentiate between different situations of employees can amount to discrimination in accordance with Articles 9 and 14.²⁷¹ This may in fact be most useful in cases dealing with working days and hours. However, the general difficulty for small size enterprises to manage a variety of days of rest and the absence of European-wide consensus on such matters may impose further obstacles for applicants. For a change in the prevalent jurisprudence to happen, the ECtHR would first have to establish a clear line on necessity of interferences or accommodation of religious requirements. Furthermore, the established approach entails a disregard for minority religions in cases where employment is arranged around the Christian calendar in predominantly Christian states. It is pointed out that, in such a scenario, Christians would actually more easily find alternative suitable jobs than others.²⁷² This leads on to the argument that the Court frequently reflects a bias towards majority religions.²⁷³ To be fair, the Strasbourg judges have to deal with the majoritarian calendar and its impact on workplaces as a *status quo* and could in any case not go beyond examining whether employment law fulfils the requirements of some form of reasonable accommodation.

3. Other Scenarios of Discrimination based on Religion in the Work Environment

a) Membership to Religious Institutions

The *Ivanova* case was concerned with a school mechanic being dismissed purely for her membership to Word of Life. The success of this application was based on the government submission being confusing and paradoxical, on the one hand highlighting the need for protecting the secular school environment from proselytism, on the other hand asserting the dismissal was purely for managerial reasons and not linked to her religion at all.²⁷⁴ Based on this, in conjunction with the absence of any proof of the applicant's proselytising at school and evidence of general religious discrimination in Bulgaria, the Court found in favour of the

²⁷⁰ Harris DJ, O'Boyle M, Bates EP and Buckley CM, *Law of the European Convention on Human Rights*, at 434-435.

²⁷¹ *Thlimmenos v. Greece*.

²⁷² Harris DJ, O'Boyle M, Bates EP and Buckley CM, *Law of the European Convention on Human Rights*, at 434.

²⁷³ Gunn TJ, "Adjudicating Rights of Conscience under the European Convention on Human Rights", in JD van der Vyver and J Witte (eds), *Religious Human Rights in Global Perspective – Legal Perspectives* (The Hague/Boston/London: Martinus Nijhoff, 1996), 305, at 329.

²⁷⁴ *Ivanova v. Bulgaria*, at 82.

applicant. Usefully, the Court included in the decision an examination of reports from the European Commission against Racism and Intolerance, as well as from Human Rights Watch and a local NGO, all confirming increasing intolerance against minority and new religions, as well as dismissals from the public sector because of religion.²⁷⁵ Whether a similar grounded, fact-related approach will be employed in future case law remains to be seen. The use of empirical findings is refreshingly positive, however, this ruling does not permit conclusions as to a willingness to scrutinise the genuine nature of state neutrality arguments due to the contradictory submission of the respondent state in this regard in this particular case.

b) Oath Requirements

A single and very specific example concerning parliamentarians at the onset of their functions was filed against San Marino. The result of the judgment was that no one can be forced to swear on the bible as a prerequisite to enter their profession, as such a condition was held to violate Article 9 of the Convention.²⁷⁶ The judges could not find a necessity in a democratic society to declare a religious belief one does not endorse and considered that a plurality of views had to be represented in parliament.²⁷⁷ No response was given to the state's submission that its margin of appreciation had to be respected, likely due to the Commission's and Court's straightforward conclusion as to a violation.

c) Proselytism in the Workplace

In *Larissis*,²⁷⁸ the judges revealed the most important features of proselytism at work, namely the specific environment in and circumstances under which it takes place. Three Pentecostal air force officers claimed an Article 9 violation due to their conviction of proselytism under criminal law, leading to probation sentences in response to their missionary activities. The ruling made a distinction, finding a violation as regards the officers' activities aimed at civilians, since there was no power imbalance,²⁷⁹ but accordingly rejected the application as far as religious freedom within the military environment goes, because there, colleagues of lower ranks may feel pressurised to comply with the advances.²⁸⁰

In another instance, the ECommHR agreed with the dismissal of a teacher of subjects other than religious education, who displayed materials opposing abortion in class, due to his

²⁷⁵ Ibid, at 65-68.

²⁷⁶ *Buscarini v. San Marino*.

²⁷⁷ Ibid, at 34 and 39.

²⁷⁸ *Larissis and others v. Greece*.

²⁷⁹ Ibid, at 59.

²⁸⁰ Ibid, at 51 and 54.

religious convictions in this regard.²⁸¹ This outcome seems reasonable in view of the teacher being employed to teach specific subjects, abiding by the curriculum and the impression he would have made on pupils when he presented materials outside the expected field. Instances of proselytism in the workplace are, overall, treated somewhat unfavourably. This is welcomed since active advances made towards colleagues and those receiving services can easily be perceived as harassment. In contained surroundings, such as most workplaces, annoyance is likely to occur since the recipients of the unsolicited religious advice cannot escape with ease. Any employer, finally, also has a legitimate interest that working time is used for its designated purpose and not for personal motives. Hence, proselytism is misplaced in all types of employment, be it public or private sector.

d) Favouritism in the Workplace

In *Kalaç v. Turkey*,²⁸² an officer was forced to retire from the armed forces due to breaches of discipline and scandalous behaviour, because his views were claimed to reveal illegal fundamentalist religious attitudes. Indeed, the officer was associated with a controversial religious faction and had intervened to appoint members of his religious group into the army.²⁸³ The Court applied the *Arrowsmith* test and determined that Article 9 does not protect such conduct, even if motivated or inspired by religion, and that individuals have to take into consideration their specific situation and position. These demands, applied to Mr Kalaç's case, were seen as imposing certain (expectable) restrictions on army personnel, even if these are not acceptable in a civil environment.²⁸⁴ Such a conclusion should, however, also apply outside the armed forces, since even in employment outside the army, helping certain persons to enter a post on grounds of their religious affiliation can be seen as inadequate.

Problematically, the Court also informed that Mr Kalaç's right to freedom of religion was not infringed, since he had been able to "fulfil the obligations which constitute the normal forms through which a Muslim practices his religion".²⁸⁵ Whereas this conclusion is suitable for the *Kalaç* judgment, such statement entails the judges seemingly thinking of themselves as generally capable to decide what is usual or not as regards the practice of a religion. Therefore, this judgment falls prey to the criticism voiced as regards the *Arrowsmith*

²⁸¹ *X v. UK*, Appl.No.8010/77, (1979) 16 D&R 101.

²⁸² Appl.No.20704/92 (1 July 1997), (1999) 27 EHRR 552.

²⁸³ *Kalaç, v. Turkey*, at 25.

²⁸⁴ *Ibid*, at 28. This reasoning was also applied in *Yanasik v. Turkey*, 16 EHRR CD5 (1993), where a student was dismissed from a military academy because of his involvement in religious fundamentalist activities.

²⁸⁵ *Kalaç, v. Turkey*, at 29.

principle. Applying the reasoning to religious dress and holidays in the workplace, one may argue, though, that these are clearly known forms of practicing religion and that an interference with these would, therefore, always constitute a limitation to freedom of religion, albeit one that may be justified. For that reason, any religious dress and holiday case should pass the hurdle of admissibility to the ECtHR. What this point may also show, is that the Court accepts that even in an army context employees ought to be able to practice their religion to some extent. Notably, the judges took into account the fact that the Turkish military facilitates religious requirements, such as prayer and fasting.²⁸⁶ Accordingly, if employers initiate religious accommodation, such as the provision of a prayer room, this may then be an aspect to be used in their favour in future cases.²⁸⁷

e) Incompatibility of Religious Manifestations with the Rights of Clients and Colleagues not to be Discriminated Against on other Grounds

The applications of *Ladele and McFarlane*²⁸⁸ from the UK were heard jointly before the ECtHR and shed light on the paramount and intricate question of the manifestations of religious beliefs of employees colliding with the right not to be discriminated against of service recipients and colleagues. Ms Ladele believed that same-sex marriages are contrary to “God’s law” which as a Christian she had to adhere to.²⁸⁹ She worked as a registrar of marriages at a council that endorses a “Dignity for All” policy issued for the benefit of staff, residents and service users, that included the promotion of equal access to council services and the removal of barriers to obtaining employment and services. The policy explained that disciplinary action was to be taken, if employees failed to promote the policy’s values or did not work within the policy. Unlike in other councils did after the introduction of the Civil Partnership Act in 2005, no opt-out schemes for those with religious objections were introduced.²⁹⁰ Initial, alternative arrangements had come to a halt when complaints were filed by two colleagues regarding rota difficulties and the burden on others, as well as by two homosexual colleagues who felt victimised.²⁹¹ The employer ignored Ms Ladele’s plea to be accommodated and announced that she will be dismissed for non-compliance with the

²⁸⁶ Ibid.

²⁸⁷ In the UK, the argument of a school offering uniforms that accommodate religious requirements was applied to the detriment of a pupil whose religious conscience required a higher degree of covering the body, *R (on the application of Shabina Begum) v. Denbigh High School* [2006] UKHL 15.

²⁸⁸ *Eweida and others v. UK*, Appl.No. 51671/10 and 36516/10 (15 January 2013).

²⁸⁹ Ibid, at 23.

²⁹⁰ Ibid, at 24-25.

²⁹¹ Ibid, at 26.

policy, if the tribunal found against her.²⁹² *Ladele* was finally decided in favour of the council at the Court of Appeal.

The ECtHR established Articles 9 and 14 as applicable a based on conduct clearly and directly motivated by orthodox Christian beliefs.²⁹³ The judges choose, as a hypothetical comparator, someone without religious objections and, therefore, determined a particularly detrimental impact on Ms Ladele. The assessment of indirect discrimination then depended on whether the decision not to make an exception for Ms Ladele due to the policy and on if this policy amounted to a legitimate aim and was proportionate.²⁹⁴ The Court highlighted that differences in treatment based on sexual orientation required “particularly serious reasons” to be justified, but there was a wide margin of appreciation equality is achieved for same-sex couples because of the differences in law throughout Europe. Accordingly, the aim pursued by the local authority was legitimate.²⁹⁵ The policy was also proportionate, despite the serious consequences of Ms Ladele losing her job and her not knowing that her job would one day include registering civil partnerships, since the aim was to protect the rights of others safeguarded under the Convention.²⁹⁶ Where ECHR rights compete, and this is crucial, the judges held that the member states have a wide margin in general. Finding that this margin was neither exceeded by Islington council, nor the courts, the judges completed their analysis at this point and rejected the case.²⁹⁷

Mr McFarlane held a position as a relationship counsellor. He deemed homosexuality as sinful which meant he did not see possible to directly endorse such conduct.²⁹⁸ After reluctantly accepting same-sex couples as clients, except on purely sexual matters, followed a period during which the employer was unable to derive a clear statement of Mr McFarlane as to his willingness to continue complying with the organisation’s equal opportunity policy.²⁹⁹ This policy includes respect for clients’ autonomy and dignity, *inter alia* on grounds of sexual orientation, and the prevention of counsellor’s prejudices to affect the therapeutic relationship. The policy, in addition, states a positive duty to prevent less favourable treatment of employees, clients and others in relation to sexual orientation.³⁰⁰

²⁹² *Ibid*, at 27.

²⁹³ *Ibid*, at 102-103.

²⁹⁴ *Ibid*, at 104.

²⁹⁵ *Ibid*, at 105.

²⁹⁶ *Ibid*, at 106.

²⁹⁷ *Ibid*.

²⁹⁸ *Ibid*, at 31.

²⁹⁹ *Ibid*, at 33-36.

³⁰⁰ *Ibid*, at 32.

Establishing direct motivation by Christian orthodox beliefs and the refusal to counsel same-sex in certain aspects, the ECtHR posed the question of positive obligations in *McFarlane*.³⁰¹ In this matter the judges, similarly as in *Ladele*, held that a fair balance had been struck between the severe sanction of losing his job and the rights of others. The analysis took into account that Mr McFarlane had been aware that filtering clients wasn't possible, yet still enrolled in a course on psycho-sexual counselling, and that the employer intended to safeguard its policy to provide a discrimination-free service. The wide margin was, expectably, again not exceeded and Articles 9 and 14 thus not violated.³⁰²

The ECtHR has recognised the need to protect against discrimination on the basis of sexual orientation³⁰³ and, therefore, understandably chose not to provide preferences for any discrimination ground over another. It is likely that the Court will continue to refer to the state's margin in any case where grounds compete directly, rather than establishing reasonable accommodation. As long as there is no consensus throughout Europe that accommodation is the way to solve competing interests not to be discriminated against. For now, giving an equal weighting to each discrimination factor and then examining the facts of case is a legally and politically sensible solution. The Court finally moving away from highlighting the employees' choice to change jobs, moreover, is a great advancement to giving freedom of religion the substance of recognition and space it had been verbally allocated in *Kokkinakis*.

IV. Conclusions

Despite the various cases brought before the Commission and the Court relating to religious freedom and discrimination in employment, solely hesitant conclusions as to the potential impact of the ECHR in this field can be made. The reluctance to make use of Article 14 and the incoherent interpretation of Articles 9 and 14 lead to decisions with little depth and influence, an issue exacerbated by the margin of appreciation doctrine and confused efforts to poise diverging rights against each other, or against seemingly irreconcilable public interests.³⁰⁴ Direct implications can furthermore only be derived from the findings in cases filed against the UK, France and Germany in particular, as the Court's rulings take into consideration each state's circumstances.

³⁰¹ Ibid, at 108.

³⁰² Ibid, at 109.

³⁰³ For instance, *Salgueiro da Silva Mouta v. Portugal*, Appl.No.33290/96, (1999) ECHR 176 (21 December 1999); *Lustig-Prean and Becket v. UK*, Appl.No.31417/96 and 23377/96, 927 September 1999); *Karner v. Austria*, Appl.No.40016/98, (24 July 2003); *PB and JS v. Austria*, Appl.No.18984/02 (22 July 2010); <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/tat10/ERES1728.htm> (accessed 15 March 2014).

³⁰⁴ Greer S, *The European Convention on Human Rights*, at 323.

Employees wishing to take time off for worship, to wear religious dress or to adhere to rituals, should have no strong expectation to benefit from the ECHR's protection at this point in time. The only clear decision in favour of employees subjected to religious discrimination is the non-requirement to swear a religious oath against their religious consciousness, in order to enter or remain in employment. The margin of appreciation doctrine, has so far prevented any remarkable decision-making leadership by the Court. The absence of a pan-European correlation of church-state relations as such and differences across states in evaluating related matters, such as headscarves in the workplace, have enabled the ECtHR to offer a large margin to member states. Jurisprudence shows that particular obstacles and consequences are, unfortunately, experienced by applicants adhering to minority religions. As Brems suitably puts it, handling "diversity in multicultural societies is one of the greatest human rights challenges in contemporary Europe. Yet so far the European Court of Human Rights has chosen not to exercise leadership in this field."³⁰⁵ Despite the observation that recent jurisprudence signals the ECtHR's move towards an attitude of valuing pluralism and accommodation (a trend that, if more effectively continued, may well result in more stringent interventions in state practices)³⁰⁶ judgments such as *Lautsi* continue to confirm a continuing bias in favour of the majority religion, and perhaps the use of the margin doctrine to avoid delving into emotive and politically sensitive topics related to minority religion. At this point, ECtHR jurisprudence refrains from setting international standards in relations to religious discrimination.

Church-state relations have been employed by member states as a mean to justify religious discrimination (or interferences with freedom of religion that amounted to religious discrimination). The ECtHR unmistakably respects any church-state relationship as such and has not yet linked any model to differing degrees of state discretion. A coherent understanding of religious neutrality has not yet been established in jurisprudence, because the margin of appreciation doctrine has permitted the judges to abstain from any meaningful, in-depth analysis of the relationship between religious discrimination and religious neutrality of the member states. Whereas the Court has rightly applied the margin of appreciation doctrine to avoid assessing church-state relations as such, it has failed to interfere in cases where states acted in a partial way towards a particular religion and thus arguably in a non-justifiable, discriminatory manner. The *Dahlab* judgment, amongst others, demonstrates

³⁰⁵ Brems E, "Diversity in the Classroom: The Headscarf Controversy in European Schools", (2006) 31 Peace and Change, 117, at 129.

³⁰⁶ Taylor PM, *Freedom of Religion*, at 335, adverting to the cases of *Kokkinakis v. Greece*, *Manoussakis v. Greece*, *Serif v. Greece* and *Hasan and Chaush v. Bulgaria*.

that it is not the church-state set-up as such that causes religious discrimination, but the application of the relevant law unfavourably towards a particular religion. At a more general level, the examination of *Dahlab* in particular reflected the idea promoted in Chapter 1 that a formal approach to neutrality is liable to cause indirect discrimination and also more likely affects adherents of minority religions. It can also be observed that a majority of controversial Article 9 jurisprudence stems from member states with either a formal conception of neutrality or, to a lesser degree, with a national/established church. With regard to formal neutrality, one may be able to establish that it is prone to give rise to violations of human rights more than substantive neutrality is, an aspect further probed in Chapter 7. If the Court keeps its doors open to formal neutrality arguments, especially in conjunction with negatively stereotyping one religion, it cannot perpetuate the impartiality required in the face of protecting all religions equally, and misses its role as an international human rights tribunal in charge of setting a minimum common denominator across all ECHR member states. For the time being it appears that a politically charged topic such as the practice of religion cannot achieve the same measure and consistency of protection as politically safe constructs. As was shown, however, there is a possibility that future input from the CJEU, or ideas promoted in *Lautsi*, will lead the Strasbourg court to accept and perpetuate substantive neutrality as a preferable construct.

CHAPTER 3 • Discrimination in the Workplace under the Law of the European Union

I. Introduction

This third chapter assesses the European Union (EU) Law relevant to religious discrimination in the workplace and potential advances made by the EU institutions as regards church-state relations. For this purpose, the chapter examines the Treaties, the Employment Framework Directive (EFD), as well as the Court of Justice of the European Union's (CJEU) jurisprudence. The rules surrounding religious discrimination in employment in the EU are foremost laid down in the Treaty on the Functioning of the European Union (TFEU) and the Employment Framework Directive (EFD). Importantly, with Article 10 TFEU a mainstreaming duty was added to the Treaty, amongst other characteristics regarding religion. In addition, Article 19 TFEU (former Article 13 EC) is the competence norm that enabled the introduction of the EFD and can therefore be seen as a marker of how central non-discrimination is in the legal setting of the EU. The EFD helped to establish provisions addressing workplace discrimination on the basis of *inter alia* religion into the Member States' (MSs) legal frameworks. The CJEU has not pronounced any judgments regarding religious discrimination at work yet, at least not outside the Union's own institutions. Particularly relevant to a prognosis is Article 17(1) TFEU which grants the MSs sovereignty over their church-state relations, as well as existing CJEU jurisprudence. The discoveries made in this chapter will serve to establish the benchmarks against which national law will be tested in relation to EU law in Chapters 4, 5 and 6.

II. Religious Discrimination under the Treaties

1. The Treaty of Amsterdam

For most of the EU's (and its predecessors') existence there has been no mention of religious discrimination in any of its numerous documents dealing with matters of employment. Focus was on sex and nationality discrimination and this is where equality issues were originally discussed and defined (surrounding former Articles 141 and 12 EC most notably). Yet, throughout the decades, the EU has increased provisions protecting human rights within its scope of jurisdiction with each Treaty amendment, so that a trend is evident.

Article 19 TFEU (then Article 13 EC) was a novelty with regard to human rights content and thus a major addition brought on by the Treaty of Amsterdam in 1997, as for the first time it entitled the EC to issue law for the purpose of diminishing discrimination. This remarkable provision acknowledges religious involvement in life from the view of equality and is

consistent, as well as understandable, in the light of the basic perspective of harmonising and adjusting national laws and carrying a challenge to the MSs to justify any differentiating treatment.¹ Article 19 TFEU was celebrated as a milestone in the Union's promotion of equality and even as a step leading towards a general equality provision as exists for gender.² Article 19(1) states:

"Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

This was the first provision to include religion and belief and more specifically, religious discrimination, into the Treaties. It had its roots in the discussion surrounding a directive on racial discrimination and was strongly motivated by the realisation that several of the (then) future MSs did not safeguard protection from discrimination adequately.³ Article 19 was also a dearly won addition at a time when right-wing politics started to be increasingly successful in some MSs, along with mounting violence against racial and religious minorities.⁴ It was this trend that motivated some European states' leaders to voice opposition, demanding a wider agenda surrounding Article 19.⁵

More or less striking are the several strengths and weaknesses of the provision. For instance, it is argued that Article 19 TFEU is independent from economic concerns and therefore part of a trend of individual rights entering the Treaties as a means of integration, although the provision's true potential in this regard still has to be unveiled.⁶ At the same

¹ Robbers G, "Religionsfreiheit in Europa", in J Isensee, W Rees and W R fner (eds), *Dem Staat, was des Staates – der Kirche, was der Kirche ist* (Berlin: Duncker & Humblot, 1999), at 205.

² Alston P and Weiler JHH, "An 'Ever Closer' Union in Need of a Human Rights Policy: The European Union and Human Rights", in P Alston, M Bustelo and J Heenan (eds), *The EU and Human Rights* (Oxford: Oxford University Press, 1999), at 60.

³ Allen R and Crasnow R, *Employment Law and Human Rights* (Oxford: Oxford University Press, 2002), at 235.

⁴ Allen R, "Article 13 EC, Evolution and Current Contexts", in Meenan H (ed), *Equality Law in and Enlarged European Union – Understanding the Article 13 Directives* (Cambridge: Cambridge University Press, 2007), at 39;

Gearty C, "The Internal and External 'Other' in the Union Legal Order: Racism, Religious Intolerance and Xenophobia in Europe", in P Alston, M Bustelo and J Heenan (eds), *The EU and Human Rights* (Oxford: Oxford University Press, 1999), at 347;

Mabbett D, "The Development of a Rights-Based Social Policy in the European Union: The Example of Disability Rights", (2005) 43(1) *Journal of Common Market Studies* 97, at 110.

⁵ Hepple BA, *Equality: The New Legal Framework* (Oxford: Hart Publishing, 2011), at 10.

⁶ Barnard C, "Article 13: Through the Looking Glass of Union Citizenship", in D O'Keefe and P Twomey (eds), *Legal Issues of the Amsterdam Treaty* (Oxford/Portland, Oregon: Hart Publishing, 1999), at 378;

Barnard C, *EC Employment Law*, 2nd ed (Oxford: Oxford University Press, 2000), at 285;

Bell M, *Anti-Discrimination Law and the European Union*, (Oxford: Oxford University Press, 2002), at 119 and 122;

Besson S, "The European Union and Human Rights: Towards a Post-National Human Rights Institution", (2006) *European Human Rights Law Review* 323, at 344-345;

O'Hare U, "Enhancing European Equality Rights: A New Regional Framework", (2001) 8(2) *Maastricht Journal of European and Comparative Law* 133, at 142.

time, the wording of “combat” hints at the rule constituting a principle.⁷ Article 19’s favourable location in the Treaty (under Part 1 ‘Principles’, Title II ‘Provisions having general application’, Part 2 Non-Discrimination and Citizenship) speaks for its constitutional significance.⁸ As it is not restricted to citizens, it may even play a pivotal role in advancing solidarity.⁹ Finally, Article 19 is essential to prevent migration solely based on different levels of protection against discrimination between MSs.¹⁰

Initially Article 19 was, nevertheless, subject to scepticism, foremost due to its restriction to cover only fields of EU competence, to being overruled by other Treaty provisions, and to only making way for secondary law.¹¹ In comparison to other Treaty provisions, for example Articles 18 and 45 TFEU, it is much less dominant insofar as it does not have direct effect, thereby merely enabling the EU to create the means to diminish discrimination. Another critical remark is made with regard to Article 19 not being open-ended, confining the institutions to the listed grounds.¹² In addition, there was criticism as to the lack of obligation for the Council to take action, as to the European Parliament’s involvement being minimal and unanimity being required for a Council’s decision.¹³ A further serious issue is the lack of explicit attention to instances of intersectional discrimination.¹⁴

Two further provisions are also noteworthy. First of all, Article 6 TEU (former Article 6 TEU) has since the Treaty of Amsterdam explicitly raised the respect for human rights to the level of principle and as a condition for EU membership, thereby filling a long-anticipated space and visibility of rights to individuals.¹⁵ Article 151 TFEU (former 136 EC) formally inaugurated the fight against exclusion at work as an objective of labour law, accompanied by Article 153 TFEU (former Article 137 EC) that proposes assisting and complementing measures, such as the provision and exchange of information, in order to integrate those excluded. Therefore, Article 19 is seen as a *lex specialis* provision for fighting discrimination, with the

⁷ Flynn L, “The Implications of Article 13 EC – After Amsterdam, will some Forms of Discrimination be more Equal than Others”, (1999) 36(6) Common Market Law Review 1127, at 1133.

⁸ Bell M and Whittle R, “Between Social Policy and Union Citizenship: The Framework Directive on Equal Treatment in Employment”, (2002) 27(6) European Law Review 677, at 688, who also take the placement of the article outside the Social Chapter as a signal that it may go further than employment matters, at 689.

⁹ Barnard C, “Article 13: Through the Looking Glass of Union Citizenship”, at 379; Flynn L, “The Implications of Article 13 EC – After Amsterdam, will some Forms of Discrimination be more Equal than Others”, at 1151; Gearty C, “The Internal and External ‘Other’ in the Union Legal Order: Racism, Religious Intolerance and Xenophobia in Europe”, at 347.

¹⁰ Allen R, “Article 13 EC, Evolution and Current Contexts”, at 53.

¹¹ Szyszczak E, “The New Parameters of European Labour Law”, in D O’Keeffe and P Twomey (eds), *Legal Issues of the Amsterdam Treaty* (Oxford/Portland, Oregon: Hart Publishing, 1999), at 152.

¹² Bell M, *Anti-Discrimination Law and the European Union*, at 127.

¹³ *Ibid.*, at 125.

¹⁴ Flynn L, “The Implications of Article 13 EC – After Amsterdam, will some Forms of Discrimination be more Equal than Others”, at 1148; for an explanation of terminology, see Schiek D, “From European Union Non-Discrimination Law towards Multidimensional Equality Law for Europe”, in D Schiek and V Chege (eds), *European Union Non-Discrimination Law – Comparative Perspectives on Multidimensional Equality Law* (London and New York: Routledge-Cavendish, 2009), at 12–13.

¹⁵ Lenaerts K, “Fundamental Rights in the European Union”, (2000) 25(6) European Law Review 575, at 576 and 586.

specification “without prejudice” to other Treaty articles hinting at a wide range of alternatives.¹⁶

2. The Treaty of Nice

Through the Treaty of Nice, a second paragraph was attached to Article 19, offering an exception to create measures by qualified majority vote under then Article 251 EC (Article 294 TFEU) in cases where incentive measures other than legal harmonisation and regulations in the MSs are concerned, to support their action pursuing the objectives referred to in paragraph 1. In spite of their apparent weakness, non-binding documents can have a significant impact, too, such as for instance codes of practice that will be used by the judiciary to aid interpreting the existing law.¹⁷

During this time, Article 19 was utilised to set up measures of an unprecedented scale in the field of discrimination in employment. Most important among these are the Race Directive¹⁸ and the EFD.¹⁹ There has been much criticism as to the scope of the EFD being limited to employment, thus creating a divide suggesting some areas of EU competence²⁰ and some fields of discrimination to be more worthy of protection than others.²¹ Indeed, a wider understanding of race and ethnicity ought to have included religion to tackle exclusion in this field more effectively.²²

Justifiably, nonetheless, Article 19 is described by Craig and de Búrca as “undoubtedly the main ‘hard source’ of EC competence in the field of human rights protection within the EU”.²³ Similar importance is attached to Article 19 by Allen, who deems the provision to be a key driver in promoting social cohesion in Europe.²⁴ Moreover, McCrudden and Kontouros

¹⁶ Bell M and Whittle R, “Between Social Policy and Union Citizenship: The Framework Directive on Equal Treatment in Employment”, at 681, also mentioning the potential role of Article 137(1) in supporting and complementing directives to advance *inter alia* inclusion and suggesting that Article 137(2) ought to have been the basis for the EFD with detailed arguments, at 683-687.

¹⁷ Bell M, *Anti-Discrimination Law and the European Union*, at 126.

¹⁸ Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L180/22.

¹⁹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L303/16, hereafter the Framework Directive or EFD.

²⁰ Whereas there used to be criticism to the opposite, there are now suggestions of a shift from an emphasis from economic to social aims of EC equality law, Steiner J and Woods L, *EU Law*, 10th ed (Oxford: Oxford University Press, 2006), at 526.

²¹ Bell M, *Anti-Discrimination Law and the European Union*, at 114.

²² Pitt G, “Religion or Belief: Aiming at the Right Target?”, in Meenan H (ed), *Equality Law in and Enlarged European Union – Understanding the Article 13 Directives* (Cambridge: Cambridge University Press, 2007), at 205. Pitt explains that discrimination is likely to take place because of one’s actual or perceived group identity, irrespective of any personal belief or way of life. She mentions Muslims as the current prime example of group identity triggering constructions of the “other”, different from mainstream society, at 226. She continues to explain that, interestingly, religion is also the most likely discrimination that can be opted in and out by the individual, given certain circumstances. Accordingly, offering the same level of protection to all spheres of religion can be deemed inappropriate. One of the solutions offered is to expand the scope of race and ethnicity to cases where religious discrimination infiltrates the identity sphere, at 227.

²³ Craig P and de Búrca G, *EU Law*, 5th ed (Oxford : Oxford University Press, 2011), at 355.

²⁴ Allen R, “Article 13 EC, Evolution and Current Contexts”, at 71.

award the provision the status of milestone on the way to granting equality and non-discrimination an autonomous status, irrespective of any palpable benefits entailed.²⁵

3. The Treaty of Lisbon

a) The Treaty's Position on Religious Discrimination

A major introduction made by the Lisbon Treaty is the EU's intended accession to the ECHR as a contracting party by virtue of Article 6(2) TEU,²⁶ though this move requires unanimity.²⁷ Pursuant to the Union's accession, nevertheless, the ECtHR will be entitled to interpret EU law with an impact on human rights. In some areas, this may result in watering down or in elevating levels of protection, depending on the respective approaches taken. In contrast, Kaczorowska anticipates an increased stage of protection, as she considers the Union's accession to the ECHR "a sign of self-confidence and maturity on part of the EU, showing the world its readiness for its institutions to be monitored, by an outside body".²⁸ This view overlooks the fact that in some regards, the levels of scrutiny to which limitations of human rights are subjected, are higher before the CJEU than the ECtHR, even more so as regards religious discrimination in employment, because of the detailed secondary legislation available under EU law in this sphere. In addition, the limited membership to the EU and the sanctions available to the CJEU should generally result in a higher likelihood of adherence to demands posed by human rights obligations. Consequently, it is difficult to foresee far-reaching consequences for future decisions on human rights due to the subjection to the ECtHR. As was explained in Chapter 2, moreover, there is also a possibility that EU law will influence the jurisprudence of the ECtHR.

In case of conflicting results from the ECtHR and the CJEU, it is anticipated that the CJEU would back down, since the ECtHR has not yet indicated to make concessions based on CJEU jurisprudence, whereas the CJEU recognises that the EU's and CoE's instruments have to be reconciled in relation to the protection of fundamental rights.²⁹ Should the situation arise in Strasbourg, it is doubtful that violations can be justified through claiming there were necessary to comply with EU law.³⁰ Whereas this sounds plausible in general

²⁵ McCrudden C and Kontouros H, "Human Rights and European Equality Law", in Meenan H (ed), *Equality Law in and Enlarged European Union*, at 113; Prechal S, "Equal Treatment, Non-Discrimination and Social Policy: Achievements in Three Themes", (2004) 41(2) Common Market Law Review 533.

²⁶ For the relationship between ECtHR and CJEU jurisprudence, see Spielmann D, "Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies and Complementarities", in P Alston, M Bustelo and J Heenan (eds), *The EU and Human Rights* (Oxford: Oxford University Press, 1999), at 757-780.

²⁷ Ewing KD and Hendy J, "The Dramatic Implications of *Demir and Baykara*", (2010) 39(1) Industrial Law Journal 2, at 40 and 43.

²⁸ Kaczorowska A, *European Union Law* (Abingdon: Routledge-Cavendish, 2009), at 49.

²⁹ Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Österreich*, [2003] ECR-I 5696, at 77; Ewing KD and Hendy J, "The Dramatic Implications of *Demir and Baykara*", at 42 and 43.

³⁰ Ewing KD and Hendy J, *ibid*, at 40.

and in the context the finding was issued (the *Demir and Baykara* case³¹ which provided a higher level of protection under the ECHR than had previously been given in similar cases under EU law), in cases where it is the CJEU that provides a well-established, higher level of protection than had previously been established before the ECtHR, this may likewise convince the latter court to follow the given direction. Considering that non-discrimination law is possibly more advanced under EU law, this scenario may become topical once the CJEU decides on religious discrimination cases in the work context. Conceivably, where it is a fundamental right and not a market or other element that succeeds before the CJEU, the ECtHR may not even find this objectionable given its primary task as guarding human rights enshrined under the ECHR.

Crucially, Article 19 TFEU now includes a consenting role for the European Parliament (EP), in another move towards creating a closer link to citizens.³² Apart from this, the Treaty of Lisbon has also brought some amendments that, more specifically, relate directly or indirectly to religious discrimination. Like other discrimination factors, religion now finds itself under the mainstreaming prerequisite of Article 10 TFEU: “In defining and implementing policies and activities referred to in this part, the Union shall aim to combat discrimination based on...religion...”. This may, however, be an ambitious project, since so far mainstreaming with regard to gender has not fully emerged as desired.³³ Correspondingly, less established grounds may even receive less attention, not least due to lack of experience and knowledge. Despite this sober analysis, mainstreaming, nonetheless, has a great potential to imaginatively answer to the underlying, systemic causes for inequality.³⁴ For mainstreaming to achieve its aspirations, Chalmers, Davies and Monti rightly point to a shift of focus from disadvantage towards a transformation of employers’ practices.³⁵ There is indeed hope that Article 10 TFEU will facilitate such change.

With the Treaty of Lisbon, the EU Charter of Fundamental Rights (CFR)³⁶ has become part of the Treaties. Whereas previously the Charter had a declaratory character, it now has the potential to bind MSs by virtue of the new Article 6(1)(1) TEU. Although it will be hard to

³¹ *Demir and Baykarav. Turkey*, Appl.No.34503/97 (12 November 2008).

³² Schrauwen A, “European Union Citizenship in the Treaty of Lisbon: Any Change at all?”, (2008) 15(1) *Maastricht Journal of European and Comparative Law* 55, at 58.

³³ Bell M, “Equality and the European Constitution”, (2004) 33(3) *Industrial Law Journal* 242, at 255.

³⁴ Chalmers D, Davies G and Monti G, *European Union Law: Cases and Materials*, 2nd ed (Cambridge, Cambridge University Press, 2010), at 577.

³⁵ *Ibid*, at 579.

³⁶ Charter of Fundamental Rights of the European Union, OJ-C 303/1 (14 December 2007).

argue that this means more than a mere task of non-interference, in fact it may also include a duty to interpret law and policy that are compatible with the Article 6 principle.³⁷

Article 10 CFR includes the right to freedom of religion, including its “manifestation in worship, teaching, practice and observance” known from public international law. In this part of the Charter, there are no further specifications as to how the respect for freedom of religion may manifest itself, unlike, for example, in relation to disability and age.³⁸ Article 52(3) CFR, however, explains that the minimum protection will be the meaning and scope granted to rights by the ECHR. The Charter’s title dedicated to equality encompasses a variety of understandings of the concept. Articles 20 and 21(1) CFR respectively establish an equality before the law and a free-standing rule prohibiting discrimination, *inter alia* on grounds of religion, as well as free from any explicitly stated restrictions thereto. By authority of Article 22 CFR, the “Union shall respect cultural, *religious* and linguistic diversity” (emphasis added), this time without the reference to a “European diversity”. This might, however, not grant any right and might therefore at best be seen as a guiding principle.³⁹

The Charter is significant in terms of symbolising a rights-based culture, as well as its legal manifestation,⁴⁰ especially since its incorporation into the Treaty. Interestingly, the CFR intends to offer a non-traditional take on rights, intertwining civil and political rights with socio-economic ones, as well as placing positive duties on the MSs.⁴¹ The inclusion of the CFR is conspicuously another marker of the Union’s commitment to equality, with a specific hint at respect for diversity. The Charter’s provisions could thus play a vital role in determining the legitimacy of indirect discrimination under the EFD, in this context limiting sympathy for measures that oppose difference.

The EU’s motto ‘United in Diversity’ is well worth mentioning in this context, too. Some of the MSs took advantage of annexing Declarations to the treaties to affirm certain intentions or exceptions in this respect. Germany and 15 other MSs, excluding the UK and France, pledge allegiance to the motto ‘United in Diversity’ in Declaration 52.⁴² The problem with the concept of unity can be the dependence on a constructed ‘other’, which can easily be based

³⁷ Fredman S, “Transformation or Dilution: Fundamental Rights in the Social Sphere”, (2006) 12(1) European Law Journal 41, at 59.

³⁸ Ibid, at 59; Article 25 “lead a life of dignity and independence and to participate...” and Article 26 “ensure...occupational integration”.

³⁹ A problematic aspect of the CFR may be the blurred dividing line between aspirational principles and justiciable rights, although even the relevance of such a distinction is debated. See Fredman S, *ibid*, at 59; Hilson C, “Rights and Principles in EU Law: A Distinction without Foundation?”, (2008) 15(2) Maastricht Journal of European and Comparative Law 193; McCrudden C and Kontouros H, “Human Rights and European Equality Law”, at 104.

⁴⁰ McCrudden C and Kontouros H, in Meenan H (ed), *Equality Law in and Enlarged European Union*, at 99.

⁴¹ Fredman S, “Transformation or Dilution: Fundamental Rights in the Social Sphere”, at 49.

⁴² Notably, Declaration 52 also contains other aspects related to symbols, such as the anthem, flag and also the single currency. The latter may well be the reason why the UK is not amongst the MSs adhering to Declaration 52.

on the factor of religion.⁴³ Unity and societal integration can, however, be cultivated with the help of religion, as long as no one is officially excluded.⁴⁴ Ultimately, exclusion would depend on whether the definition of the notion ‘diversity’ esteems the global interactions in history and presence. If it is such an open-minded diversity that is the uniting factor, then otherness is key to unity, even if some may see it as only European diversity, provided it is not artificially constructed as a closed box of ideas and systems.

The interpretation of diversity is, accordingly, decisive in relation to which degree and in which form religious minorities are encompassed and whether this has any bearing on practical outcomes in this field. It will have to be seen, perhaps in conjunction with other indicators, whether the notion of “cultures and traditions of the peoples of Europe” under the TEU’s Preamble also includes all minority groups. Opting for a wide definition of culture, Pan delivers a strong argument. He suggests that cultural diversity entails wealth and creativity, if self-fulfilment is granted to individuals and that this may have even been the reason for Europe’s 500-year rise from misery to economic superpower.⁴⁵ Similarly, Donders argues that this part of the Preamble attributes value to cultural heterogeneity and thus culture is seen as a factor extending European integration.⁴⁶ She adds that “peoples of Europe” is unlike the concept of MS and can mean internal communities, for instance, minorities.⁴⁷ In any case, this section of the Preamble may not merely be a reference to majority groups, if read in conjunction with the CFR. As mentioned above, Article 22 CFR states that the “Union shall respect cultural, *religious* and linguistic diversity” (emphasis added), without the reference to this meaning a “European diversity”. Pursuant to this discussion, an inclusive view of diversity is preferable.

Whereas these contemplations emit hope of a strong protection against religious discrimination, including in favour of religious minority practices, factors outside the Treaty warrant a more cautious starting point. Common Basic Principles (CBPs) on Integration were introduced by a Justice and Home Affairs (JHA) Council in 2004, and mention religious practices as a source of conflict with EU and national law, as well as a demand for particular forms of engagement with society and for respect for the EU’s values, while desisting from

⁴³ Challand B, “From Hammer to Sickle to Star and Crescent: The Question of Religion for European Identity and Political Europe”, (2009) 37 (1/2) Religion, State & Society 65, at 75.

⁴⁴ Habermas J, “Religion in the Public Sphere”, (2006) 14(1) European Journal of Philosophy 1, at 13; Laudrup C, “A European Battlefield: Does the EU have a Soul? Is Religion out of Place in the European Union?”, at 56.

⁴⁵ Pan C, “Die Bedeutung von Minderheiten- und Sprachschutz für die kulturelle Vielfalt Europas”, (2008) 1(1) Europäisches Journal für Minderheitenfragen 11, at 11–12.

⁴⁶ Donders Y, “The Protection of Cultural Rights in Europe: None of the EU’s Business?”, (2003) 10(2) Maastricht Journal of European and Comparative Law 117, at 137.

⁴⁷ Ibid, at 141.

an analysis of the legitimacy and effectiveness of corresponding measures at all levels.⁴⁸ Under the CBPs, adaptation and adherence to the values promoted by the EU is hailed as a prerequisite for immigrants' integration, albeit as part of a two-way process. This approach sits comfortably with attitudes found in France and some German *Länder*,⁴⁹ a finding that is highly relevant for the law on religious discrimination at work. CBP 8 goes into more detail, declaring that the "practice of diverse cultures and religions is protected under the CFR and must be safeguarded, unless practices conflict with other inviolable European rights or with national law". This subordination of religious manifestations under any domestic law may reject the respect for difference, as endorsed by multicultural paradigms.⁵⁰ Yet, considering that, at EU law level, a conflict with inviolable European rights is required for limitations, most likely a similar level of law at national level was envisaged. Further explanation of CBP 8 conveys that the exercise of women's rights and equality are to be ensured by MSs, if these are impinged on by religious practices. Although unsurprisingly no religion is singled out as a source for problematic practices, McCrea points out that "the framework deliberately emphasizes issues such as the equality of men and women, which have been prominent in debates around the practice of Islam in Europe".⁵¹

Galalla argues that irreconcilable clashes between rules stemming from Islam and from the EU hinder Muslim integration in Europe.⁵² As regards potential CJEU cases dealing with religious discrimination, much of the outcome will indeed depend on the judges' interpretation of such conflicts and of the term 'integration'. In the light of Gallala's viewpoint, it is nonetheless explainable that the promotion of multicultural formats of integration has not extended beyond rhetoric, with the EFD appearing as an isolated example where supranational law has influenced religious governance at national level.⁵³ Furthermore, the invention and support of "Euro-Islam", that ventures to reconcile religious values with those endorsed by the EU,⁵⁴ can also be a sign of hesitation and exploration. The promotion of a distinctive European form of Islam is arguably an attempt to control and monitor Islamic

⁴⁸ Kostakopoulou D, "The Anatomy of European Integration", at 939-940, and "Common Basic Principles for Immigrant Integration in the European Union", Justice and Home Affairs Council Meeting 2618, 14615/04 (19 December 2004), CBPs 1, 2, 4.1 and 8.2.

⁴⁹ McCrea R, *Religion and the Public Order of the European Union* (Oxford: Oxford University Press, 2010), at 226.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, at 227.

⁵² Gallala I, "The Islamic Headscarf: An Example of Surmountable Conflict between *Shari'a* and the Fundamental Principles of Europe", (2006) 12(5) *European Law Journal* 593, at 594.

⁵³ Koenig M, "Europeanising the Governance of Religious Diversity: An Institutional Account of Muslim Struggles for Public Recognition", at 927.

⁵⁴ AlSayyad N and Castells M (eds), *Muslim Europe or Euro-Islam* (Lanham etc: Rowman & Littlefield Publishers, 2002); Gallala I, "The Islamic Headscarf: An Example of Surmountable Conflict between *Shari'a* and the Fundamental Principles of Europe", at 605; http://www.euro-islam.info/about_us/sponsors/ (accessed 15 March 2014).

leadership in Europe.⁵⁵ Since no equivalent movements are found in relation to other religions, it seems that Muslims are subjected to specific scrutiny by virtue of the Union's activities.

Finally, it is impossible to reach a common ground as regards all values in any society, due to their complexity, even if there were no minorities of any type present. Democracies should invariably be able to accommodate different and challenging viewpoints (as long as these do not result in or encourage criminal acts or any human rights violations) in order to facilitate mutual respect and learning, as well as to strengthen the concept of personal freedom, dignity and autonomy. A better way to integrate third country nationals and to promote values is to prevent and to be known to prevent discrimination of minorities, so that fundamental principles are experienced as a positive good.⁵⁶ In the face of the CBPs, the argument that the expanding competence in the sphere of JHA needs to be counterbalanced by human rights policies⁵⁷ is indeed very topical.

Recognition of the importance of integrating religious minorities into the EU can also be found in the EP's activities, based on the significance of freedom of religion as part of the Union's promotion of human rights.⁵⁸ Most of the reports on Islam commissioned by the EP have dealt with contexts outside the EU,⁵⁹ however, one report mentioned stereotyping about Muslims and their restricted socio-economic opportunities as contributing factors to an inability to integrate, as well as to fundamentalism in Europe.⁶⁰ In conclusion, no clear-cut approach to societal integration can be identified across the EU's institutions and activities. Whether the CJEU will engage with the issue of integration and to which degree, in case of a preliminary reference regarding religious discrimination, is an equally open question.

b) The Treaty's Position on Church-State Relations

In order to be more relevant to the Union's inhabitants,⁶¹ the TEU's Preamble now proclaims the "cultural, *religious* and humanist inheritance of Europe" (emphasis added) that led to human rights, freedom, democracy, equality and the rule of law. This wording had already

⁵⁵ Kraler A, "The Political Accommodation of Immigrant Religious Practices: The Case of Special Admission Rules for Ministers of Religion", (2007) 33(6) *Journal of Ethnic and Migration Studies* 945.

⁵⁶ Gallala I, "The Islamic Headscarf: An Example of Surmountable Conflict between *Shari'a* and the Fundamental Principles of Europe", at 609.

⁵⁷ Alston P and Weiler JHH, "An 'Ever Closer' Union in Need of a Human Rights Policy: The European Union and Human Rights", at 19.

⁵⁸ Silvestri S, "Islam and Religion in the EU Political System", at 1224.

⁵⁹ *Ibid.*, at 1226.

⁶⁰ Oostlander A, on behalf of the Committee on Civil Liberties and Internal Affairs of the European Parliament, "Report containing a Draft European Parliament Recommendation to the Council on Fundamentalism and the Challenge to the European Legal Order", European Parliament, 29 April 1998.

⁶¹ Due to the negative outcome of the initial Irish referendum in June 2008, the Lisbon Treaty's entry into force had been delayed from 1 January 2009 to 1 December 2009.

been used in the abandoned Treaty establishing a Constitution for Europe.⁶² At the time, the inclusion of religion followed a divide over this issue in the MSs.⁶³ Mentioning Europe's (Judeo-) Christian legacy was a preference of many MSs, but strongly negated by France in particular, which pointed out the incompatibility of such a reference with the EU's secular character.⁶⁴ Weiler, who is in favour of an express reference to Europe's Christian heritage or even a statement that European integration aims for the establishment of Christian values, claims that Christianity is a common constitutional tradition of the MSs.⁶⁵ There appears to be no substantiation though as to why Christian values are the basis for a shared European identity and culture.⁶⁶

Menendez, therefore, opposes such an affiliation of the EU with a Christian identity since "[t]oleration seems to put an end to the idea and the symbols of a dominant religion, and to be based on a basic value agreement, until proof to the contrary, is...best presented by secularism".⁶⁷ Bearing in mind that secularism can also be exclusionary, a preferred version of this quote would instead refer to substantive neutrality instead of secularism. Since this type of neutrality can in theory be achieved equally in secular and non-secular states, it does not *per se* oppose toleration (in itself an arguable term, but here meant in the common sense of the word). The Christian religion, being affiliated with violent colonial ambitions of many EU MSs, does actually not link easily with values currently predominant in Europe either, and can also be viewed as an influence in the opposite direction, the same as *al-Andalus*, on European culture.⁶⁸ There has definitely been much cross-fertilisation between Jewish, Christian and Muslim philosophy in Europe,⁶⁹ which, for example, does not allow for a dichotomy between Judeo-Christian and Islamic heritage in terms of values and traditions. Considering the temporary experience of fascist and communist regimes in parts of Europe with the subsequent renewal of ideas,⁷⁰ it may not even be appropriate to use the term tradition in the first place. A monopoly on values as Christian can be offensive to adherents to other religions who consider themselves as possessors of the same qualities, in this way

⁶² OJ C-310, 16 December 2004, at 1-474.

⁶³ Ahdar R and Leigh I, *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2005), at 79; Rivers J, "In Pursuit of Pluralism: The Ecclesiastical Policy of the European Union", (2004) 7(34) *Ecclesiastical Law Journal* 267, at 267.

⁶⁴ Ahdar R and Leigh I, *ibid*, at 80.

⁶⁵ Weiler J, *Un'Europa Cristiana: Un Saggio Esplorativo* (Milan: Rizzoli, 2003), at 54 and 61; also backed by the Pope, Italy and Poland, see Chelini-Pont B, "Papal Thought on Europe and the European Union in the Twentieth Century", (2009) 37 (1/2) *Religion, State & Society* 131, at 141.

⁶⁶ Cvijic S and Zucca L, "Does the European Constitution need Christian Values?", (2004) 24(4) *Oxford Journal of Legal Studies* 739, at 742.

⁶⁷ Menendez AJ, "A Pious Europe? Why Europe should not define itself as Christian", (2005) 30 *European Law Review* 133, at 145.

⁶⁸ *Ibid*, at 144; Bader V, "The Governance of Islam in Europe: The Perils of Modelling", (2007) 33(6) *Journal of Ethnic and Migration Studies* 871, at 871; Bruckstein-Çoruh AS, "Die Jüdisch-Christliche Tradition ist eine Erfindung", *Tagesspiegel* (12 October 2010), <http://www.tagesspiegel.de/kultur/die-juedisch-christliche-tradition-ist-eine-erfindung/1954276.html> (accessed 15 March 2014).

⁶⁹ Leben C, "Is there a European Approach to Human Rights?", in P Alston, M Bustelo and J Heenan (eds), *The EU and Human Rights* (Oxford: Oxford University Press, 1999), at 87, in fn.78.

⁷⁰ *Ibid*, at 87.

impairing democratic debate.⁷¹ Likewise, agnostics and atheists may hold such interests, even if the framework is slightly different, or to the contrary may be offended if Christian values are officially promoted as agnostic or atheist ones. Since a single, absolutist form of identity ignores any culture's hybridity and mosaic composition, whilst inherently implying a superior status,⁷² any such reference to one or a few religions should be avoided completely.

Another rule concerned with the diversity scheme, however, from the MSs perspective is Article 167(1) TFEU. It asserts that "[t]he Union shall contribute to the flowering of the cultures of the Member States while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore." At the first glance, this provision has no particular relevance to religious discrimination at work. Indirectly though, Article 167 promotes not only non-interference with culture, but also the highlighting and valuing of difference, even if this is in a slightly dissimilar context. In accordance with this and the Preamble, one can argue that the EU promotes a perspective according to which difference is seen as a positive element in society. The rule may also become pertinent from a different perspective. One could argue that the domestic interpretation of church-state relations is part of culture, and thus needs to be respected. Indeed, difficulties in harmonisation where cultural understandings diverge across MSs have been observed in other areas of law.⁷³

c) The Relationship between the EU and Religious Organisations

The Lisbon Treaty also provides clarification as to the EU's interplay with churches and other religious entities. This relationship can be relevant to religious discrimination cases, with the Union-church relational model determining the benchmark for levels of interference based on interpretations of national church-state relations. Secondly, such a scenario, would establish in more detail to which degree the EU may interfere with domestic church-state relations, an area where no competence exists, in order to protect human rights.

⁷¹ Awe BM, "Religion in the EU: Using Modified Public Reason to Define European Human Rights", (2009) 10(11) German Law Journal 1439, at 1446-1447; Cvijic S and Zucca L, "Does the European Constitution need Christian Values?", at 745; Laudrup C, "A European Battlefield: Does the EU have a Soul? Is Religion out of Place in the European Union?", (2009) 37 (1/2) Religion, State & Society 51, at 56.

⁷² Shore C, *Building Europe – The Cultural Politics of European Integration* (London: Routledge, 2000), at 63; Günther K, "The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effect on Political Culture", in P Alston, M Bustelo and J Heenan (eds), *The EU and Human Rights* (Oxford: Oxford University Press, 1999), at 118.

⁷³ Carrera S and Parkin J, "The Place of Religion in European Union Law and Policy", RELIGARE Working Document No.1, September 2010, <http://www.ceps.eu/book/place-religion-european-union-law-and-policy-competing-approaches-and-actors-inside-european-co> (accessed 15 March 2014), at 29; Sefton-Green R, "Multiculturalism, Europhilia and Harmonization: Harmony or Disharmony?", (2010) 6(3) Utrecht Law Review 50, at 65.

Article 17 TFEU echoes and is complemented by Declaration 11 on Churches and Non-Confessional Organisations annexed to the Treaty.⁷⁴ In accordance with Article 17(1) TFEU, the EU respects national sovereignty over church-state relations, the status of churches and other religious associations, these areas thereby remaining untouched by EU law. The MSs' sovereignty over church-state relations was negotiated by the Pope and other heads of churches.⁷⁵ At the same time, Article 17(2) declares the Union's equal recognition of the identity and contribution of all religious and philosophical streams in Europe, thus voicing respect for differences amongst the religious groups' foundations, and including the active aspect prescribing use of "open, transparent and regular dialogue" (Article 17(3)).

It is maintained that the MSs' church-state laws are incidentally part of national identity and thereby enjoy the protection of Article 6(3) TEU.⁷⁶ This and Article 17(1) emphasise that the EU has no competence over state-church relations, but also demands considerateness for those relations inasmuch as its own jurisdiction, for instance in relation to employment or social affairs, has indirect bearing on national state-church paradigms.⁷⁷ Although this is a major weakness from the viewpoint of the churches, Heinig remarks that the Declaration (and therefore now Article 17 TFEU) constitutes a general illustration of the status of churches in Europe as being "no mere *quantité negotiable* on Brussels' stage, but are recognized actors in Europe's policy-making drama."⁷⁸ Moreover, despite the Union's lack of power to act in the religious realm, several provisions of secondary law make concessions so that EU law does not conflict with the existing national law on churches.⁷⁹ In the EFD, this materialised in the exception for employment in organisations with a religious ethos. Consequently, the EU is ascribed a unique system of church-state relations, in which is included a genuine separation that grants recognition to the role of religion in the public arena.⁸⁰ To the EU, Willaime elucidates, state and church are independent, whilst non-discrimination is safeguarded.⁸¹ Differently, Lambert has claimed that the EU and the MSs accomplish a development of pluralistic secularisation, where religion can fully and respectfully flourish in society without having to manifest a public role.⁸²

⁷⁴ Declaration 11 on the Status of Churches and Non-Confessional Organisations to the Final Act of the Treaty of Amsterdam of 20 October 1997, OJ C-340, 10 November 1997, at 133.

⁷⁵ Chelini-Pont B, "Papal Thought on Europe and the European Union in the Twentieth Century", at 141.

⁷⁶ Heinig HM, "Law on Churches and Religion in the European Legal Area – Through German Glasses", (1999) 8 German Law Journal 563, at 570.

⁷⁷ Hesselberger D, *Das Grundgesetz – Kommentar für die Politische Bildung*, 13th ed (Bonn: Bundeszentrale für Politische Bildung, 2003), at 386.

⁷⁸ Heinig HM, "Law on Churches and Religion in the European Legal Area – Through German Glasses", at 570.

⁷⁹ *Ibid*, at 564, who provides examples of this accommodation in the law on working times and religious discrimination in employment, for instance Article 17(1)(c) of 2003/88/EC, OJ L-299, 18 November 2003.

⁸⁰ Willaime J-P, "European Integration, *Laïcité* and Religion", (2009) 37(1) Religion, State and Society 23, at 25.

⁸¹ *Ibid*, at 27.

⁸² Lambert Y, "Le Rôle dévolu à la Religion par les Européens", (2000) 37 Sociétés Contemporaines 11, at 33.

As mentioned above, churches and other religious groups may be invited to undertake “open, transparent and regular dialogue” dialogue with the EU under Article 17(3) TFEU. This rule is strengthened by further provisions, as well as activities. Within the Treaties, Article 11(2) TEU more generally promotes “open, transparent and regular dialogue” with groups representing civil society, hence potentially including associations with a religious interest. The White Paper on Governance⁸³ also endorses widening the participation of civil society, naming faith-based groups as contributors. The predecessor rule for dialogue with religious entities, Article 52 of the failed Constitutional Treaty, had been heftily criticised by humanist groups for creating a special partnership with religious organisations, as opposed to other interest groups.⁸⁴ Such criticism was reasonable, as any dialogue should include non-religious groups promoting their belief systems in order to provide an equal standing to representatives of all beliefs.

In general, such dialogue is pivotal to the EU and its citizens. In 1994, a document titled *A Soul for Europe* was introduced, based on an idea of Jacques Delors, then presiding over the Commission, who had declared a desire to provide the EU with a spiritual and ethical dimension.⁸⁵ Reason for this turning point was the realisation that efforts needed to be made to make the Union relevant to its citizens.⁸⁶ The resulting document prescribed dialogue between the EU and religious communities, promotion of a pluralist and equality agenda, for instance, through funding for interfaith projects.⁸⁷ Put in a wider context, this programme strived to “contribute to the recognition and understanding of the ethical and spiritual dimension of European unification and politics”.⁸⁸ Thanks to Article 17 TFEU, dialogue with religious entities as envisaged by Delors has now been brought into the limelight.

In view of this agenda of recognition and interaction, it appears that the EU not only realised the significance of dialogue between religious groups, but also made genuine efforts to inclusively and equally involve all religions. Through dialogue between religious movements and the Commission via its Bureau of European Policy Advisors, even new religions can gain a voice.⁸⁹ So far, all groups that are at least recognised in one MS have been accepted as partners in dialogue, though a higher level of procedural formality may be introduced the

⁸³ COM(2001) 428, 2001/C287/01.

⁸⁴ Foret F, “Religion: A Solution or a Problem for the Legitimisation of the European Union?”, (2009) 37 (1/2) Religion, State & Society 37, at 39.

⁸⁵ Delors J, “Speech to the Churches”, 14 April 1992; Cavanaugh K, “Islam and the European Project”, (2007) 4(1) Muslim World Journal of Human Rights 1, at 5.

⁸⁶ Silvestri S, “Islam and Religion in the EU Political System”, (2009) 32(6) West European Politics 1212, at 1217.

⁸⁷ Cavanaugh K, “Islam and the European Project”, at 5.

⁸⁸ Ibid.

⁸⁹ Pastorelli S, “The European Union and the New Religious Movements”, (2009) 37 (1/2) Religion, State & Society 193.

future.⁹⁰ This type of lobbying is mainly consultative and to gather information and, therefore, has little direct impact on outcomes.⁹¹ Muslims, however, are not formally represented at Directorate General (DG) level; still, they appear to be the recipients of many policy measures.⁹² Muslim inclusion into the dialogue paradigm is considered to have been inhibited due to the actors involved being elite representatives in civil society or eurocrats.⁹³ The value of this programme has accordingly been contested,⁹⁴ and efforts to overcome issues of representation are much needed, since the EU has started to formulate law impinging on religious freedom through the EFD.

So far, endeavours of dialogue may have little influence on shaping the EU's output, but these continue and have become more formalised and structured and, consequently, more impactful.⁹⁵ Also in general, an allusion to a spiritual dimension, the entertaining of dialogue with religious groups, and the prominence of the *Soul for Europe* institutional discourse, can be conducive to religious discrimination claims, as these are clearly an indication of the recognition of the rights of those who follow a religion. It may take time to facilitate dialogue in a proportionally representative manner, but the prominent position of Article 17 TFEU should benefit this process. Calls for excluding religious groups from having a voice⁹⁶ now probably have little standing.

Other than delineating the EU's relationship with religious bodies, some policy measures shed light on how dialogue can supplement law in its pursuit to combat religious discrimination. The 2008 Year of Inter-Cultural Dialogue can be seen as a continuation of efforts to combat discrimination and intolerance, since dialogue often features as a major solution for these problems. Inter-cultural dialogue can be defined as "a series of specific encounters, anchored in real space and time between individuals and/or groups with different ethnic, cultural, religious and linguistic backgrounds and heritage, with the aim of exploring, testing and increasing understanding, awareness, empathy and respect. The

⁹⁰ Foret F, "Religion: A Solution or a Problem for the Legitimation of the European Union?", at 39; Pastorelli S, "The European Union and the New Religious Movements", at 196-197.

⁹¹ Foret F, "Religion: A Solution or a Problem for the Legitimation of the European Union?", at 39.

⁹² Carrera S and Parkin J, "The Place of Religion in European Union Law and Policy", at 39-40.

⁹³ Koenig M, "Europeanising the Governance of Religious Diversity: An Institutional Account of Muslim Struggles for Public Recognition", at 923.

⁹⁴ Coleman J, *The Conscience of Europe* (Strasbourg/London: Council of Europe Publishing, 1999), at 22; Elbe S, "Eurosomnia: Europe's 'Spiritual Vitality' and the Debate on the European Idea", in P Mandaville and A Williams (eds), *Meaning and International Relations* (London/New York: Routledge, 2003), at 66.

⁹⁵ Silvestri S, "Islam and Religion in the EU Political System", at 1219 and 1221-1223, with further details and background information.

⁹⁶ Such a debate had been reignited since the terrorist attacks of 11 September 2001, 11 March 2004 and July 2005, but are deeply rooted in the idea that public policy should be discussed in universally accessible terms. Leustean LN and Madeley JTS, "Religion, Politics and Law in the European Union: An Introduction", (2009) 37 (1/2) *Religion, State & Society* 3, at 7.

ultimate purpose of intercultural dialogue is to create a cooperative and willing environment for overcoming political and social tensions.”⁹⁷

This definition usefully highlights how dialogue could facilitate better inclusion and participation of disadvantaged groups in the work context. Dialogue can shed a positive light on religious diversity, by creating a genuine “European multi-cultural and multi-faith society” and an “intercultural mindset”, perceptive to cultural and religious pluralism, as advertised by the EU.⁹⁸ Fittingly, the Proposal for the 2008 Year emphasised the development of a European citizenship that is active and open-minded, respects cultural diversity and is based on the shared values in the EU, such as human rights, including the rights of minorities.⁹⁹ Intercultural encounters are paramount and necessary to promote non-discrimination in the workplace. It is not only theoretical understanding a person can gain through dialogue, but also the personal connection to individuals with different ideas, experiences and backgrounds, that are likely to hinder discriminatory conduct. If someone previously perceived as different becomes familiar and commonalities are found, this experience can create a moral barrier to act as a discriminator and awareness that discrimination is wrong, even if only at a subconscious level.

Although diversity and inclusion have been extensively hailed in EU policy, there has been little in terms of proposing actual measures to support these values.¹⁰⁰ Several challenges seem to obstruct the EU’s influence over its MSs in relation to diversity and dialogue. Cavanaugh points out that, for example, several MSs have more rigorously governed religious expression in public since 11 September 2001, portraying this as a necessity for national security and as a natural component of a pluralist state.¹⁰¹ Support at MS level may also be less enthusiastic since the resurgence of nationalism, as religious difference in particular is used to construct the ‘other’ in society.¹⁰² Therefore, Howard contends, it will be the role of the CJEU to give effect to the EU’s desired outcomes in relation to diversity through guarding the EFD’s provisions.¹⁰³

⁹⁷ Ibid, at 29.

⁹⁸ Carrera S and Parkin J, “The Place of Religion in European Union Law and Policy”, at 29; Kostakopoulou D, “The Anatomy of European Integration”, (2010) 73(6) *Modern Law Review* 933 at 935; European Commission and European Policy Centre Debate “New Horizons: Active Citizenship to Bridge Inter-Religious Divides” 2008, http://ec.europa.eu/culture/news/news1392_en.htm (accessed 15 March 2014).

⁹⁹ Proposal for a Decision of the European Parliament and of the Council concerning the European Year of Intercultural Dialogue, COM(2005) 467 final, at 4.

¹⁰⁰ Howard E, “The European Year of Equal Opportunities for All – 2007: Is the EU moving away from a formal Idea of Equality?”, at 177.

¹⁰¹ Cavanaugh K, “Islam and the European Project”, at 5.

¹⁰² Kostakopoulou D, “The Anatomy of European Integration”, at 935.

¹⁰³ Howard E, “The European Year of Equal Opportunities for All – 2007: Is the EU moving away from a formal Idea of Equality?”, at 184.

III. The Employment Framework Directive

The EFD was adopted under (then) Article 13(1) EC and covers discrimination in employment and occupation on the grounds of religion or belief, disability, age and sexual orientation. As Barnard points out, the Directive follows the “classical human rights model to combating discrimination: individual and rights based”.¹⁰⁴ A strong commitment to espouse the Directive was perceived, although it is suspected that this agreement was found without clear knowledge of the type of rights involved and their implementation.¹⁰⁵ According to its Article 1, it offers a general framework to fight discrimination in these areas and to increase prominence of the equal treatment principle within the member states. The characteristics of religion and belief were included in the EFD due to the rise of Islamophobia in Europe, even before the incidents of 11 September 2001, as well as empirical data showing a considerable number of occurrences of religious discrimination at work.¹⁰⁶ Shortly after the EFD came into being, an Action Programme to combat discrimination complementing the EFD and the Race Directive was set up by the Council to guide the EU's activities.¹⁰⁷

1. Types of Discrimination

Neither religion nor belief are defined, which has been criticised as it might lead to intricate judicial discussions.¹⁰⁸ The fact, however, that the word “belief” is added suggests that a broad concept is intended. This also finds support in Recital 24, which mentions (lack of) respect for philosophical and non-religious belief.

Terminology is provided for the concepts of direct and indirect discrimination, both of which fall within the Directive's ambit. The significance of this inclusion of guidance ought not to be underestimated, in particular in the light of the fact that law in the MSs often does not contain workable definitions.¹⁰⁹ Under Article 2(2)(a), direct discrimination is held to “occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation” due to any discrimination ground listed, thus including discrimination by perceived characteristic and by association. Article 2(2)(b) defines indirect discrimination as a situation “where an apparently neutral situation, criterion or practice would put persons having a particular religion or belief...at a particular disadvantage compared with other

¹⁰⁴ Barnard C, *EC Employment Law*, 3rd ed (Oxford: Oxford University Press, 2006), at 311.

¹⁰⁵ Mabbett D, “The Development of a Rights-Based Social Policy in the European Union: The Example of Disability Rights”, at 110.

¹⁰⁶ Barnard C, *EC Employment Law*, 3rd ed, at 388;

Weller P, Feldman A and Purdam K, Home Office Research Study 220 “Religious Discrimination in England and Wales”, Home Office Research, Development and Statistics Directorate, 2001.

¹⁰⁷ Council Decision 2000/750/EC of 27 November 2000, establishing a Community Action Programme to combat discrimination (2001-2006), OJ L303/23.

¹⁰⁸ Skidmore P, “EC Framework Directive on Equal Treatment in Employment: Towards a Comprehensive Community Anti-Discrimination Policy?”, (2001)

30(1) *Industrial Law Journal* 126, at 130.

¹⁰⁹ Allen R and Crasnow R, *Employment Law and Human Rights*, at 235.

persons unless: (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary...". This provision goes beyond formal equality and interestingly can affect standard market practices, when it comes to enabling religious adherence, for example, of headscarves worn at work, as well as religious holidays.¹¹⁰ Thus, Article 2(2)(b) requires to some degree that employers actively answer for the (lack of) fulfilment of religious requirements, even if existing practices in the workplace are affected, contrary to some of the Strasbourg jurisprudence.¹¹¹ The expression "compared with other persons" is not very precise and, therefore, is taken as waiving the need for statistical proof at domestic level.¹¹²

By including harassment, the EFD extends itself further and explains that this is also a form of discrimination that takes place in cases where behaviour connected with any of the Directive's grounds for discrimination result in the violation of someone's dignity and in "creating an intimidating, hostile, degrading, humiliating or offensive environment".¹¹³ In particular, the addition of harassment being "unwanted" conduct is a great advance in making it subjective from the victim's perspective, this fostering greater sensitivity towards others. The harassment provisions are seen as a strongpoint and as based on the recognition of human dignity.¹¹⁴ The instigation to discriminate is also recognised as a form of discrimination.¹¹⁵ Article 11 requires MSs to make provisions for the protection against victimisation, this being defined as any detrimental behaviour connected to legal action taken regarding equal treatment. These definitions are extremely useful for setting common standards across the MSs.

Positive action is explicitly mentioned in Article 7 as a measure of choice where enabling practical equality is desired.¹¹⁶ MSs may uphold or issue tools pre-empting or remedying disadvantages within the Directive's field of application. Clearly, the voluntary character of this rule is a major weakness. To which extent Article 7 will allow for activities in practice remains to be seen, since it is known that the CJEU has a tendency to discourage positive action as regards sex discrimination.¹¹⁷ Still, positive action under the EFD may be wider than so far permitted by the CJEU, as the strong wording of ensuring "full equality in practice"

¹¹⁰ McCrea R, *Religion and the Public Order of the European Union*, at 151.

¹¹¹ *Ibid.*

¹¹² Skidmore P, "EC Framework Directive on Equal Treatment in Employment", at 128, although the Preamble's Recital 15 allows for the use of statistics to prove indirect discrimination.

¹¹³ Article 2(3)

¹¹⁴ Allen R, "Article 13 EC, Evolution and Current Contexts", at 63.

¹¹⁵ Article 2(4).

¹¹⁶ Article 7(1).

¹¹⁷ Steiner J and Woods L, *EU Law*, 10th ed (Oxford: Oxford University Press, 2009), at 176.

appears to allude to result-led procedures.¹¹⁸ Consequently, an expansion from an ‘equal opportunities’ to an ‘equal results’ standpoint might occur.¹¹⁹ Whereas such a move is hoped for, such will entirely depend on the MSs being active in this regard in the first place. Therefore it is understandable that, even before the Directive’s inception, Szyszczak had suspected that there are few options at the EU level to effectively tackle social exclusion of disadvantaged groups.¹²⁰

With regard to the type of employment situations covered, Article 3(1) informs that within EU jurisdiction the Directive shall be utilised to facilitate a wide field of application, listing, for example, public and private sector, access, working condition, pay, as well as work experience and training.

2. Justifiable Limitations and Exceptions under the EFD

Spread across the Framework Directive, there are several provisions which afford the MSs’ discretion to choose measures different from the ones proposed, mostly subject to certain circumstances. Similarly to the way in which many articles of the ECHR are restricted, Article 2(5) allows for MSs to issue discriminatory laws provided that these are necessary “in a democratic society, for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of the rights and freedoms of others”. Without an indication as to how to determine necessity in these instances, it leaves the MSs with a wide margin for deciding upon this. Ellis points out that, firstly, Article 2(5) was inserted on request of the UK government based on the fear that adherents to harmful acts, paedophiles and those with dangerous mental or physical diseases could fall under the protection of the act, and secondly, that the rule’s wide ambit requires the CJEU “to patrol its boundaries carefully”, especially with regard to the fact that only workplace discrimination is covered.¹²¹ This indicates that only forms of religious practice amounting to criminal, dangerous activities, or conducts with severe health implications warrant interferences. In spite of this, suspicion is rightfully expressed due to the question of whether, in a democratic state, discrimination can be necessary at all to pursue public security, order and the

¹¹⁸ Howard E, “The European Year of Equal Opportunities for All – 2007: Is the EU moving away from a formal Idea of Equality?”, (2008) 14(2) European Law Journal 168, at 175;

Schiek D, “A New Framework on Equal Treatment of Persons in EC Law”, (2002) 8(2) European Law Journal 290, at 299.

¹¹⁹ Howard E, *ibid*, at 175;

Poires Maduro M, “The European Court of Justice and Anti-Discrimination”, (2005) European Anti-Discrimination Law Review 21, at 26;

Waddington L and Bell M, “More Equal than Others: Distinguishing the European Union Equality Directives”, (2001) 28 Common Market Law Review 587, at 602.

¹²⁰ Szyszczak E, “The New Parameters of European Labour Law”, at 153.

¹²¹ Ellis E, *EU Anti-Discrimination Law* (Oxford: Oxford University Press, 2005), at 291.

prevention of crime.¹²² Similarly, the question arises of why such an exception was not included in parallel under the Sex and Race Directives.¹²³ The most pressing doubt, however, is based on the fact that a genuine occupational requirement should be the only necessary exception to cover scenarios that cause concerns of the above types.¹²⁴ So there is really no sustainable reason for the Article 2(5) exception. In this light, Skidmore powerfully argues that the limitation ground could act as an excuse for MSs to continue stereotyping, for instance, as regards to Muslims and Jews in order to exclude these from workplaces.¹²⁵

Perhaps the furthest-reaching opportunity for MSs to justify discriminatory conduct is: the occupational requirement laid down in Article 4. In accordance with its paragraph 1, discrimination is held not to exist if, due to the “nature of the particular occupational activities concerned or the context in which they are carried out,...a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate”. It is proposed that, despite the six qualifying terms of this paragraph, it presents notable leeway to exclude some employees or applicants.¹²⁶ For instance, the rule is ambiguous and non-conclusive as to conflicting rights, the actual reason behind this being the need to ensure completion of the Directive’s text at the time.¹²⁷ Article 4 is, nevertheless, paramount to answering the questions of compatibility in Chapters 4 to 6, considering that it is the Directive’s main option for justifying indirect (and direct) discrimination within the scope of this thesis. Accordingly, employers and courts ought to examine if possible justification is well-argued in line with Article 4. Where employers defend indirect discrimination on grounds of religion on the basis of church-state relations in the three subsequent chapters, this aspect will, expectably, also be decided in accordance with the CJEU’s interpretation of Article 4.

Dealing with a specific problem, Article 15(1) allows for Northern Ireland to take positive measures as regards recruitment to its police force with the purpose of diminishing the gap in representation caused by the existing religious composition. Thus, this rule sets out to assist the Northern Irish peace process by enabling the underrepresentation of Catholics in the police force to be tackled.¹²⁸ Similarly, Article 15(2) exempts recruitment of Northern Irish teachers from the Directive, referring to the need to ease the barriers between Catholics and

¹²² Schiek D, “A New Framework on Equal Treatment of Persons in EC Law”, at 302.

¹²³ O’Hare U, “Enhancing European Equality Rights”, at 153; Skidmore P, “EC Framework Directive on Equal Treatment in Employment”, at 130.

¹²⁴ Skidmore P, *ibid*, at 129.

¹²⁵ *Ibid*, at 130.

¹²⁶ Andar R and Leigh I, *Religious Freedom in the Liberal State*, at 319.

¹²⁷ Allen R, “Article 13 EC, Evolution and Current Contexts”, at 69.

¹²⁸ Skidmore P, “EC Framework Directive on Equal Treatment in Employment”, at 131.

Protestants whilst maintaining equal opportunities. Both paragraphs are subject to a basis in domestic law. Thus this provision acknowledges the necessity in Northern Ireland to create a more even representation of the main religious groups in the two sectors of employment, where Catholics are a minority.¹²⁹ This exception raises questions, however, as to its effectiveness, as well as to the period for which it can be maintained.¹³⁰

3. Remedies and Implementation

Articles dealing with remedies are notably weak. Article 9 leaves it to the MSs to decide which type of procedure to provide for potential claimants in cases of unequal treatment. A reversal of the burden of proof is contained in Article 10. There is no explicit suggestion of criminal sanctions, although, due to the severity of some discriminatory conduct, criminal law would be an appropriate medium of response.¹³¹

Articles 12 to 14 encourage MSs to seek involvement of and cooperation with the parties and organisations involved in the subject area of the Directive. The enforcement, for instance, of NGOs', shows that the drafters have taken into account research which reflected the positive effect of institutional support for victims of discrimination.¹³² Regrettably, collective action has not been made part of the scheme, since this may have constituted a more effective mean of enforcement.¹³³ The absence of compulsory establishment of institutional support is also criticised because of its significance for the law to make an impact at ground level.¹³⁴ Due to opposition in the Council, a proposed Directive proscribing equality bodies at domestic level has not gone ahead yet.¹³⁵ Emphasis is also placed on adequate information regarding the new law being disseminated in the relevant circles (Article 12). Although worded as 'duties', the vagueness of the proposed measures to achieve this is most likely to create significant differences between the respective national efforts. This is cause for concern, since importantly employers need to be trained and informed to ensure that the benefits of equal treatment are internalised and objectivity in decision-making is achieved.¹³⁶

¹²⁹ O'Hare U, "Enhancing European Equality Rights", at 152; Steiner J and Woods L, *EU Law*, 10th ed (Oxford: Oxford University Press, 2009), at 568.

¹³⁰ Allen R and Moon G, "Substantive Rights and Equal Treatment in Respect of Religion and Belief: Towards a Better Understanding of the Rights, and their Implications", (2000) *European Human Rights Law Review* 580, at 597.

¹³¹ Allen R, "Article 13 EC, Evolution and Current Contexts", at 53.

¹³² O'Hare U, "Enhancing European Equality Rights", at 156.

¹³³ Schiek D, "A New Framework on Equal Treatment of Persons in EC Law", at 299.

¹³⁴ Skidmore P, "EC Framework Directive on Equal Treatment in Employment", at 129.

¹³⁵ Carrera S and Parkin J, "The Place of Religion in European Union Law and Policy", at 12.

¹³⁶ Allen R, "Article 13 EC, Evolution and Current Contexts", at 53.

The final provisions of the Directive relate to measures which ensure implementation in a broad sense and include, for example, the requirement of compliance of existing law and agreements, as well as the provision of sanctions.¹³⁷ It would have been preferable to add more imaginative tools to support effectiveness, such as measures of affirmative action or other schemes, in cases where discrimination has been found.¹³⁸

IV. The Framework Decision on Racism and Xenophobia

A Framework Decision on combating racism and xenophobia¹³⁹ has introduced criminal sanctions for intentional incitement of *inter alia* religious violence and hatred. At first glance, this Decision could have an impact on protecting religious diversity¹⁴⁰ and also religious discrimination in the workplace. The Decision, however, must not result in restrictions to freedom of association or expression.¹⁴¹ Thereby, the treatment of remarks by fellow employees, for instance, that may offend at a religious level, will probably have to reach a level of considerable severity, before any action can be taken.

V. CJEU Jurisprudence and Religious Discrimination

1. The CJEU's Position on Human Rights

It is safe to say that the Court has been the main actor in the advancement of human rights in the EU.¹⁴² In its jurisprudence, the Court has emphasised on several occasions its central role in ensuring respect for fundamental rights, for the purpose of which it deems itself inspired by the common constitutional traditions of the MSs,¹⁴³ as long as the case in question arises within the scope of the Union's activities.¹⁴⁴ Initially, jurisprudence was affected and guided by the reluctance at MSs level to accept the perils of human rights' erosion through economic integration as pursued by the then EC.¹⁴⁵ Fredman emphasises that "fundamental rights...owe their genesis to fairness and justice for its own sake, rather than as a means of efficiency" and are accordingly required to rank above market powers, as there are still doubts as to how the judges may balance economic interests with human

¹³⁷ Articles 16 and 17.

¹³⁸ Barnard C, "Gender Equality in the EU: A Balance Sheet", in P Alston, M Bustelo and J Heenan (eds), *The EU and Human Rights* (Oxford: Oxford University Press, 1999), at 258; O'Hare U, "Enhancing European Equality Rights", at 154.

¹³⁹ Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ 328 (6 December 2008).

¹⁴⁰ Carrera S and Parkin J, "The Place of Religion in European Union Law and Policy", at 8.

¹⁴¹ Article 7 of the Decision.

¹⁴² Ahmad T and Butler IJ, "The European Union and Human Rights: An International Law Perspective", (2006) 17(4) *European Journal of International Law* 771; Awe BM, "Religion in the EU: Using Modified Public Reason to Define European Human Rights", at 1455.

¹⁴³ Case C-4/73 *Nold KG v. Commission*, [1974] ECR 491.

¹⁴⁴ Case C-249/96 *Grant v. South-West Trains Ltd.* [1998] ECR I-621.

¹⁴⁵ Betten L and Grief N, *EU Law and Human Rights* (Harlow: Longman, 1998), at 58; Case C-4/73 *Nold KG v. Commission*, [1974] ECR 491, at 509, para 14.

rights.¹⁴⁶ At least the CJEU has promisingly elaborated that respect for human rights is a constituting factor for the legality of EU acts and that the Union's institutions are under a positive obligation to ensure that fundamental rights are complied with.¹⁴⁷ Limitations to these rights have been partially expressed in very general terms though,¹⁴⁸ entailing proneness to political bargaining that is linked to vague language.¹⁴⁹ Correspondingly, there is a problem of legal certainty, as well as legitimate expectations where challenges are concerned with a right for the first time.¹⁵⁰

2. The CJEU's Position on Non-Discrimination in General

According to Barnard, equality "has been the central and most highly developed pillar of the European Union's social policy. It lies at the core of the European social model and it has served as a catalyst for change in the member states".¹⁵¹ Moreover, it is argued that equality law in the EU framework is possibly the most sophisticated globally, particularly regarding sex equality.¹⁵² This striking achievement needs to be to a large extent imputed to the work of the CJEU. Considering that the Court has not yet decided a case regarding religious discrimination at work, it is worth beholding some of its rulings that examined discrimination in other contexts.

Non-discrimination on grounds of sex and nationality, in particular, has enjoyed sizeable protection through the CJEU's judgments, with equal treatment in relation to sex having been declared a principle of then Community law early on.¹⁵³ Measures in relation to sex equality that aim to eradicate existing inequalities have been permitted, the Court thus adopting a substantive approach.¹⁵⁴ There can be, however, no assumption that the Court's interpretation will align across discrimination grounds, and the existing "hierarchy of grounds"¹⁵⁵ may mean that religion will receive a less generous consideration. The different

¹⁴⁶ Fredman S, "Transformation or Dilution: Fundamental Rights in the Social Sphere", at 46-47, under reference to Case C-177/88 *Dekker*, [1991] IRLR 27; Case C-32/93 *Webb v. EMO Air Cargo Ltd*, [1994] IRLR 482 and Directive 96/34/EC; McCrudden C and Kontouros H, "Human Rights and European Equality Law", at 89.

¹⁴⁷ Alston P and Weiler JHH, "An 'Ever Closer' Union in Need of a Human Rights Policy: The European Union and Human Rights", at 25.

¹⁴⁸ For instance, "justified by objectives of general interest pursued by the Community", or "tolerable", Case C-44/79, *Hauer*, [1979] ECR 3747 and Case C-84/95, *Bosphorus*, [1996] ECR 3953.

¹⁴⁹ Koskeniemi M, "The Effects of Rights on Political Culture", in P Alston, M Bustelo and J Heenan (eds), *The EU and Human Rights* (Oxford: Oxford University Press, 1999), at 111.

¹⁵⁰ Shiubhne NN, "The European Union and Fundamental Rights: Well in Spirit but Considerably Rumbled in Body?", in P Beaumont, C Lyons and N Walker (eds), *Convergence and Divergence in European Public Law* (Oxford/Portland, Oregon: Hart Publishing, 2002), at 183.

¹⁵¹ Barnard C, *EC Employment Law*, 2nd ed, referring to the White Paper on Social Policy COM(94) 333, at 41.

¹⁵² McCrudden C and Kontouros H, "Human Rights and European Equality Law", at 83.

¹⁵³ Case C-43/75, *Defrenne v. Sabena I*, [1976] ECR 455; Case C-149/77 *Defrenne v. Sabena II*, [1978] ECR 1365, at 26-27; Case C-13/95 *P v. S and Cornwall County Council*, [1996] ECR I-1243, especially at 19.

¹⁵⁴ Case C-312/86, *Commission v. France*, [1988] ECR 6315 at 15; reinforced in Case C-450/93, *Kalanke v. Freie Hansestadt Bremer*, [1995] ECR I-3051 at 18, and Case C-409/95, *Marschall v. Land Nordrhein-Westfalen*, [1997] ECR I-6363 at 26; Case C-136/95, *CNAVTS v. E Thibault*, [1998] ECR I-2011.

¹⁵⁵ For instance, Schiek D, "A New Framework on Equal Treatment of Persons in EC Law"; Waddington L and Bell M, "More Equal than Others: Distinguishing the European Union Equality Directives".

levels of protection are suspected to stem from a lesser degree of commitment.¹⁵⁶ In a preferred view, the same as the other grounds guarded by the EFD, religion deserves a similar level of protection, as it can in many cases be considered unalterable and in general is also regularly extraneous to an employee's ability to carry out tasks.¹⁵⁷

The seminal *Mangold*¹⁵⁸ case shed light on the interpretation of the EFD. In *Mangold*, the CJEU spectacularly stated that age-based discrimination was a general principle of then EC law and that its application was not hindered by the non-transposition of the EFD at the time.¹⁵⁹ *Mangold* thus made room for the assumption that this also applies to all other grounds covered by the EFD,¹⁶⁰ religious non-discrimination presumably also being a general principle of EU law.¹⁶¹ Since only few MSs had safeguards against age discrimination before the EFD and most did as regards religion, a strong point can be made that non-discrimination on grounds of religion can even more so be a general principle under EU law. In addition, the ruling clarified that economic constraints are to be accepted by employers.¹⁶² The Court thereby moved workplace discrimination on all grounds safeguarded by the Treaties into an even more elevated position than Article 13 EC (now Article 19 TFEU) would have suggested. This rise, presumably of all discrimination characteristics, is desirable to make law more effective in combating discrimination, although admittedly the *Mangold* judgment was not free from criticism for its unorthodox reasoning.¹⁶³

It has also been clarified that general occupational requirements are a narrow exception that ought not to allow discriminators to escape lightly.¹⁶⁴ Thus, the clearer concepts of discrimination compared to the one elaborated under the ECHR and the smaller scope for justifications may mean a stronger protection for employees than under Strasbourg jurisprudence.¹⁶⁵ Confirming *Mangold*, the case of *Kücükdeveci* restated that non-discrimination is a general principle of EU law and that the EFD is a particular expression of

¹⁵⁶ O'Cinneide C, "Positive Action and the Limits of Existing Law", (2006) 13(3) Maastricht Journal of European and Comparative Law 351, at 359.

¹⁵⁷ Barnard C, *EC Employment Law*, 3rd ed, at 389; the question of immutability of the characteristic of religion is, however, contentious. A concise discussion of this topic can be found in Vickers L, "Promoting Equality or Fostering Resentment? The Public Sector Equality Duty and Religion and Belief", (2011) 31(1) Legal Studies 135, at 138-139.

¹⁵⁸ Case C-144/04, *Werner Mangold v. Rüdiger Helm*, [2005] ECR I-9981.

¹⁵⁹ *Ibid*, paras 44-47.

¹⁶⁰ Waddington L, "Recent Developments and the Non-Discrimination Directives: *Mangold* and more", (2006) 13(3) Maastricht Journal of European and Comparative Law 365, at 369.

¹⁶¹ McCrudden C and Kontouros H, "Human Rights and European Equality Law", at 89.

¹⁶² *Mangold*, at 44-47.

¹⁶³ Eriksson A, "European Court of Justice: Broadening the Scope of European Nondiscrimination Law", (2009) 7(4) International Journal of Constitutional Law 731, at 737-739 and 753.

¹⁶⁴ Case C-222/84, *Johnston v. RUC*, [1986] ECR 1651 and Case C-285/98 *Kreji*, [2000] ECR I-69.

¹⁶⁵ Handbook on European Non-Discrimination Law (Luxembourg: Publications Office of the European Union, 2011), http://fra.europa.eu/fraWebsite/research/publications/publications_per_year/2011/pub_handbook_caselaw_en.htm (accessed 15 March 2014); McCrudden C and Kontouros H, "Human Rights and European Equality Law", at 107.

this principle, and gave useful clues as to proportionality.¹⁶⁶ The judges set the condition for “every derogation from an individual right to reconcile, so far as is possible, the requirement of the principle of equal treatment with those of the aim pursued.”¹⁶⁷ This will hopefully mean that a genuine reconciliation of interests is strived for and a serious evaluation of the integrity of the employers’ interests will take place. Since *Kücükdeveci* dealt with age discrimination, too, and the scope for derogations in relation to this type of discrimination is much broader than for other types, this judgment may again apply even more so to religious discrimination. Hence, *Kücükdeveci* gives rise to a prospect of a genuine assessment of proportionality also in religious discrimination cases.

3. The CJEU’s Position on Religious Discrimination

In the 1970s, in the case of *Prais*,¹⁶⁸ the CJEU found exams for the EU’s civil service being held on a Saturday were discriminatory against Jews. In this case, the Court only spoke hesitantly of freedom of religion, focussing rather on “religious interests” that needed to be protected. Despite this linguistic option, there is an expectation for this notion to be exceeded nowadays, considering how intensely the protection of fundamental rights has developed in the meantime on a European level.¹⁶⁹ At the very least, *Prais* already confirmed a recognition of religion as a human rights issue.¹⁷⁰ It is likely that such a view would also be adopted in a work context outside the Union’s institutions and thus would constitute a more generous approach than that of the ECtHR. In particular, the outcome of the case was the accommodation of religious requirements, which goes beyond a formal protection from discrimination. According to Rivers, this case can be placed within the context of the wider commitment of the Union to freedom, equality and diversity, the respect of which is a prerequisite for its measures.¹⁷¹ The *Prais* ruling, however, did not have to address the more intricate issue of justification, as it was not difficult for the employer to postpone the examination in question.¹⁷² Therefore, no conclusion can be drawn from *Prais* as regards balancing business and individual interests, and the same can be said for weighing up individual interests against one another or against any aspects posed by church-state relations.

¹⁶⁶ Case C-555/07, *Kücükdeveci v. Swedex* (19 January 2010).

¹⁶⁷ *Ibid*, at 65.

¹⁶⁸ Case 130/75, *Vivien Prais v. European Council*, [1976] ECR 1589.

¹⁶⁹ Robbers G, “Religionsfreiheit in Europa”, at 204.

¹⁷⁰ Allen R and Moon G, “Substantive Rights and Equal Treatment in Respect of Religion and Belief: Towards a Better Understanding of the Rights, and their Implications”, at 585.

¹⁷¹ Rivers J, “In Pursuit of Pluralism: The Ecclesiastical Policy of the European Union”, at 270, referring to Case 11/70 *Internationale Handelsgesellschaft*, [1970] ECR 1125 and former Article 6(2) TEU.

¹⁷² Allen R, “Article 13 EC, Evolution and Current Contexts”, at 56.

In the absence of CJEU case law on religion under the EFD, one could on the one hand presume that, in cases where non-discrimination is to be balanced with church-state models/principles, the Court may experience difficulties in arguing in favour of the individual or entity claiming a violation caused by a particular national model/principle, since the EU owes respect to domestic church-state relations (Article 17 TFEU). On the other hand, such a case may also be an opportunity to advise on definitions and the exact boundaries of religious discrimination, a contested area under the national laws of several MSs. While notably the Treaty leaves unclear to which degree respect will be granted to church-state relations of the MSs,¹⁷³ there is probably sufficient leeway for the Court to argue that these cannot be used as a *carte blanche* to justify all sorts of religious discrimination. Awe, in addition, contends that, due to the Treaties vague and careful mention of religion, the Court has particularly broad opportunities in interpreting religious human rights.¹⁷⁴ The same can, however, be said for church-state relations, as well as for all fundamental rights, where under the Lisbon Treaty religion has a comparably prominent position, let alone non-discrimination. Accordingly, it is not anticipated that this aspect will be a determining factor to the detriment of those claiming religious discrimination.

Possibly indicative, jurisprudence on restrictions to fundamental freedoms to the advantage of fundamental rights suggests that MSs enjoy a discretion in deciding on proportionality.¹⁷⁵ Since MS discretion is granted especially, if sensitive ideological matters are at stake or matters correlating with “particular social risks”,¹⁷⁶ a lot in this regard will depend on issue at stake’s classification as sensitive. Unlike the ECtHR, however, the CJEU does engage in a detailed assessment of how the MSs examined proportionality,¹⁷⁷ thereby ensuring its own requirement that the MSs’ weighting of interests needs to be reconcilable with the Treaties, in particular with fundamental rights and serving a general public interest.¹⁷⁸ A field as strongly protected as non-discrimination should thus certainly be given due weighting and surmounts the hurdle of general interest.¹⁷⁹ On the basis that the balance tilts towards a right, where it is affected at its substance by a measure,¹⁸⁰ religious non-discrimination should in many cases persevere over aspects of church-state relations. The Court is bound

¹⁷³ Flynn L, “The Implications of Article 13 EC – After Amsterdam, will some Forms of Discrimination be more Equal than Others”, at 1143.

¹⁷⁴ Awe BM, “Religion in the EU: Using Modified Public Reason to Define European Human Rights”, at 1445.

¹⁷⁵ See, for instance *Schmidberger*, at 93 and Case C-36/02, *Omega Spielhaller- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Stadt Bonn*, [2004] ECR-I 9619, at 101.

¹⁷⁶ *Omega*, at 101-102.

¹⁷⁷ *Schmidberger*, at 82-92 and *Omega*, at 103-113.

¹⁷⁸ *Schmidberger*, at 80 and *Omega*, at 64 and 97.

¹⁷⁹ Eriksson A, “European Court of Justice: Broadening the Scope of European Nondiscrimination Law”, at 748.

¹⁸⁰ Harbo T-I, “The Function of the Proportionality Principle in EU Law”, (2010) 16(2) *European Law Journal* 158, at 175.

to continue on this path, at least if fundamental rights protected at EU level are the object of restrictions posed by arguments that are not even market related. Since the Court looks at the ECHR to find shared values across its MSs which then are given weight in determining proportionality,¹⁸¹ freedom of religion and correlating non-discrimination should also score higher than church-state relations, which are diverse across MSs both in relation to models and their interpretation. Especially regarding church-state relations, there is space for compromise, in that the national system as such can be respected, but not a particular interpretation of neutrality, that disrespects the fundamental rights as enshrined in the Treaties.

It is noteworthy that religious discrimination in employment may also be dealt with under different headings before the CJEU. Possible discrimination in headscarf cases importantly intersects at the nodes of sex, race and religion and thus arouses curiosity of whether the Court would address such cases under the conditions of sex and race discrimination, as well as religion.¹⁸² Loenen produces a set of arguments indicating that the Court would evaluate headscarves in the workplace differently to the ECtHR. First, there is the fact that the ECHR only provides minimum protection, which is not a limiting factor for the CJEU.¹⁸³ Second, the Court is not inclined to grant the MSs a margin of appreciation in interpreting law, but its interest is to apply EU law uniformly at MS level.¹⁸⁴ Finally, she highlights the crucial point that the Court has a tradition of seriously testing proportionality as regards sex discrimination and expects a similar standard to be applied to the ground of religion.¹⁸⁵ Given that positions forbidding headscarves at work have been unconvincing,¹⁸⁶ and that the CJEU has access to the immense commentary written on such cases under national law and in relation to the ECHR, one can consequently presume a fairly strict handling of employers' wishes to exclude women who wear headscarves. In accordance with Smith, there is the additional component of the free movement of workers that ought to interest the CJEU.¹⁸⁷ Religious discrimination being capable of obstructing migration to states that offer comparably low protection, there is a strong market-based argument towards favouring

¹⁸¹ *Schmidberger*, at 71-72 and *Omega*, at 46.

¹⁸² Loenen T, "The Headscarf Debate – Approaching the Intersection of Sex, Religion and Race under the European Convention on Human Rights and EC Equality Law", in D Schiek and V Chege (eds), *European Union Non-Discrimination Law – Comparative Perspectives on Multidimensional Equality Law* (London and New York: Routledge-Cavendish, 2009), at 313.

¹⁸³ Loenen T, *ibid.*, at 323.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*, at 324, and discussion in relation to the *Dahlab* case in Chapter 2.

¹⁸⁷ Smith RKM, "Unveiling a Role for the EU? The 'Headscarf Controversy' in European Schools", (2007) 19 *Education and the Law* 111, at 115, 117, 119, 121.

employees' rights, too.¹⁸⁸ With employment also being a central EU competence, it can be anticipated that the CJEU will not hesitate to interfere in national matters when it comes to interpreting the Directive.¹⁸⁹

Even so, the range of interpretative options open to test religious discrimination ought not to hide the fact that religion is a sensitive point in the European legal and political discourses.¹⁹⁰ This fact may add uncertainty as to how the CJEU will deal with, for instance, the in later chapters described French and German cases on religious discrimination in employment, as the CJEU may consider measures related to the relationship between church and state as a matter of national competence. Since the EFD, however, is a piece of law that is concerned very specifically with the topic of religious discrimination in employment, the EU has signalled a willingness to use its jurisdiction in this regard, so that the CJEU may follow suit along the same line as it did in *Mangold*. Consequently, it can be ascertained that the EU will be less reluctant than the ECtHR to interfere with sensitive issue of religion.

VI. The Agency for Fundamental Rights

The Agency for Fundamental Rights (FRA)¹⁹¹ is the successor of the European Monitoring Centre on Racism and Xenophobia (EUMC), its activities comprise assisting and advising the EU and the MSs with implementation, collection and dissemination of information, reporting and analysis of impact of EU measures, as well as the cooperation with civil society. Due to its disappointingly low status and minimal competence,¹⁹² the FRA is not likely to have any real (binding) impact on the protection of human rights in the workplace. For instance, the FRA is not endowed with a complaints procedure and does not monitor MSs' compliance. Although this needs to be seen in the light of the work already being done by the Council of Europe, with which the FRA liaises,¹⁹³ the EU's human rights work may well be more advanced and complainants of religious discrimination in employment would probably have a better outlook for success under the EU's legal regime. In addition, the Agency is not fully independent by virtue of two out of four members in the Executive Board being delegated by the Commission and the Commission's competence to set themes for

¹⁸⁸ Bell M, "Equality and Diversity: Anti-Discrimination Law after Amsterdam", in Shaw J (ed), *Social Law and Policy in an Evolving European Union* (Oxford/Portland, Oregon: Hart Publishing, 2000), at 162; Gearty C, "The Internal and External 'Other' in the Union Legal Order: Racism, Religious Intolerance and Xenophobia in Europe", at 348; for a more general account of the free movement of workers' social dimension, see Fairhurst J, *Law of the European Union*, 7th ed (Harlow: Pearson, 2010), at 372-373, who *inter alia* refers to the preamble of Regulation 1612/68, according to which the free movement of workers is to be "exercised in freedom and dignity".

¹⁸⁹ Rivers J, "In Pursuit of Pluralism: The Ecclesiastical Policy of the European Union", at 276.

¹⁹⁰ Robbers G, "Religionsfreiheit in Europa", at 214.

¹⁹¹ European Commission, "Proposal for a Council Regulation establishing a European Agency for Fundamental Rights", COM(2005) 280 final; established through Council Regulation 168/2007, OJ-L 53/1 (15/22 February 2007).

¹⁹² Kaczorowska A, *European Union Law*, at 240-242.

¹⁹³ Howard E, "The European Agency for Fundamental Rights", (2006) 4 European Human Rights Law Review 445, at 448.

activity. Nonetheless, as an integrated, centralised institution, the FRA may indeed help to address problems of intersectionality more effectively, an issue above identified as relevant to workers suffering religious discrimination.¹⁹⁴ Furthermore, the FRA's creation is paramount for increased public presence of discrimination topics, as well as for collection of data that had been completely absent hitherto.¹⁹⁵

A relevant example of work carried out by the FRA are the "Data in Focus" reports. The second report dealt with discrimination experienced by Muslims in the EU within the span of a year.¹⁹⁶ 23,500 Muslims across 14 EU MSs were interviewed in 2008, of which roughly one third reported having experienced discrimination.¹⁹⁷ Religious discrimination within and whilst looking for employment was notably high in Germany (28%). Also in Germany, the workplace was generally held as a common place where discrimination is encountered.¹⁹⁸ Almost 80% of respondents in MSs did not report the discriminatory incident anywhere, mostly due to the impression that nothing would be done about it, but also because 21% worried about the consequences of reporting.¹⁹⁹ If this data is representative, this would mean thousands of cases remain undocumented in the MSs in question.²⁰⁰

VII. Conclusions

By virtue of the Treaty of Lisbon, one could say that the 'reappearance of religion' has also had a notable effect at EU level.²⁰¹ The Lisbon Treaty's inclusion of religion in contexts other than Article 19 TFEU, such as dialogue, representation and mainstreaming, is remarkable and will hopefully increase awareness within the EU's institutions, in particular with regard to the needs of religious minorities, in so far as these are affected by areas of EU competence. Evaluating the past Treaty amendments, an uninterrupted trend towards enhancing non-discrimination policies can be observed. The EU's body of law additionally contains, through the EFD, an instrument that is highly specific to religious discrimination in the workplace. In conjunction with the supranational character of the EU, this means that, most likely, the most powerful outside influence on national law in this field will also emerge

¹⁹⁴ See more generally, Kantola J and Nousiainen K, "Institutionalising Intersectionality in Europe", (2009) 11(4) *International Feminist Journal of Politics* 459, and Burri S and Schiek D, *The European Network of Legal Experts in the Field of Gender Equality, Multiple Discrimination in EU Law – Opportunities for Legal Responses to Intersectional Gender Discrimination*, European Commission, 2009.

¹⁹⁵ Howard E, "The European Agency for Fundamental Rights", at 450.

¹⁹⁶ European Union Minorities and Discrimination Survey, Data in Focus Report 2: Muslims, European Agency for Fundamental Rights, 2008, available at http://fra.europa.eu/fraWebsite/eu-midis/eumidis_muslims_en.htm (accessed 27 May 2011).

¹⁹⁷ Data in Focus Report 2: Muslims, at 2-3; a division by MSs shows that Germany reflects this average, compared to 25.5% of Muslims in France. No interviews were conducted in the UK.

¹⁹⁸ *Ibid*, at 6-7.

¹⁹⁹ *Ibid*, at 8; 38% consider religious discrimination at work normal, 33% did not know what to do, and less than half of the respondents were aware of legislation in place to protect against such conduct.

²⁰⁰ *Ibid*.

²⁰¹ Foret F, "Religion: A Solution or a Problem for the Legitimation of the European Union?", at 37.

from the Union. Hence, the EFD is potentially, despite its shortcomings, a major instrument of advancement in relation to religious non-discrimination.

It can safely be said that discrimination law in employment is generally advanced before the CJEU and has evolved into significant protection throughout time. The Court has been a strong, if not the strongest, force behind advancing equality in Europe. The crucial matter for the subject of this thesis will be the way in which the CJEU handles justifications of indirect religious discrimination, in particular if attributed to church-state relations. Until now, the CJEU has not received a preliminary reference concerned with religious discrimination under the EFD. Unlike the ECtHR, this chapter predicts the CJEU will be more likely to engage in examining the questions brought before it, in particular the conclusions reached by the MSs as to proportionality of a restriction, whilst allowing for domestic discretion. Contrary to the judges in Strasbourg, who tend to simply accept the argument of limiting religious freedom of employees based on the pertinent church-state model or imagined sex equality issues, it is indeed expected that the CJEU will address these issues more thoroughly and genuinely guided by the principle of proportionality.²⁰² In the case of the CJEU, it is also likely that the free movement of workers will be taken into account when finding a decision, aiming for the establishment of similar working conditions throughout the MSs. A pertinent CJEU ruling will also provide clarity as to the understanding of respect for diversity, as found within the Treaties and policy. So far, nothing in EU law suggests that, in effect, religious minorities will experience particular detriment. There is also no indication that EU law only permits a particular type of church-state model. Continuing from these findings, the subsequent three chapters will allow the respective law of the UK, France and Germany relating to religious discrimination in the workplace to be measured against the standards set at CoE and EU levels.

²⁰² Knights S, "Religious Symbols in the School: Freedom of Religion, Minorities and Education", (2005) 5 European Human Rights Law Review 499, at 515.

CHAPTER 4 • The Law in the UK concerned with Religious Discrimination in Employment and its Compatibility with the ECHR and EU Law

I. Introduction

This chapter concerns the law in the UK and is the first of three analysing national law and its compatibility with the ECHR and EU law. In order to facilitate a full appreciation of the case law and to clarify terminology used therein, the court structures available to employees and recent statistics on religious discrimination claims will be outlined initially. Statutory law dealing with religious discrimination (at work) has been heavily influenced by the ECHR and the Employment Framework Directive (EFD), which has since led to the enactments of new legislation in Great Britain, such as the 2010 Equality Act (EA). In contrast, legislation in Northern Ireland is longer-standing and geared towards the particular situation in this part of the UK. The chapter then moves on to examine the relevant case law to understand how the statutory rules have been interpreted. Cases will be assessed under categories that have caused concerns in the UK courts. Discrimination cases have largely surfaced in indirect form and touch upon a large variety of contexts, for instance, dress codes, working hours and participation in certain activities. The final part of this chapter then scrutinises, as far as is possible, the compliance of the law on religious discrimination at work in the UK with the obligations set by the ECHR and EU law.

II. Court Structures and Statistics

All cases concerned with religious discrimination in employment are heard before Employment Tribunals (ET) in the first instance and before Employment Appeal Tribunals (EAT) in the next instance. From there, cases can then be taken to the Court of Appeal (CA) and the Supreme Court, formerly House of Lords (HL), as the last instance. Between April 2011 and March 2012, 940 applications of alleged religious discrimination in employment reached the ETs and EATs, with consistently rising numbers throughout time.¹ Yet, statistical evidence also reflects a “climate of reluctance” of the courts towards deciding in favour of employees filing religious discrimination cases in the UK.² Nevertheless, the total numbers of applications speak for a certain level of awareness about the right not to be discriminated against due to religion.

¹ <http://www.justice.gov.uk/downloads/statistics/tribs-stats/employment-trib-stats-april-march-2011-12.pdf> (accessed 15 March 2014), ET and EAT Statistics. Numbers of accepted claims in 2006/2007 were 648, in 2007/2008 were 710, and in 2008/2009 were 830. The number of applications in the two prior years were similar, in 2005/2006 there were 486 and 307 in 2004/2005. Religious discrimination claims have a low success rate of approximately 2–3%, however, settlements reached via ACAS typically account for around a third of all applications.

² Jennings E and Dutt A, “A Cross to Bear”, (2006) *New Law Journal* 1900.

III. Statutory Law

Until the start of the 2nd millennium, Britain had little to offer in terms of law on religious discrimination. The 1976 Race Relations Act safeguarded only those, who belonged to a distinctive race, leaving most adherents to religion out of its ambit.³ After long-standing criticism of the Race Relations Act for leaving some religious minorities out of its protection, the 2003 Employment Equality (Religion or Belief) Regulations (2003 Regulations)⁴ at least in part remedied this shortfall. Three years prior to their introduction, the Human Rights Act (HRA) had come into force, which gave further effect of the ECHR in national law. In 2010 the new EA finally combined a vast amount of relevant legislation into one piece.

Northern Ireland has a long-standing history of violent religious conflict and this has, of course, penetrated and affected workplaces.⁵ Accordingly, there has been legislation regarding this topic since the 1920s, more recently comprising the 1989 Fair Employment (Northern Ireland) Act. This was consolidated with other amendments by the Fair Employment Treatment Order (Northern Ireland) 1998 (FETO),⁶ to become the 1998 Act. FETO was the outcome of an intensive review of equality in employment, that found religious discrimination at a severe scale and identified lack of monitoring, employers having little awareness of good practice and segregation to be the major problem areas.⁷ At the time this Act, which contains positive duties, put Northern Ireland at the forefront of equality legislation in the UK, if not in Europe.⁸

1. The Human Rights Act 1998

The HRA gives further effect to the ECHR in domestic law, including to the rights of freedom of religion and freedom from discrimination. Section 6 of the HRA twined parliamentary sovereignty with a powerful requirement on public authorities, thus comprising courts and tribunals, to align their conduct with Convention rights, i.e., to interpret the law in question in compliance with these. Furthermore, all statutory law must be compliant with the obligations under the ECHR.⁹ Since the HRA binds only public authorities, private sector employees

³ Connolly M, *Discrimination Law*, 2nd ed (London: Sweet & Maxwell, 2011), at 66.

⁴ SI 2003, No.1660 of 26 June 2003; differently Lester A and Uccellari P, "Extending the Equality Duty to Religion, Conscience and Belief: Proceed with Caution", (2008) 13(5) *European Human Rights Law Review* 567, at 572, who highlight that only Jews should have been protected under the RRA, based on the belief that this is the only religious group to experience racism due to actual or perceived belonging to an ethnic group.

⁵ For detailed statistics of religious composition in Northern Irish workplaces, see Osborne RD, "Religious Discrimination and Disadvantage in the Northern Ireland Labour Market", (2003) 7(4) *International Journal of Social Economics* 206.

⁶ Amended by SR 2003/520.

⁷ Yarrow S and Steele J, *Religious and Political Discrimination in the Workplace – seeking Justice in Northern Ireland* (London: Policy Studies Institute, 1997).

⁸ Fitzpatrick B, "The Fair Employment and Equal Treatment (Northern Ireland) Order 1998 – The Northern Ireland Act 1998", (1999) 28(4) *Industrial Law Journal* 336, at 336.

⁹ Section 3 HRA.

cannot invoke Convention rights in court, whereas employees in the public sector can pursue this path. By authority of Sections 2 and 6 of the HRA, however, those working for private organisations can insist that legislation is interpreted in conformity with the ECHR. The full impact of the HRA as regards religion in the workplace has not been fully felt and is, after the implementation of the EFD, most likely to be used secondarily in this context. It is nevertheless possible that the HRA would be fairly unfavourable towards employees, due to the interpretation of the rights along the ECtHR's jurisprudence.¹⁰

2. The 2003 Employment Equality (Religion or Belief) Regulations

The 2003 Regulations were the first instrument to implement the EFD and, importantly, abolished the requirement of employees showing disadvantage for indirect discrimination, the employee did not have to show any more that he/she could not comply, as it became sufficient to show that compliance would amount to inconvenience.¹¹ This approach was rightly welcomed, explaining that common sense is more relevant than a detailed assessment in court to find out if there is actually a religious requirement.¹² Due to their novel approaches, clarifications and filling the gap for religious discrimination at least in the field of employment, the Regulations, accordingly, received much attention in scholarship.¹³

3. The 2010 Equality Act

After comprehensive campaigning and research since the late 1990s, a unified EA finally came into being in 2010.¹⁴ In response to the criticism of discrimination law prior to its inception, the Act's main goals are harmonisation of law and the advancement of equality.¹⁵ Under this statute, the meaning of religion is 'any religion', or the absence thereof.¹⁶ The Explanatory notes are similarly vague, however, clarify that sects are included and this is

¹⁰ Ahdar R and Leigh I, *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2005), at 300; Collins H, "The Protection of Civil Liberties in the Workplace", (2006) 69(4) *Modern Law Review* 619; Edge PW, *Legal Responses To Religious Difference* (The Hague: Kluwer Law International, 2002); Ewing KD, "The Human Rights Act and Labour Law", (1998) 27(4) *Industrial Law Journal* 275; see also the relevant jurisprudence of the ECtHR in Chapter 4.

¹¹ Ahdar R and Leigh I, *ibid*, at 307; Vickers L, *Religious Freedom, Religious Discrimination and the Workplace* (Oxford: Hart Publishing, 2008), at 127.

¹² Ahdar R and Leigh I, *ibid*, at 307.

¹³ Barmes L, "Promoting Diversity and the Definition of Direct Discrimination", (2003) 32(1) *Industrial Law Journal* 200; Bell M, "A Patchwork of Protection: The New Anti-Discrimination Law Framework", (2004) 67(3) *Modern Law Review* 465;

De Marco N, *Blackstone's Guide to the Employment Equality Regulations 2003* (Oxford: Oxford University Press, 2004);

Gillow E, in Du Feu, Edmund, Gillow and Hopkins, *EU & International Employment Law: United Kingdom*, (Bristol: Jordans, 2005), chapter 6.6.1;

Vickers L, "The Employment Equality (Religion or Belief) Regulations 2003", (2003) 32(1) *Industrial Law Journal* 188.

¹⁴ Hepple B, *Equality – The New Legal Framework* (Oxford and Portland, Oregon: Hart Publishing, 2011), 1-7. Key publications that supported a single equality statute were:

Hepple B, Choudhury T and Coussey M, *Equality: A New Framework – Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (Oxford: Hart Publishing, 2000); "Discrimination Law Review: A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain – A Consultation Paper" (London: Department of Communities and Local Government, 2007),

<http://www.communities.gov.uk/publications/communities/frameworkforfairnessconsultation> (accessed 15 March 2014);

Vickers L, "Celebrating Diversity? The Implementation of the European Non-Discrimination Directives in the UK", (2006) 13(3) *Maastricht Journal of International and Comparative Law* 279.

¹⁵ Connolly M, *Discrimination Law*, at 16.

¹⁶ Section 10(1).

expected to comprise sub-sections of religions, such as Protestant and Catholic Christians.¹⁷ Hence, courts will have to decide in each case, whether the position held can be categorised as religion. The absence of statutory definition entails a number of potential benefits and pitfalls.¹⁸ Vickers suggests a definition for both religion and belief including the aspects of necessity for a person's dignity and integrity, concerning "man's place in the world", importance "in helping the believer make sense of the unknowable" and serving to develop "a sense of the good".¹⁹ Such a definition, also applied to religion alone as relevant in this thesis, would both include newer or lesser-known religions and religious practices and exclude frivolous claims.²⁰

For the purpose of the Act, 'work' is to be seen loosely, as it encompasses not only most aspects of employment, but also service contracts, partnerships, and the aspects of employment offer, terms, refusal to employ, promotion, transfer, training opportunities, dismissal, and other detrimental conduct.²¹ By virtue of Section 13(1), direct discrimination is deemed to take place where less favourable actual or potential treatment is afforded to one person as opposed to another. Section 14(1) would have accounted for dual discrimination, where such treatment occurs, due to a combination of two characteristics, as opposed to someone who does not share either factor. Discrimination only needed to be established on one factor and could also be refuted on the basis that it did not take place as regards one of the two factors.²² It would have been particularly interesting to see, how frequent and successful Section 14 would be invoked in court, in view of intersectional discrimination allegedly based on religion, race and sex, where previously the law did not provide any remedies.²³ For now, the government has, however, decided that Section 14 will not enter into force.²⁴

Indirect discrimination takes place where a 'provision, criterion or practice' constitutes a disadvantage for persons sharing a characteristic in contrast to others and meets four conditions: the disadvantage needs to apply to others who do not share the relevant discrimination ground, has to put those who do share the ground 'at a particular

¹⁷ Explanatory Note 53 and Connolly M, *Discrimination Law*, at 67.

¹⁸ For a summary, see Vickers L, *Religious Freedom, Religious Discrimination and the Workplace*, at 13-24.

¹⁹ *Ibid* at 24.

²⁰ *Ibid*; see below for a detailed discussion on the topic of definition of religion.

²¹ Part 5 'Work' and Section 39.

²² Section 14(3) and (4).

²³ See, for instance, Loenen T, "The Headscarf Debate: Approaching the Intersection of Sex, Religion, and Race under the European Convention on Human Rights and EC Equality Law", in D Schiek and V Chege (eds), *European Union Non-Discrimination Law – Comparative Perspectives on Multinational Equality Law* (London and New York: Routledge-Cavendish, 2009), at 313-328.

²⁴ <http://www.homeoffice.gov.uk/equalities/equality-act/commencement/> (accessed 15 March 2014)

disadvantage' in comparison to those who do not, there is an actual, or potential disadvantage for the complainant and is not justified.²⁵ Indirect discrimination is justified if there is a 'proportionate means of achieving a legitimate aim'.²⁶ In relation to direct and indirect discrimination, it is irrelevant, if the discriminator shares the characteristic(s).²⁷

Schedule 9, Part 1 deals with occupational requirements which can justify discrimination in employment matters. Generally, an exception applies, if the reason for the conduct in question is an occupational requirement, this requirement is justified and the complainant does not fulfil the requirement, or is reasonably expected not to fulfil it. Examples given in the Explanatory Notes comprise, *inter alia*, the capacity to use British Sign Language for a counsellor for persons preferably using this language, and female sex as a requirement for work as a counsellor for female rape victims.²⁸ Markedly, these instances are strictly linked to the ability to carry out the very activities involved in the position, rather than suspected or perceived incompatibilities, as have been revealed in the *Dahlab* and *Şahin* cases in Chapter 2, for instance. In the same way as was expected for the 2003 Regulations, the occupational requirement will probably have to be based on a clear, objective reason to satisfy the condition of necessity.²⁹ Also, exemptions apply if the particular employer is an organised religious group.³⁰

Victimisation and harassment are also prohibited under the EA. According to Section 27(1)(a), victimisation occurs where an employee is treated adversely on the basis that he/she has carried out a protected act, or is suspected of having a choice or doing so. The protected conduct is listed and concerns action related to the EA, that needs to be truthful and in good faith.³¹ Harassment is defined under Section 26 to be the violation of dignity or the creation of "an intimidating, hostile, degrading, humiliating or offensive environment". Alternatively, this environment can be the aim or effect of the conduct in question.³² Importantly, needs to 'relate' to a discrimination factor, not be 'on grounds of' any more. Thus conduct may relate to another person than the complainant, as this can also cause hostile surrounds.³³ A harassing effect can be established based on the complainant's perception,

²⁵ Section 19(2)(a)-(c).

²⁶ Section 19(2)(d).

²⁷ Section 24.

²⁸ Explanatory Notes, para.798.

²⁹ Freedland M and Vickers L, "Religious Expression in the Workplace in the United Kingdom", (2009) 30(3) Comparative Labor Law and Policy Journal 597, at 615.

³⁰ Schedule 9, Part 1, Section 2.

³¹ Section 26(2) and (3).

³² Section 26(1)(b); this wider definition is to guarantee non-regression as demanded by the EFD, Hepple B, *Equality*, at 78.

³³ Hepple B, *ibid*, at 79.

the circumstances and the reasonable expectation of that effect. In this regard it is argued that such a provision might fail to offer protection to unreasonably sensitive employees.³⁴ In opposition to this view, it could be held that there need to be certain objective limitations to prevent abuse of the Act, as well as to give employers and employees confidence to be able to judge which type of behaviour is in line with the law and which is not. Therefore, it could be an option to protect sensitive employees, as far as their perception has a basis within their religion that this employee can plausibly explain. In the context of religion or belief it is, however, correctly stated that tribunals may have little experience with harassment and particular perceptions, which makes it hard to decide upon the reasonableness of the employee's sensitivity: "The use of a subjective test of 'offensiveness' is particularly appropriate in the context of religious harassment, given the relative lack of shared or established understanding of the likely effects of certain behaviour on religious people".³⁵ In the opinion of several authors, the absence of an explicit 'reasonable person'-test is an intentional move to cease the application of such a paradigm.³⁶

Other features contributing to the scope of the Act are the inclusion of vicarious liability of the employer for anyone else related to the work setting, liability of fellow employees, persons helping to contravene the Act and those who instruct, cause or induce contraventions, as well as the extension of protection after the employment relationship has ended.³⁷

Also, there is an exception under Section 192, according to which any measures to the end of national security are permissible.³⁸ Other limitations may arise from outside the EA, namely where other protected rights are infringed by way of practice of religious rights. Section 191 exempts measures that are permitted in other statutory law. This is significant since the practice of religion or belief is considered more likely than other rights to interfere with those of other persons,³⁹ in addition to perhaps being the most contentious discrimination criterion.⁴⁰ The lack of explicit guidance for such cases can be seen as one of the major shortcomings of the EA.⁴¹

³⁴ Brought forward in relation to the 2003 Regulations by Vickers L, "The Employment Equality (Religion or Belief) Regulations 2003", at 189.

³⁵ Vickers L, *Religious Freedom, Religious Discrimination and the Workplace*, at 149.

³⁶ Voiced in relation to the 2003 Regulations. Ahdar R and Leigh I, *Religious Freedom in the Liberal State*, at 307; Vickers L, *ibid*, at 149.

³⁷ Sections 109, 110, 112, 111 and 108 respectively.

³⁸ A national security exception will be also criticised in the context of the parallel provision of the EFD in Chapter 6.

³⁹ McColgan A, *Discrimination Law*, 2nd ed (Oxford: Hart Publishing, 2005), at 631.

⁴⁰ Hepple B, *Equality*, at 40.

⁴¹ Criticism voiced as regards the equivalent provision of the 2003 Regulations, Vickers L, "The Employment Equality (Religion or Belief) Regulations 2003", at 193.

Sections 158 and 159 allow for 'positive action', amongst other reasons, in cases of under-representation as regards a protected ground, as long as the measure is proportionate and does not contravene the Act. More specifically, concerned with recruitment and promotion of equally qualified persons, the permission extends to more favourable treatment that is linked to disadvantage or under-representation, if the aim is to overcome these situations and if the other person does not share the characteristic. A related novelty, actually to be appraised, was the public sector duty to reduce effects of socio-economic disadvantage by mainstreaming under Section 1. The government has, nevertheless, decided not to take forward the public sector duty with regards to socio-economic disadvantage.⁴² Since this would have applied to all functions of public authorities, it potentially had significant effects on issues of employment.

A more limited general public sector duty is clarified in Section 149(1), ranging from extinguishing discrimination and advancing equal opportunities, to entertaining good relations between those who share a discrimination ground and those who do not. Good relations are to be achieved through fighting prejudice and increasing understanding.⁴³ This paragraph acknowledges preconceptions and ignorance to be the root of discrimination and thus is a promising addition to anti-discrimination law. The concept of 'advancing' equality of opportunity is also new and seen as highlighting a proactive, result-focused equality in comparison to the previously used 'promoting'.⁴⁴ This may, for instance, mean that employers need to make arrangements for prayers.⁴⁵ There is unfortunately no equivalent duty for private sector employers, an extension which is highly desirable for potential future amendments of the EA.

Vickers takes into consideration prior experience with public sector duties and, accordingly, warns of ineffective practices when implementing these.⁴⁶ Several further difficulties surrounding the public sector duty and religion in particular are also highlighted, for instance, complications in 'fostering good relations' in view of diverse needs within religious groups, as well as the risk of emphasising differences between such groups.⁴⁷ In the end, however, Vickers makes a strong case that pitfalls of the public sector duty can be overcome, if

⁴² <http://www.homeoffice.gov.uk/equalities/equality-act/commencement/> (accessed 15 March 2014).

⁴³ Section 149(5).

⁴⁴ Hepple B, *Equality*, at 135.

⁴⁵ Ibid.

⁴⁶ Vickers L, "Promoting Equality or Fostering Resentment? The Public Sector Equality Duty and Religion and Belief", (2011) 31(1) *Legal Studies* 135, at 137-139.

⁴⁷ Ibid, at 144-145; see also Lester A and Uccellari P, "Extending the Equality Duty to Religion, Conscience and Belief: Proceed with Caution", (2008) 13(5) *European Human Rights Law Review* 567, who object a public sector duty in relation to religion.

equality is understood in terms of inclusion and participation.⁴⁸ Such a strategy is favourable, since it affirms features of transformative equality, recognising both individual choice and the allocation of resources to accomplish a real choice, thus improving the opportunities of those who suffer recurrent disadvantage.⁴⁹

In contrast, Lester and Uccellari have warned against extending the equality duty to the religion ground, on the basis of “increasingly persistent demands from religious groups that their belief systems be given a more influential place in the public sphere”, providing the examples of requests to permit *shari’ah* competences and exemptions from the HRA.⁵⁰ This suggestion is, however, questionable, since there is little evidence for large-scale demands of this type, religious law has been applied in parallel for considerable years,⁵¹ and fears of such requests are mainly based on misconceptions. Moreover, an apparent rise in these demands may result from improved integration in society, which has improved the voice of religious communities, and/or even just from raised media attention to matters of minority religion. Lester and Uccellari justify their viewpoint with the nature of religion as a mutable characteristic and thus a less worthy component of identity that does not affect a person’s “very being or humanity”, but rather his/her “individual beliefs, practices and choices”.⁵² It is, therefore, proposed that this distinction stems from an artificial and subjective understanding of ‘believing’ and ‘being’, perhaps understandable from a majority perspective.

Despite the fact that religion is mutable in terms of doctrinal flexibility and development in history,⁵³ the proponents of this opinion overlook that in reality not all individuals are equipped or in doubt to make choices in these regards. A strongly held religious conviction may thus be as firmly integrated in one’s very being as, for example, the characteristics of sex, sexual orientation and ethnicity. The authors seem to assume that the choice they envisage as an alternative belief can be readily made at any time to accustom to the circumstances of the environment. Ironically, they also refer to “patriarchal and intolerant religions”, as if not all religions can be interpreted either in this way or the opposite. This reference, again, shows a certain lack of objectivity that may have led to the formation of the overall standpoint and shows how firmly subconscious or misinformed beliefs are at times

⁴⁸ Vickers L, “Promoting Equality or Fostering Resentment? The Public Sector Equality Duty and Religion and Belief”, at 154-157.

⁴⁹ See introduction and Hepple B, *Equality*, at 21; Albertyn S, “Substantive Equality and Transformation in South Africa”, (2007) 23(2) South African Journal of Human Rights 253, at 257; in relation to religious discrimination specifically, Spinner-Halev J, “Liberalism and Religion: Against Congruence”, (2008) 9(2) Theoretical Enquiries into Law 553.

⁵⁰ Lester A and Uccellari P, “Extending the Equality Duty to Religion, Conscience and Belief: Proceed with Caution”, (2008) 13(5) European Human Rights Law Review 576, at 567.

⁵¹ For instance, the London *Beth Din*, <http://www.theus.org.uk/category/london-beth-din> (accessed 15 March 2014).

⁵² Lester A and Uccellari P, “Extending the Equality Duty to Religion, Conscience and Belief: Proceed with Caution”, at 569.

⁵³ McColgan A, “Class Wars? Religion and In(equality) in the Workplace”, (2009) 38(1) Industrial Law Journal 1, at 23.

held. In the absence of more concrete criticism and the possibility to adapt to broad conceptions of equality, the adoption of the public sector duty is to be appreciated.

Since 2007, employers and employees, amongst others, can obtain general information and personal advice from the Equality and Human Rights Commission (EHRC), which has come to life under the 2006 Equality Act.⁵⁴ To this end, the previously operating Equal Opportunities Commission, Disability Rights Commission and Commission for Racial Equality were absorbed into the new EHRC. The EHRC has the strategic objective to *inter alia* “build a society without prejudice, promote good relations and foster a vibrant equality and human rights culture”.⁵⁵ Codes of Practice were revised to reflect the latest effects of the EA.⁵⁶ In Scotland, a separate body, the Scottish Human Rights Commission (SHRC) oversees the protection of human rights, by way of research, training and inquiries.⁵⁷ Thus, the HRA and the EA are attended to by two Commissions (see below in relation to Northern Ireland).

4. Statutory Exemptions and the Concept of Accommodation

In the UK, some areas of conflict between work and religious commitments have already been addressed by law in the form of statutory exemptions. For instance, under Part IV of the Employment Rights Act 1996, some employees are exempt from working on Sundays; also, according to Section 4(1) of the Abortion Act 1967, medical staff can refuse to participate in the actual physical process of an abortion.⁵⁸ Other examples of exceptions are the right to deny consent to research on embryos,⁵⁹ Sikh workers not needing to wear hard-hats where this is otherwise required,⁶⁰ and formerly exemption from trade union membership where this was compulsory on others.⁶¹ The statutory exemptions reflect a degree of accommodation, based on an attitude of understanding of genuine religious needs. Accordingly, these established exceptions could be used to argue for a more general right to reasonable accommodation in the future debate. As these exceptions are statutorily enshrined, the underlying theme can be said to be that the majority is more able to influence

⁵⁴ For a critical evaluation of the EHRC's characteristics, see Choudhury T, “The Commission for Equality and Human Rights: Designing the Big Tent”, (2006) 13(3) Maastricht Journal of International and Comparative Law 311 and O’Cinneide C, “The Commission for Equality and Human Rights: A New Institution for New and Uncertain Times”, (2007) 36(2) Industrial Law Journal 141.

⁵⁵ <http://www.equalityhumanrights.com/about-us/vision-and-mission/our-strategic-plan/> (accessed 15 March 2014).

⁵⁶ <http://www.equalityhumanrights.com/legal-and-policy/equality-act/equality-act-codes-of-practice/> (accessed 15 March 2014).

⁵⁷ <http://www.scottishhumanrights.com/> (accessed 15 March 2014).

⁵⁸ A claim brought by an administrator, who denied a patient a referral letter to a doctor for the purpose of an abortion therefore failed, as this was classified as indirect participation, *R v. Salford Health Authority, ex parte Janaway*, [1988] 2 WLR 442.

⁵⁹ Section 38 Human Fertilisation and Embryology Act 1990.

⁶⁰ Section 11 Employment Act 1989.

⁶¹ *Webster v. UK*, (1982) 4 EHRR 38.

the law through the democratic process, in contrast to less vocal or resourceful minorities, who are not able to do so.⁶² Furthermore, the additional rights granted are not even desirable for the majority and are as such not a general advantage.⁶³

This backdrop can provide a sound basis to argue in favour of a general duty to accommodate individual needs and, in relation to this thesis, for the accommodation of employees' religious needs. An employer's duty to make adjustments has already existed in relation to disabled persons since the 1995 Disability Discrimination Act. This model has continued under the 2010 EA, which requires employers to reasonably adjust the workplace for disabled persons.⁶⁴ Under Section 20 EA, employers have to undertake reasonable steps to avoid disabled workers' substantial disadvantages by (i) amending rules, criteria, or practices, (ii) removing physical barriers, and/or (iii) providing equipment, or assistance (auxiliary aids).⁶⁵ The question is, then, whether this concept ought to be transferred also to other discrimination grounds, such as religion. In abstract terms, there is perhaps little difference between a duty to accommodate and a prohibition to indirectly discriminate. In both cases, the factual problem is the incompatibility between work-related obligations and a religious requirement, which the employer did not alleviate and needs to justify. Besides, in both cases, and depending on interpretation, the terms proportionate (in the context of indirect discrimination) and reasonable (for the purposes of the duty to accommodate) can be interchangeable.⁶⁶ There are, however, two essential differences. Firstly, it is arguably easier for the employee, in the case of the duty to accommodate, to prove a *prima facie* case of (i.e. that the employer did not attempt to address a specific situation of conflict between a work-related obligation and a religious requirement), than to prove a *prima facie* case of indirect discrimination. Secondly, contrarily to the notion of indirect discrimination, the duty to accommodate is of an individualised nature.⁶⁷ In other words, the duty to accommodate relates to a specific person's problem and its solution, and not to a disproportionate effect on a specific group as in the case of indirect discrimination.⁶⁸ The employer, decisively, can more easily dispute group disadvantage.⁶⁹ Hence, in practice,

⁶² Knights S, *Freedom of Religion, Minorities and the Law*, at 149.

⁶³ Ibid.

⁶⁴ Section 39(5).

⁶⁵ Section 20(3)-(5); guidance available at <http://www.equalityhumanrights.com/advice-and-guidance/guidance-for-employers/the-duty-to-make-reasonable-adjustments-for-disabled-people/the-three-requirements-of-the-duty/> (accessed 2 May 2012).

⁶⁶ Vickers L, "Approaching Religious Discrimination at Work: Lessons from Canada", (2004) 20(2) *International Journal of Comparative Labour Law and Industrial Relations* 177, at 185, 189 and 191; similarly Waddington LB, "Reasonable Accommodation - Time to Extend the Duty to Accommodate Beyond Disability?", (2011) 38(2) *NJCM-Bulletin* 186, at 193.

⁶⁷ Vickers L, *Religious Freedom, Religious Discrimination and the Workplace*, at 222-223; Waddington LB, "Reasonable Accommodation - Time to Extend the Duty to Accommodate Beyond Disability?", at 188.

⁶⁸ Waddington LB, *ibid.*, at 193; Vickers L, *ibid.*, at 220.

⁶⁹ *Ibid.*, at 194; McColgan A, "Class Wars? Religion and In(equality) in the Workplace", at 28.

accommodation covers a wider range of discriminatory situations, which is laudable, in that minority beliefs within faith communities and other exceptional settings can be more easily included within the scope of protection. Equally crucial, accommodation is of fundamental use for the religion ground where quibbling, irresolvable distinctions between direct and indirect discrimination result in unnecessary disputes over the meaning of religious symbols (and the related distinction between internal and external forms of worship), instead of tackling the actual problems of disadvantaged and excluded individuals.⁷⁰

Actually, cases such as *Şahin* and *Dahlab* before the ECtHR have shown that discussing religious symbols is counterproductive to wider non-discrimination goals, so it is indeed promising to approach such instances from another angle. Consequently, the practical differences between accommodating and not discriminating indirectly go beyond a mere terminological move from 'proportional' to 'reasonable' conduct. Accommodation also appears suitable to address a large range of actually existing religious needs, similar to what is known from disability discrimination.⁷¹

A fundamental argument against the duty to accommodate is the concept's reactive nature, which leaves the causes and structures facilitating inequality unscathed.⁷² Although it would be advisable that employers change their policies and provide training following an incident of accommodation, this does undeniably not take place in all instances. Sossin provides the hopeful example of the Canadian *Bhinder* case, which ruled on accommodation of religious dress.⁷³ This case had a domino effect in another employment sector, which amended its rules to explicitly allow beards and turbans.⁷⁴ In spite of comparable potential in the UK, a large-scale reform of unequal structures can admittedly not be expected merely because of the insertion of such a duty. Still, as was discussed as regards the inception of the EA, there are political obstacles to more effective measures to battle structural inequality (such as the duty to alleviate socio-economic disadvantage), and conceivably even more so if extended to private sector employers. Therefore, these do not present viable options at this moment, whereas a duty to accommodate could be a more likely and feasible interim achievement. Moreover, the reactivity of a duty to accommodate may be partially remedied by the wide public discussion that usually accompanies the introduction of new legislation affecting

⁷⁰ Edge P, *Legal Responses to Religious Difference*, at 118-119; Hepple B, *Equality*, at 43; McColgan A, *ibid*, 29.

⁷¹ Vickers L, *Religious Freedom, Religious Discrimination and the Workplace*, at 221.

⁷² McColgan A, "Class Wars? Religion and In(equality) in the Workplace", at 27-28; Vickers L, *ibid*, at 221.

⁷³ Sossin L, "God at Work: Religion in the Workplace and the Limits of Pluralism in Canada", (2009) 30(2) *Comparative Labor Law and Policy Journal* 485; *Bhinder v. Canadian National Railway Company*, (1985) 2 *Supreme Court Reports* 561.

⁷⁴ Sossin L, *ibid*, at 495-496.

many undertakings and service providers. Thus, the insertion of a duty to accommodate could operate as a publicity tool to raise the profile of anti-discrimination in general and signal the state's expectations in this regard. Although such publicity also tends to stir up concerns, governments may dispel any expected doubts: concerns can be anticipated with the help of pertinent literature, in particular dealing with other jurisdictions' experience with duties to accommodate on the basis of several characteristics.

Also, a duty to accommodate faces opposition due to the detriment to those burdened therewith. The main difficulties employers would perhaps encounter relate to financial or managerial consequences and the mediation between the employee in question and those who may feel disadvantaged because of the accommodation.⁷⁵ In order to evaluate potential difficulties in these regards, it seems useful to consider experiences from jurisdictions that have already implemented a duty to accommodate religious needs in the work environment, such as Canada and the USA. According to the Canadian *Meiorin* test, measures that are *prima facie* discriminatory are only justified if accommodating the relevant need is impossible, unless the employer experiences 'undue hardship'.⁷⁶ 'Undue hardship' has evolved from exceeding a *de minimis* cost⁷⁷ to higher expectations, such as taking reasonable action "to accommodate without undue interference in the operation of the employer's business and without undue expense to the employer", in the landmark ruling of *O'Malley*.⁷⁸ Leaving aside any difficulties in defining the boundaries of 'undue hardship', these parameters have led to a system where occupational requirements are likely to be disproportionate when employers make no efforts to accommodate, on the one hand, and where employees benefitting from the accommodation show willingness to compromise, on the other.⁷⁹ The Canadian example reflects the idea of cooperation or shared contribution inherent to the concept of accommodation.⁸⁰ Valuably, the mutual goal of compromise between the parties in question also facilitates dialogue between individuals which then can lead to more peaceful relationships, even if disagreement on the religious subject matter may remain.⁸¹ A further advantage of reasonable accommodation can here be identified

⁷⁵ Vickers L, *Religious Freedom, Religious Discrimination and the Workplace*, at 222.

⁷⁶ British Columbia (Public Service Employee Relations Commission) v. BCGSEU (*Meiorin*), [1999] 3 SCR 3 (9 September 1999), at 54.

⁷⁷ *Froese v. Pine Creek School Division* No 30 (1978).

⁷⁸ *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, (1985) 2 Supreme Court Reports 536, at 23.

⁷⁹ Vickers L, "Approaching Religious Discrimination at Work: Lessons from Canada", at 189 and 192, referring to *O'Malley*, *ibid.*, and *More v. British Columbia (Ministry of Social Services)*, 17 Canadian Human Rights Reports D/426.

⁸⁰ Vickers L, *ibid.*, at 198.

⁸¹ Sossin L, "God at Work: Religion in the Workplace and the Limits of Pluralism in Canada", at 505.

along with Wahlstrom, who praises the ability of this notion to account for incompatible values, without necessitating agreement on autonomy or other political values.⁸²

In the USA, courts have afforded a lower standard of accommodation measures to matters of religion than disability.⁸³ US courts consider that there is 'undue hardship' to accommodate when a *de minimis* cost is exceeded, or there is some sort of disruption, such as complaints of co-workers.⁸⁴ In addition to the confusion caused by differing standards across duties to accommodate,⁸⁵ such a system would probably bring down the standard of protection offered by the prohibition of indirect discrimination in the EU member states.

Reflecting on the US and Canadian approaches, the seeming harshness of the duty of accommodation placed on the employer could be resolved through demarcating reasonableness, even by requiring a lower standard of justification in the first place.⁸⁶ As long as the person or entity accused of not fulfilling the duty can show an actual effort to accommodate and tangible obstacles to (better) fulfilment, then all parties involved ought to be sufficiently protected still.⁸⁷ If anything, it seems, the main difficulty would be to prevent limiting the scope of rights due to potentially subjective standards of what is reasonable.⁸⁸

In the context of defining reasonableness, it is also helpful to look into guidance provided by the EHRC concerning reasonable adjustments for disabled persons. This highlights the determining factors of effectiveness of the method, its practicality, cost and the availability of financial support.⁸⁹ Furthermore, employers may need information and help to effectively facilitate accommodation. Once more, it can be expected that the EHRC, as an entity overarching all discrimination grounds, would take a lead role in providing such advice. Indeed, its website already provides a multiplicity of guidance for all stakeholders within its areas of competence.⁹⁰

Potential discontent about accommodation from fellow workers is thinkable, for instance, where many would like to work on Sundays, but these shifts are allocated to those who

⁸² Wahlstrom AK, "Liberal Democracies and Encompassing Religious Communities: A Defense of Autonomy and Accommodation", (2005) 36(1) Journal of Social Philosophy 31, at 39.

⁸³ Waddington LB, "Reasonable Accommodation - Time to Extend the Duty to Accommodate Beyond Disability?", at 190.

⁸⁴ Vickers L, *Religious Freedom, Religious Discrimination and the Workplace*, at 185-191 and 222, see for example, *TWA v. Hardison*, 432 US 63 (16 June 1977), at 84.

⁸⁵ Waddington LB, "Reasonable Accommodation - Time to Extend the Duty to Accommodate Beyond Disability?", at 191.

⁸⁶ Vickers L, *Religious Freedom, Religious Discrimination and the Workplace*, at 224.

⁸⁷ *Ibid*, at 222-223.

⁸⁸ Moon G and Allen R, "Substantive Rights and Equal Treatment in Respect of Religion and Belief: Towards a Better Understanding of the Rights, and their Implications", (2000) 5(6) European Human Rights Law Review 580, at 601.

⁸⁹ <http://www.equalityhumanrights.com/advice-and-guidance/guidance-for-employers/the-duty-to-make-reasonable-adjustments-for-disabled-people/what-is-meant-by-reasonable/> (accessed 15 March 2014).

⁹⁰ <http://www.equalityhumanrights.com/advice-and-guidance/> (accessed 15 March 2014).

require another day off for religious reasons, or vice versa, if extended leave and weekends are given off for religious reasons.⁹¹ Whilst acknowledging that these are legitimate complaints by co-workers, Waddington clarifies that this kind of opposition does not constitute an unreasonable burden on the employer.⁹² McColgan adds that the level of inconvenience to employers is no more than accommodating employees' leaves related to pregnancy and children.⁹³ Besides, Freedland and Vickers creditably propose a two-way process, where the employee whose need is to be accommodated ought to take on some unpopular tasks in return.⁹⁴ These positions are pragmatic, given that otherwise fellow employees could disrupt the implementation of law based on extraneous motives. As long as working time arrangements are made equitably and transparently, then all staff ought to be willing to cooperate. The finding of compromises and solutions is, debatably, simpler the more diverse the workforce is, since this will lead to a larger variety of needs and corresponding availability to cover tasks unsuitable for co-workers with a differing set of identity markers.

Another set of counter-arguments surround the risks of accommodation as regards religion, in particular, unduly favouring over competing interests.⁹⁵ Conflicts with interests of other individuals are at times inevitable; foreseen areas of struggle are religious versus sexual orientation/sex/race interests, if religious accommodation leads to an incursion into other individuals' equality rights.⁹⁶ Even though proportionality may be more suited to address such conflicts,⁹⁷ the same balancing act can be achieved by defining the term 'reasonable' attached to the accommodation concept.⁹⁸ The main difficulty would then be the ability of the employer to harmonise conflicting interests, however, this again equates to the determination of proportional responses in the case of indirect discrimination. The condition of reasonableness should serve to balance the relevant interests involved, simply because it would not be reasonable to violate one right at the expense of protecting another; details of each case will, thus, have to determine which violation would be greater.

⁹¹ Vickers L, *Religious Freedom, Religious Discrimination and the Workplace*, at 222; Waddington LB, "Reasonable Accommodation - Time to Extend the Duty to Accommodate Beyond Disability?", at 190-191.

⁹² *Ibid*, at 191.

⁹³ McColgan A, "Class Wars? Religion and In(equality) in the Workplace", at 26.

⁹⁴ Freedland M and Vickers L, "Religious Expression in the Workplace in the United Kingdom", at 616.

⁹⁵ Allen R and Moon G, "Substantive Rights and Equal Treatment in Respect of Religion and Belief: Towards a Better Understanding of the Rights, and their Implications", (2000) 6 *European Human Rights Law Review* 580, at 601; Lester A and Uccellari P, "Extending the Equality Duty to Religion, Conscience and Belief: Proceed with Caution"; McColgan A, "Class Wars? Religion and In(equality) in the Workplace", at 26.

⁹⁶ Freedland M and Vickers L, "Religious Expression in the Workplace in the United Kingdom", at 618; McColgan A, *ibid*, at 26.

⁹⁷ Waddington LB, "Reasonable Accommodation - Time to Extend the Duty to Accommodate Beyond Disability?", at 193.

⁹⁸ Freedland M and Vickers L, "Religious Expression in the Workplace in the United Kingdom", at 617.

Realistically, successful requests for accommodation will, therefore, involve areas that require a counterbalance to privileges afforded to what McColgan coins as “favoured faiths”, such as days and times of rest, dress and food provision.⁹⁹ It appears constructively, in addition, that such accommodation would sit nicely with any church-state model, considering that any potential degree of privilege afforded to one or more faiths can be used as a benchmark for what is, in return, to be provided to the “non-favoured” faith. Finally, it is also recommended that accommodation continues until any state operates in a substantively neutral way, or for as long as the consequences of partiality are present.¹⁰⁰ In an ideal case, accommodation would also take into account the overlap of race and religion and provide greater accommodation for minority religions’ practices to even out existing disadvantages, a principle that can be applied as regards discrimination grounds too.¹⁰¹

Although, for practical reasons, there is a lot to be said for the idea of integrating accommodation under the concept of indirect discrimination,¹⁰² as has occasionally been done *de facto* before the ECtHR,¹⁰³ explicit accommodation rules under national law would lend themselves to manifesting, hopefully one day, a European consensus on the issue. Finally, it is also noteworthy that both in Canada and the USA accommodation has first been addressed in the context of religion, rather than in the context of other grounds.¹⁰⁴ This may indicate that religion is a characteristic particularly prone to need accommodation, however, under a wider perspective, all markers of identity would benefit from being accommodated. It appears that, despite its virtues, an introduction of reasonable accommodation in the field of religious discrimination is still subject to more convincingly answering several points of objection, in particular the potential confusion and efforts entailed for employers.¹⁰⁵

5. Northern Irish Statutory Law

FETO is an advanced instrument to protect from religious discrimination in many ways, for instance, it requires employers with more than ten employees to monitor the religious

⁹⁹ McColgan A, “Class Wars? Religion and In(equality) in the Workplace”, at 25-26.

¹⁰⁰ *Ibid*, at 28.

¹⁰¹ Freedland M and Vickers L, “Religious Expression in the Workplace in the United Kingdom”, at 620.

¹⁰² Vickers L, *Religious Freedom, Religious Discrimination and the Workplace*, at 223-224; Waddington LB, “Reasonable Accommodation – Time to Extend the Duty to Accommodate Beyond Disability?”, at 197, who nevertheless adds that this may confuse employers, at 194.

¹⁰³ *Jakóbski v. Polanc*, Appl.No.18429/06 (7 December 2010), at 48-55 (failure to provide food in accordance with religious tenets); *Thlimmenos v. Greece*, Appl.No.34369/97, at 44-48 (failure to enact exceptions); at domestic level, this *de facto* accommodation can be found as regards sex discrimination in *London Underground Ltd v. Edwards*, [1999] ICR 494 (CA).

¹⁰⁴ Waddington LB, “Reasonable Accommodation – Time to Extend the Duty to Accommodate Beyond Disability?”, at 189.

¹⁰⁵ See Department for Local Communities and Local Government, “Discrimination Law Review – A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain”, London, June 2007, at 4.40 and more substantial discussions by Allen R and Moon G, “Substantive Rights and Equal Treatment in Respect of Religion and Belief: Towards a Better Understanding of the Rights, and their Implications”; Hepple B, Coussey M and Choudhury T, *Equality: A New Framework – Report to the Independent Review of the Enforcement of UK Anti-Discrimination Legislation*; Vickers L, *Freedom of Religion, Religious Discrimination and the Workplace*, at 220-225.

composition of their workforce. Section 4 of FETO prescribes ‘affirmative action’ to employers, this being defined as securing “fair participation in employment by members of the Protestant, or members of the Roman Catholic, community” through measures that encourage participation and ending measures that hinder participation. The provision thus notably does not arrange for the same action as regards adherents of other religions. Public sector employers, however, are subjected to a mainstreaming duty to promote equal opportunities. Still, Fitzpatrick considers the positive duties as “modest”, in light of their focus on training and redundancy selections.¹⁰⁶ He explains that the monitoring aspects, in conjunction with considerable fines for contraventions, are the real drivers for change.¹⁰⁷

In this part of the UK, amendments aligned the existing FETO with the obligations under the EFD. This led, in particular, to the addition of harassment as unlawful behaviour and to the shift of the burden of proof to the employer. Under Article 70 of FETO, an exception is granted to employers in cases where the existence or absence of a belief is required by “the essential nature of the job”, without any element of proportionality. Additionally, FETO does not apply to ministers of religion, teachers and to some extent police personnel, in accordance with the exception under Article 15 of the EFD. To alleviate the Northern Irish imbalance of opportunities, the Police (Northern Ireland) Act 2000 retained its content of requiring the police to recruit an equal number of Roman Catholic employees.

The functioning of Northern Irish discrimination law has been overseen since 1998 by the Equalities Commission for Northern Ireland (ECNI).¹⁰⁸ Its tasks and activities are largely similar to the EHRC and laid down in Part II of FETO.

IV. Case Law

1. The Notion of Religion

In the UK, there has been general reluctance of the courts to define religion and the roots of this attitude lie in the intention of taking a neutral role in this regard.¹⁰⁹ Suitably, Lord Nicholls provided in the case of *Williamson* that religious beliefs are “intensely personal”, may be “irrational and inconsistent”, as well as “surprising”.¹¹⁰ Accordingly, he continued, courts ought not to verify religious beliefs as genuine according to any objective standard, but only

¹⁰⁶ Fitzpatrick B, “The Fair Employment and Equal Treatment (Northern Ireland) Order 1998 – The Northern Ireland Act 1998”, at 337; McCormack V and O’Hara J, *Enduring Inequality – Religious Discrimination I Employment in Northern Ireland* (London: National Council for Civil Liberties, 1990), at 65–74.

¹⁰⁷ Fitzpatrick B, *ibid.*, at 338. For instance, Sections 27–29 of the Fair Employment Act 1998 prescribe annual reporting and Section 31 provides for formal investigations; for example £25,000 in *Duffy v. Eastern Health and Social Sciences Board*, [1992] IRLR 251.

¹⁰⁸ <http://www.equalityni.org/> (accessed 15 March 2014).

¹⁰⁹ Ahdar R and Leigh I, *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2005), at 125.

¹¹⁰ *R (Williamson) v. Secretary of the State for Employment*, [2006] 2 AC 246 (HL), at 22.

consider the presence of good faith and the absence of “fictitious”, “capricious” and artificial elements.¹¹¹ More specifically, in a discrimination context, an employment tribunal has recognised a “wide and liberal meaning” of religion, which in this instance included remaining at home for the purpose of bereavement.¹¹² As a consequence, it seems discrimination does not need to have taken place due to a particular religion, but because of religion in general. Although the case of *Nicholson*¹¹³ referred to climate change and thus a non-religious, philosophical belief, this case importantly indicates a number of further requirements that presumably apply to religion, too. Drawing from previous rulings, the judge emphasised that religious and philosophical beliefs do not need to be shared by others and do not need to “govern the entirety of a person’s life”, but have to be compatible with dignity and integrity and have to be respectable in a democracy.¹¹⁴ *Nicholson* clarified that science-based philosophical beliefs are protected (by the 2003 Regulations), that it was unnecessary to establish the existence of a counter-belief and, finally, that evidence and cross-examination as to the genuineness of a claimed belief are a necessary part of the investigation before court.¹¹⁵ This jurisprudence overall seems to serve the purposes served by Vickers’ definition above, which means it can be hoped that it sufficiently makes up for an absent statutory definition. *Nicholson* also, generally, indicates that courts are open to include beliefs that have not been subject to judicial assessment previously, which can be an advantage for adherents of minority religions, and minorities within minorities.

The limiting factor of ‘respectworthy in a democratic society’ promoted by the courts also answers to the fear that inclusivity can be problematic in relation to fundamentalist standpoints or illegal conduct, due to the impossible justification of direct discrimination.¹¹⁶ A similar answer can be given to contenders worrying that a flexible definition can lead to overlooking excessive claims for religious discrimination,¹¹⁷ as any such attempt would be found in cross-examination. The above summary also ought not cover the fact that, whilst courts are open as to what counts as a religion, they may have recently become stricter in assessing objectively whether conduct is a manifestation of that religion.¹¹⁸ This is, perhaps,

¹¹¹ *Ibid.*

¹¹² *Hussain v. Bhuller Bros*, ET 1806638/2004 (5 July 2005).

¹¹³ *Grainger plc and others v. Nicholson*, [2009] UKEAT/0219/09 (3 November 2009).

¹¹⁴ *Ibid.*, at 27-28.

¹¹⁵ *Ibid.*, at 30-31.

¹¹⁶ Hepple B, *Equality – The New Legal Framework* (Oxford and Portland, Oregon: Hart Publishing, 2011), at 41, who adds that homophobia and racism will probably not be protected, taking into consideration *Nicholson*, at 11, where political beliefs were excluded.

¹¹⁷ Ahdar R and Leigh I, *Religious Freedom in the Liberal State*, at 125.

¹¹⁸ See *R (Playfoot) v. Governing Body of Millais School*, [2007] EWHC (Admin) 1698, which concluded that a pupil’s chastity ring may be religiously motivated, but is not a form of religious manifestation.

a way to continue with a generous interpretation of religion as a notion and filtering at a later stage of assessment cases that are not regarded as suitable for a successful claim.

The outer limits of the term religion (and belief) are emphasised in two further tribunal cases. In the first one the applicant failed to show that his affection for his native country constitutes a religious belief. Accordingly, he was denied the right to sew the United States' flag on the protective clothing at work, which had to be kept clear.¹¹⁹ Similarly, a job applicant for a GP practice manager position who had been rejected by the employer on grounds of being a member in the British National Party (BNP) could not demand that this status amounted to a belief similar to religion, since this meant philosophical, non-political beliefs.¹²⁰ Problematically, the tribunal highlighted that it was not the potential belief, but the membership to the party that caused the rejection, and, that it was the BNP's beliefs surrounding ethnicity, rather than religion, that made it unlike a religious belief.¹²¹ This is a rather weak reasoning which reflects the understandable dislike for a racist party, rather than an assessment of what can constitute a philosophical belief similar to religion.

2. Discrimination based on Religious Appearance

The judgment in *Bodi* oddly presents a *prima facie* case of direct religious (and race) discrimination,¹²² insofar as the applicant provided evidence that unlike himself, other less qualified candidates had been shortlisted for a job and treated in a more favourable manner. Since the respondent failed to explain cogently and convincingly that discrimination had not taken place, the tribunal found in favour of the applicant. *Bodi* is not only an exceptional case due to the clarity of evidence, but also in that the employer never expressed links between religious (or racial) appearance and any aspect of the job pursued. It was purely the unjustifiable choice that made the applicant aware of the discriminatory intentions, in addition to the rare incompetence of the employer to disprove these observations. This incompetence resulted in a finding of direct discrimination both on grounds of religion and ethnicity, without respective distinctions made. Under normal circumstances, a direct discrimination claim is very hard to establish, as the following presentation of cases shows. Unless highlighted otherwise, these cases were heard under the regime of the 2003 Regulations.

¹¹⁹ *Williams v. South Central Limitec*, ET 2306989/2003 (16 June 2004).

¹²⁰ *Baggs v. Fudge*, ET 1400114/2005 (23 March 2005).

¹²¹ *Ibid*, at 6-7.

¹²² *Bodi v. Teletext*, ET 3300497/2005 (13-14 October 2005).

In contrast to *Bodi*, in *Mohamed* a Muslim employee's claim was rejected before the EAT, because of an inability to refute that he was dismissed for inadequate performance and attitude, or, in other words, he could not prove a link between his religion and discrimination.¹²³ The employee grew a beard of particular length based on his religious belief that this was required of him. The employer did not oppose the beard as such, but repeatedly asked Mr Mohamed to adhere to the uniform policy of a "neatly trimmed beard" and a smart appearance, a prerequisite that was adhered to by a Sikh fellow employee who also wore a beard for religious reasons.¹²⁴ Consequently, it may have been the style of the beard, rather than its religious nature, that caused the problem. The same conclusion was found in a further, related case that would be relevant today, but had failed under the RRA, because Rastafarians were not classified as an ethnic group. This case found indirect discrimination where cutting one's hair short was a requirement for a job position.¹²⁵ More recently, such a case was decided to the same effect. In *Harris*, the judges held that there was no indirect discrimination in asking a Rastafarian to keep his hair tidy, because a tidy look can be achieved by everyone, also whilst maintaining dreadlocks.¹²⁶ The court usefully added that, even if there was indirect discrimination, this would have been justified by way of appropriate representation of the company to clients, since this is a legitimate aim.¹²⁷ This case does not answer the question of how one would determine the proportionality of the measure pursuing the legitimate aim to represent the employer's business in an appropriate manner.

The *Eweida* case, heard before the ECtHR that found in favour of the applicant,¹²⁸ provides further insights in relation to how UK courts regard religious attire at work. The ET held that the company's uniform policy had neither been directly, nor indirectly discriminatory.¹²⁹ The examination of direct discrimination found that all employees were treated equally, considering the ability to display mandatory religious items, which a Christian cross could not be counted as. With regard to indirect discrimination, it was concluded that the policy did not cause a general disadvantage for Christians, as required by Regulation 3(1) of the 2003 Regulations. This was also because wearing a cross was not seen as mandatory requirement for Christians and due to the fact that the applicant had been the only case of

¹²³ *Mohamed v. Virgin Trains*, [2005] ET 220/8/4/2004 (12–14 October 2004; 20 May 2005) and [2006] EAT WL 25224803 (30 August 2006).

¹²⁴ Buchanan R, "Lifting the Veil", (2006) Employment Law Network 35.

¹²⁵ *Dawkins v. Crown Suppliers (PSA) Limited*, [1989] IRLR 284, CA.

¹²⁶ *Harris v. NKL Automotive Ltd and another*, [2007] UKEAT/134/07/DM, 2007 WL 2817981 (3 October 2007).

¹²⁷ *Ibid.*

¹²⁸ For the facts of the case, see Chapter 2.

¹²⁹ *Eweida v. British Airways plc*, ET 2702689/06 (7 January 2008).

complaint amongst approximately 30,000 employees. The matter of justification was also hypothetically considered which, interestingly, came to the same conclusion as the ECtHR, that the uniform policy pursued a legitimate aim, but would have been disproportionate.

The EAT also held in favour of the employer,¹³⁰ again on the basis that no form of discrimination had taken place. At this stage, the reasoning was nuanced to the effect that it was deemed unnecessary for indirect discrimination under the 2003 Regulations to show that other Christians had complained, too. The EAT, nevertheless, also required evidence for a defined group to be affected by the uniform policy, which was also not the case.

Before the CA¹³¹ the judges clarified that a single disadvantage was sufficient to establish indirect discrimination, but added that indirect discrimination requires the possibility to generalise characteristics of a religious group to an extent that an employer can reasonably anticipate their measure to have a negative impact on that group. Thus, this ruling confirmed that the disadvantage to 'persons' does not include a solitary disadvantage.¹³² The court also stated that the uniform policy had been a proportional mean to achieve a legitimate aim, firstly, because no one, including Ms Eweida, had complained for about seven years, and, secondly, when she did, the problem was addressed conscientiously, including by offering an interim employment alternative without loss of pay. Furthermore, Sedley LJ considered religion as a choice, in contrast to all other protected discrimination characteristics. This reasoning as regards choice is questionable,¹³³ however, emphasises the potentially differing levels of protection across discrimination grounds.¹³⁴

The reasoning in *Eweida* raises questions. To start with, Sandberg highlights the problem of decisions focusing on the existence of interference, instead of justification, thus implicitly questioning the strength of people's beliefs.¹³⁵ This may also result in a higher likelihood of minority belief within a religious group being disregarded,¹³⁶ as well as practices of religions with few adherents. One also ought to criticise the argument of non-necessity of a religious item, as judges are not necessarily aware of religious rules and this contravenes the idea reflected in statutory and case law that religious doctrine is, to large extent, outside the scope of judicial scrutiny. The restriction to mandatory religious requirements in *Eweida* overlooks

¹³⁰ *Eweida v. British Airways plc*, [2008] UKEAT 123082011 (20 November 2008).

¹³¹ *Eweida v. British Airways plc*, [2010] EWCA Civ80 (12 February 2010).

¹³² *Ibid*, referring to the definition of indirect discrimination under Section 19(2)(a) and (b) EA.

¹³³ See the discussion in Chapter 3.

¹³⁴ Schiek D, "A New Framework on Equal Treatment of Persons in EC Law", (2002) 8(2) *European Law Journal* 290, at 308-311; Vickers L, "Religious Discrimination in the Workplace: An Emerging Hierarchy?", (2010) 12(3) *Ecclesiastical Law Journal* 280.

¹³⁵ Sandberg R, *Law and Religion* (Cambridge: Cambridge University Press, 2011), at 113.

¹³⁶ *Ibid*, at 113-114.

the fact that Christianity is a missionary religion and that some adherents may accordingly consider advertising their denomination by wearing this central symbol as a compelling rule. More profoundly, Christianity and other religions follow an assignment to renovate society in accordance with their respective value systems,¹³⁷ even though this is subject to the challenge that missionary activities, regardless how subtle, are perhaps illegitimate in the workplace. Preferably, passive expressions of faith, such as jewellery or clothing, ought to be permissible as such, since it is impossible to establish the underlying intentions without the individual's cooperation in each case.

In addition, a problem is identified, in that the judgments in *Eweida* (and also *Harris* above) wrongly asserted that there was no notable detriment, because these cases were examined too generally.¹³⁸ Regardless of whether one agrees with this finding, it emphasises the unwelcome effects of judges evaluating religious manifestations. Moreover, the national level outcome of *Eweida* appears to contravene wider purposes that can be attributed to discrimination law. Just as the EA prescribes the fostering of good community relations (to public authorities), a case that raises the suspicion of anti-Christian sentiments cannot nurture such relations. It is submitted that, even though not yet required by law, such goals ought to be considered when deciding discrimination cases like *Eweida*, in which there is no evidence of any harm caused by the religious practice. If the religious practice at stake is harmless, in that the employer does not suffer any detriment, then it makes sense to look into wider effects on communities. At least in this case it seems that a minor uniform policy has caused a lot of consternation.

It is unclear how exactly these conclusions were found, in view of the seemingly fussy original uniform policy. If the law included a right to be accommodated, it is still plausible that changing the uniform policy would have taken some time and that a temporary placement in another position would have been a reasonable compromise. The employer making efforts to prevent loss of income to Ms Eweida during the interim and the resulting changes in the uniform policy ought to be taken as a sign that her interests were taken seriously and tackled actively. It is just unfortunate that this case has fortified ideas that religion is a personal choice and also that no understanding was shown as to the right to change one's religion,¹³⁹ or manifestations thereof.

¹³⁷ Edge P, *Legal Responses to Religious Difference*, at 184.

¹³⁸ Sandberg R, *Law and Religion*, at 114.

¹³⁹ 18(1) ICCPR, in contrast, allows for adopting a religion, this encompassing changing beliefs within one religion.

Jewellery has also been subject to court scrutiny in *Ferri*, where no uniform policy was in place that could have been violated. A Catholic person had been asked during her interview not to wear her two crucifix pendants and one Mary necklace whilst at work, since these were perceived as “loud” and ostentatiously religious, a request she did not adhere to. The tribunal accepted on the basis of documented evidence that her dismissal was based on poor performance at work, rather than on religious discrimination.¹⁴⁰ As a result, no further insights were gained as to the judiciary’s perception of such employer’s conduct. In light of the ECtHR ruling in *Eweida*, it is now, in any case, highly likely that religious item and dress cases will be assessed to the point of proportionality and not fail at earlier stages.

In *Kaur* the matter of debate were the trousers that a trainee nurse wore under the dress that formed part of her uniform.¹⁴¹ The EAT overturned the initial decision, which had granted her this right, considering the health authority being bound by their regulations on clothing. This had been heard under the RRA 1976 and would likely have a differing outcome under the EA 2010, especially since the employer now would have to show proportionality. Forcing employees to display their legs seems to stand in stark contrast to the ease with which the employer could offer alternatives, such as allowing women to wear the men’s uniform, without having to compromise the uniform policy. In the UK these alternatives are today most probably thought of when determining or re-examining dress policies, in order to make these inclusive.

As a final example of how UK law deal with religious appearance, the *Noah* case involved an applicant to a hair dressing position, who was told in the interview that she was unsuitable.¹⁴² The explanation given for the rejection was that employees needed to display ultra-modern hairstyles to attract clients, which was prevented by Ms Noah’s headscarf. Whereas the tribunal accepted the employer’s perception of a business risk, it concluded that too much weight had been afforded to this aspect, and therefore granted the claim for indirect discrimination.¹⁴³ Although this decision is notably at ET level, it may give an indication of a trend where religious interests are weighed up carefully against business interests, in particular those relating to appropriate representation of a business. For now, in *Noah*, the tribunal took into account the actual facts of the case in weighing up the interests which is preferable to an abstract assessment.

¹⁴⁰ *Ferri v. Key Languages Limited*, ET 2302172/2004 (12 July 2004).

¹⁴¹ *Kingston and Richmond Area Health Authority v. Kaur (Tajwinder)*, [1981] ICR 631.

¹⁴² *Noah v. Desrosiers*, [2008] ET 2201867/07 (29 May 2008).

¹⁴³ *Ibid.*

3. Religious Discrimination related to Hours of Work

All major religions are connected to certain faith-based holidays and some denominations require actions to be carried out at particular times, both of which might interfere with the working time expected or necessary in a particular workplace. The adjustment of working hours or the provision of holidays, as a single event or on regular terms, may correspondingly be necessary to enable religious worship. Since law is usually in conformity with majority values and practices but tends to conflict with those of minority religions, working time regulations are particularly prone to cause indirect discrimination.¹⁴⁴ This does not, however, need to constitute a problem, but rather harbours opportunities. As Edge coherently argues, granting time off to religious minorities would namely strengthen the claim of the majority to reserve Sunday as a day of rest.¹⁴⁵ In addition, at least larger companies can benefit from constant availability of employees to suit global business interactions.

Flexible working time programmes can include religious observance as a factor for potential modification. Experience with section 80F Employment Rights Act 1996 concerning flexible working time for parents and carers, however, shows that there is difficulty in the prioritisation of requests.¹⁴⁶ If one factor alone already causes problems for employers, then, admittedly, the addition of religion (and other characteristics) is likely to increase managerial demands. On the other hand, the positive aspects of a healthier work-life balance on employees' well-being and productivity are opportunities worth exploring in the UK.¹⁴⁷ Until a generally applicable right to ask for adjustments to hours of work is in place, perhaps within the framework of reasonable accommodation suggested above, there are a number of cases that highlight the limitations of the current law.

A significant, yet dated, pre-2003 Regulations case concerned with the adjustment of working time in the UK due to the observance of religious duties is *Ahmad v. ILEA*.¹⁴⁸ Mr Ahmad was a teacher who wished to attend the Friday prayers at the mosque closest to his workplace, a practice that is a duty for all Muslim adult males according to the main schools of thought. He was denied a right to be absent for 45 minutes on Fridays, but initially agreed to have his working time adjusted to a 4½ day week. Since this affected Ahmed's pension

¹⁴⁴ Edge P, *Legal Responses to Religious Difference*, at 127.

¹⁴⁵ *Ibid*, at 183.

¹⁴⁶ Freedland M and Vickers L, "Religious Expression in the Workplace in the United Kingdom", (2009) 30(3) *Comparative Labor Law and Policy Journal* 597, at 622.

¹⁴⁷ Collins H, "The Right to Flexibility", in J Conaghan and K Rittich (eds), *Labour Law, Work, and Family* (Oxford: Oxford University Press, 2005), at 104-105 and 115.

¹⁴⁸ [1978] ICR 36.

rights, he filed a claim, which was finally heard by the HL. The law in question was Section 33 of the Education Act, which stated that teachers are entitled to religious worship, which according to Denning LJ meant “if time so permits”. Foremost, the reason for denying Mr Ahmed time off was that, despite his knowledge of the school’s timetable when entering the post, he had not informed the employer of his religious needs. The judgment’s significance, however, is not based on the outcome, but on the arguments some of the Lords issued. Lord Denning, who was largely followed, argued that it would be to the disadvantage of the Muslim community in the UK to be given special privileges over others. To the contrary, and possibly very far sighted, Lord Scarman mentioned in his dissenting opinion that what was required was a policy of understanding as well as flexibility. He also argued that it was against the spirit of the law, referring to Section 33 of the Education Act, to deny Ahmad the particular time off. In the end, Mr Ahmad’s case was rejected by the ECtHR.¹⁴⁹ Since the arrival of the 2003 Regulations, Scarman’s view would likely prevail, because some degree of effort seems to be expected of the employers.¹⁵⁰

The case of *Stedman*,¹⁵¹ also heard before the 2003 Regulations, involved a Christian employee in a travel agency. Having refused to sign a new employment contract requiring her to work Sundays on a regular basis, the employer dismissed Stedman. Her request was also rejected in all instances, including under the ECHR,¹⁵² since she was free to resign from the post. Thereafter, in *Esson*, the dismissal of a Seventh Day Adventist for being absent from work on Saturdays was held to be fair, too.¹⁵³ The employee had been offered to arrange his shifts in line with religious requirements, but on Saturdays when this was impossible he had claimed to be sick. In *Esson*, the decision was based on the employee’s breach of contractual duties, as well as that it would have been unreasonable to force fellow employees to work Saturdays, unless there was mutual agreement. Although these cases were decided before the 2003 Regulations, at least the facts in *Esson* and Lord Scarman’s opinion in *Ahmad* already show that attention was offered to the interests of employees requiring accommodation.

A similar case was heard just before the 2003 Regulations had been introduced and came under an unfair dismissal heading, which led to a differing ending. In *Copsey* the employee was dismissed for refusing to agree to contractual variation in the working hours, requiring

¹⁴⁹ *Ahmad v. UK*, (1982) 4 EHRR 126, see Chapter 2.

¹⁵⁰ Vickers L., “Approaching Religious Discrimination at Work: Lessons from Canada”, at 186.

¹⁵¹ *Stedman v. UK*, (1997) 23 EHRR CD 168.

¹⁵² *Stedman v. UK*, Appl.No. 29107/95, European Commission of Human Rights, 9 April 1997 (Admissibility), 89-A, (1997) D&R 104.

¹⁵³ *Esson v. London Transport Executive*, [1975] IRLR 48.

occasional work on Sundays.¹⁵⁴ The ET and EAT had found in favour of the employer, that the dismissal was based on the failure to agree to amended shift patterns, but not on religious discrimination. The tribunals also mentioned that there was a genuine business reason and that the change in shifts was economically called for. Fellow employees had also been consulted by the employer, with the result that these would have been disadvantaged if an exception had been made for Mr Copsey. The CA agreed on the result for a variety of reasons that are worth being examined. The argument of the missing link to religion was correctly reconsidered by Mummery J,¹⁵⁵ which suggests itself in the case of a Christian employee who seeks to observe Sunday as a day of rest. He went on to propose that the HL or the ECtHR ought to decide on the issue, since previous Article 9 ECHR case law on hours of work had emphasised the voluntary aspect of employment and might have to be revised. According to Rix LJ the outcome depended on whether it was the employer or the employee who desired to change the contract. Only in the former instance he deems Article 9 to be engaged at all, which then ought to involve reasonable accommodation as a solution.¹⁵⁶ Neuberger LJ approached the problem from another angle. He sees the law on unfair dismissal as fully sufficient and applicable in a situation where the dismissal was based on religion and therefore does not demand the assessment of Article 9 ECHR. The outcome ought to be reasonable and practicable for the employer.¹⁵⁷ This opinion is unlikely to comply with the HRA, but nevertheless conforms to the aspect of reasonable adjustments on behalf of the employer, named by Mummery J and in other judgments. It can be hoped that the determining factors for accommodating religious needs are established and integrated in the system provided by the EA. So far there is no legal requirement for the employer to accommodate for days of worship and, in the light of the Lords' emphasis on the voluntary character of employment,¹⁵⁸ this may not materialise. However, *Copsey* was heard before the 2003 Regulations came into force, so that a more stringent assessment of proportionality could be expected today, in line with the newer case law above. *Copsey*, still, importantly reflects the variety in lines of reasoning when courts focus on either the applicability of religion to a set of rules or the employee's intentions. In contrast, a duty to reasonable accommodation, or a strict and comprehensive proportionality test, can avoid such complications and the newer case law appears to take these concepts into account.

¹⁵⁴ *Copsey v. WWB Devon Clays Limited*, [2005] EWCA 932.

¹⁵⁵ *Ibid*, at 39.

¹⁵⁶ *Ibid*, at 71–72.

¹⁵⁷ *Ibid*, at 82, 84, 89 and 90.

¹⁵⁸ Compared to the compulsory character of education, where accordingly, reasonable accommodation is required, *R(Begum) v. Headteachers and Governors of Lenbigh High School*, [2006] UKHL 15, at 24.

The newer case of *Khan*¹⁵⁹ reflects a possible change in attitude of the judiciary since the instigation of the 2003 Regulations. A worker was granted the right to take a six-week holiday in order to attend the *hajj* pilgrimage.¹⁶⁰ His employer did not refuse to grant the leave, but merely did not reply until after his return. Mr Khan was then informed of his dismissal for the reasons of gross misconduct and unauthorised absence. The court held that the employer discriminated against Mr Khan based on his religion and that it was not objectively justified to refuse holidays as long as other arrangements are possible. £10,000 compensation had to be paid. Whether this ruling is the first to demand employers to accommodate for long absence of employees is nevertheless questionable, due to the circumstance that the employee genuinely believed that he was authorised to take the leave.¹⁶¹

In *Williams-Drebbble* an employee was successful before the ET in claiming indirect discrimination under the 2003 Regulations. Her complaint of direct discrimination was rejected.¹⁶² The tribunal then established that the employer had acted unfairly towards the employee, as it was assumed that working shifts were intentionally and continuously changed in a way that prevented the employee from attending Sunday church services. In particular, the employer had known since her interview that she was unable to work on Sundays and had inadequately conveyed that the rota system introduced was a “proportionate means of achieving a legitimate aim”.¹⁶³ In line with this previous ruling, the tribunal in *Fugler* came to a similar conclusion in that the respondent plausibly explained that clients needed to be served on Saturdays, but had not attempted to make arrangements for the employee to take a particular Saturday off, which was required by her Jewish faith.¹⁶⁴ Despite the fact that there is no duty to accommodate religious needs of employees, it appears from the post-2003 cases that business interests are accepted as a legitimate aim only if, in addition, the employer explored possibilities of accommodating for employees’ religious needs in order to establish proportionality, or if business interests clearly exceed the weight given to the employee’s religious interests. In that sense the case law has moved beyond former case law,¹⁶⁵ although further evidence for this trend has to be awaited.

¹⁵⁹ *Khan v. G&S Spencer Group*, ET 1803250/2004 (12 January 2005).

¹⁶⁰ Although the *hajj* itself only lasts for ten days, its nature may indeed require someone to be present for a longer period of time.

¹⁶¹ Sandberg R, “Flags, Beards and Pilgrimages: A Review of the Early Cases on Religious Discrimination”, (2007) 9(1) Ecclesiastical Law Journal 87, at 90.

¹⁶² *Williams-Drebblev. Pathway Care Solutions*, [2005] ET 2601718/2004 (2 December 2004).

¹⁶³ *Ibid.*

¹⁶⁴ *Fugler v. Macmillan – London Hair Studios Ltd*, [2005] ET 2205090/2004.

¹⁶⁵ Sandberg R, *Law and Religion*, at 107; Vickers L, *Religious Freedom, Religious Discrimination and the Workplace*, at 83ff.

A final case from the UK regarding working hours provides a good example of difficulties faced by employers who may attempt to accommodate absence for religious worship. In *Cherfi*, the applicant was a security officer at a site where the employer was under the obligation to delegate a minimum number of staff at a time. This obligation could not be reconciled with Mr Cherfi's request to attend Friday prayers. Instead, the employer offered him to work weekend days, so he would not be on duty on Fridays. Due to this offering of alternatives, the tribunal decided in favour of the employer.¹⁶⁶ What this case highlights is that for accommodation to succeed, a spirit of compromise is required from all parties.

Typical days of rest are a prime example of the non-neutrality of the state, though one can argue that this is more of a cultural, rather than religious non-neutrality. In addition, non-religious persons may desire a day of rest shared by all the family. Upholding Sunday as a day of rest as such, therefore, is thought to be non-discriminatory, a customary rather than religious day off, and this line of reasoning can thus be used by the employer to request presence at work on other days.¹⁶⁷ From a minority perspective, however, the particular day off work may constitute hardship to reconcile religious interests and the need to work. Inevitably, a deviation from maintaining Sunday as a general day of rest will depend on feasibility. Those businesses that operate on weekdays only will have a strong interest, for reasons of efficiency, that all employees are available at the same time. Other companies already operate daily and might be able to offer differing days of rest with ease, if there is a sufficient number of employees to cover for those absent. A genuine attempt to regulate working time in a manner that respects adherents of all religions (and beyond, as explained above) is, thus, a major task for any state in order to achieve substantive neutrality.

4. Religious Discrimination based on Health, Safety and Security

Three cases related to beards, worn by employees in food-processing factories, had been examined under the RRA 1976 and held discrimination to be justified for reasons of health and safety. In one case the prohibition of beards was seen as fundamental and reasonable to maintain hygiene,¹⁶⁸ in another the employer had presented expert evidence satisfying the judges that public health as under Article 9 ECHR necessitated the beard policy.¹⁶⁹ The

¹⁶⁶ *Cherfi v. G4S Security Services*, [2011] UKEAT 379 10 (24 May 2011).

¹⁶⁷ *Vickers L*, *Religious Freedom, Religious Discrimination and the Workplace*, at 129.

¹⁶⁸ *Singh v. Lyons Maid Limited*, [1975] IRLR 328.

¹⁶⁹ *Panesar v. Nestle Co. Limited*, [1980] ICR 144.

third case convinced the court of the reasonableness of the beard rule, on the basis of consultation medical, food and drugs officer expert witnesses.¹⁷⁰

The ET case of *Chaplin*¹⁷¹ found no direct discrimination due to the pertinent health and safety grounds and no indirect discrimination, stating that a disadvantage needed to be “noteworthy, peculiar, or singular”, which was not the case since no other “persons” were at a particular disadvantage.¹⁷² In conjunction with the redeployment offer, genuine health and safety concerns are highly probable, rather than religion being an issue. Instead of detailing justification, in a similar way as in *Eweida* (above) the application was dismissed on grounds of absent discrimination. *Chaplin* is, therefore, another example of a case where emphasis on justification would have been preferable to a narrow interpretation of the term ‘disadvantage’. The outcome would likely have been the same, given the plausibility and proportionality of the health and safety rules, as now confirmed by the ECtHR decision in this case. Alternatively, if a right to be accommodated was in place, then Chaplin could have been resolved in this, also preferable, light, again with the same result.

Restrictions on religious dress for reasons of the health and safety of the employee were also debated in *Singh* before the 2003 Regulations. The employee lost a claim for promotion into a position that would have required him to wear a hard-hat whilst lying under train carriages to repair these. The decisive point was that the activities required wearing a helmet by health and safety law, which was impossible to Mr Singh, as he wore a turban. The court established that the employer would commit a criminal offence if the employee would not wear the helmet. Due to the fact that the duty was based on potential criminal liability, no exception could be made, other than in the case of helmets for motorbike riders.¹⁷³ In view of the likelihood of injury, it would have indeed been unfair to expose the employer to the risk of criminal liability.

In the case of *Dhinsa*, a prison accomplished justification for denying a Sikh officer the right to wear a *kirpan*, as required by his religion. The court took into account the circumstances of the workplace, as well as the fact that the employer had offered Mr Dhinsa several alternative roles, in which he could have carried the *kirpan*.¹⁷⁴ This outcome is sensible and, again, the willingness to find alternative positions for Mr Dhinsa hints at the employer not

¹⁷⁰ *Singh v. Rowntree Mackintosh Limited*, [1976] ICR 554.

¹⁷¹ For the facts of the case, see Chapter 2.

¹⁷² *Chaplin v. Royal Devon & Exeter Hospital NHS Foundation Trust*, [2010] ET 172886/2009 (21 April 2010), at 27.

¹⁷³ *Kuldip Singh v. British Rail Engineering Limited*, [1986] ICR 22, EAT.

¹⁷⁴ *Dhinsa v. Serco & another*, ET/1315002/09.

being at odds with the religious aspect of the *kirpan*, but over its implications for health and safety.

A solitary case was identified that concerns religious discrimination on the basis of national security. There was, however, no membership to a particular group in the case in *Farooq*, where a police officer of the diplomatic protections unit, protecting *inter alia* Downing Street and the US embassy in London, was removed from his post to another unit within the police force.¹⁷⁵ The reason provided to him was that he no longer fulfilled the necessary requirements to work in the special unit. The information obtained following a security check and that according the Metropolitan Police rendered him unsuitable for the post was that two of his five children, aged nine and eleven, used to attend a mosque that at the time was also frequented by an imam with alleged terrorist links. At the time of the security check the imam had been asked to leave the mosque, due to the strong disagreement with his radical views. Further arguments were that Mr Farooq travelled to Pakistan and that the workers of the American embassy might get upset if they see him closely. The Metropolitan Police provided that the removal of Mr Farooq from his unit was a defensible, proportionate and justified measure, with no further explanation on this.¹⁷⁶ In the absence of a publication of this judgment, the circumstances under which public security can be an accepted justification for religious discrimination remain unclear. Unlike in the subsequent case of *Devlin*, the evidence leading to the employer's decision in *Farooq* is apparently weak and non-conclusive.

In the case of *Devlin*, a job applicant complained about the rejection from the Northern Irish civil service which had been explained on national security grounds without further details. According to Mr Devlin, he had been rejected because he was Catholic and a member of the Irish National Foresters,¹⁷⁷ a nationalist organisation. The case succeeded before the ECtHR on the basis of Article 6 because judicial review of the case had been denied.¹⁷⁸ Whereas from the facts it is unclear if the two reasons raised contributed to the national security rejection, and if yes, whether religion was a reason, it seems suspicious that both an explanation of the rejection was denied to Mr Devlin at the first point of call and the opportunity to have an official investigation of the matter undertaken. As a majority of

¹⁷⁵ *Farooq v. Metropolitan Police/Scotland Yard* (ET), this case was the first to be heard in secret, due to national security grounds, http://www.swindonadvertiser.co.uk/news/2245026.muslim_pc_barred_from_own_tribunal/ (accessed 15 March 2014).

¹⁷⁶ <http://news.independent.co.uk/uk/legal/article1961446.ece>; <http://news.bbc.co.uk/1/hi/uk/6123472.stm> (both accessed 15 March 2014).

¹⁷⁷ English R, Case Report "Devlin v UK", http://www.1cor.com/1315/?form_1155.replyids=455 (accessed 15 March 2014).

¹⁷⁸ *Devlin v. UK*, Appl.No.29545/96 (30 October 2001).

members to the Irish National Foresters are Catholic, religion appears a likely determining factor to some extent. Another case involved the dismissal of four Protestant teachers. The school justified the choice with having to retain teachers who can teach Catholic RE. The tribunal held that this was religious discrimination, since all teachers in question had obtained the same qualification, a fact that the school had failed to consider.¹⁷⁹ In a further case religious discrimination was found, where two members of staff had been dismissed for disciplinary reasons linked to conflicts between employees. The tribunal, however, took into account the circumstances of the workplace and the employer's refusal to protect staff from sectarian violence.¹⁸⁰

In contrast, the tribunal in *Martin* held that there was no failure to provide a harmonious work environment. This case is, however, revealing in terms of circumstances, seemingly viewed as 'normal' in a workplace, including accusations, insults and the intertwining of religion and politics.¹⁸¹ Finally, a case was decided in favour of the complainant, where the employer had failed to prevent sectarian harassment at work, for instance, no staff training had been facilitated.¹⁸² Most of these cases have in common the fact, that the employers did not explicitly name religion as an issue relevant to the work relationship. In consideration of the findings in court, it appears, nevertheless, a factor employers are vividly aware of.

5. Discrimination based on Workplace Requirements physically incompatible with Religious Beliefs

In the UK a singular case, *Azmi v. Kirklees Metropolitan Council*,¹⁸³ was concerned with a teaching assistant at a primary school suspended for wearing *niqab*. Both the ET and EAT found indirect discrimination on grounds of her religion, however, the measure to suspend her was justified based on a legitimate aim and proportionate measures.¹⁸⁴ This conclusion was achieved after comprehensive collection of evidence. This revealed that Ms Azmi was primarily engaged as a language assistant, since 90% of the pupils in her class spoke a mother tongue other than English, of which most required help accordingly. Consulted experts pointed out that face and mouth are especially important communicative means for children with language difficulties, the benefit of which is prevented by the *niqab*. Since Ms Azmi's suspension was plausibly and apparently solely due to her inability to show her face

¹⁷⁹ *Brudell v. Board of Governors of Ballykelly Primary School & WELF*, 161/09 FET (22 June 2010).

¹⁸⁰ *Mooney & Cafolla v. Andras House Ltd*, 187/05 FET 1405/05 and 210/05 FET 1422/05, which considered the areas where the employees lived, in addition to the undertaking's particular location, both as regards religious composition and violence, at 1-3.

¹⁸¹ *Martin v. Belfast Fireplaces Ltd*, 424/01 FET and 524/01 FET, 3438/01 (April 2004).

¹⁸² *Brannigan v. Belfast City Council*, 40/89 FET (January 2002).

¹⁸³ *Azmi v. Kirklees Metropolitan Borough Council*, 1801450/06 (ET) (6 October 2006) and *Azmi v. Kirklees Metropolitan Borough Council*, [2007] IRLR 434 (EAT) (30 March 2001).

¹⁸⁴ Section 7 of the 2003 Regulations.

to the children, the school was deemed to have acted legitimately. Thus, this case is a rarity, in that it was found that carrying out her profession to the required level was physically impossible whilst wearing religious dress. It is, therefore, explicable that this case caused little controversy in the literature.¹⁸⁵

Though, one could also argue alongside Böckenförde, that religious dress covering everything but the eyes is not suitable for teachers as it hinders dialogue in the lessons,¹⁸⁶ hence not permitting *niqab* in any classroom setting. Hypothetically, reasonable accommodation would probably also not be possible for reasons of communication. Even if a teacher who observes *niqab* was accommodated in that no adult males entered her classroom, this would, arguably, be unreasonable, since efficiency, flexibility and safety required in a school environment would not permit for restrictions on movement of members of staff. McColgan additionally sees such an arrangement as amounting to sex discrimination of male staff,¹⁸⁷ but does not refine the interests of male staff involved. Anyhow, an assessment of whether accommodation was possible, would thus have meant a more elaborate balance of interests than actually took place.

6. Discrimination based on Workplace Requirements morally incompatible with Religious Beliefs

Another area where indirect discrimination is likely to take place, concerns requiring employees' participation in conduct that may be offensive or immoral based on their religious belief. Examples for such incidents are medical assistance or delivery of an abortion, socialising with a client in an environment that sells alcohol, facilitation of adoption to single or homosexual parents, conducting same-sex marriages, offering sex education at school, involvement in setting up a gambling institution, or killing as part of military commitments.¹⁸⁸

The obvious argument in favour of the employer would be the fact that these conflicts of conscience were to be anticipated by the employee in taking up a particular post and that this was a voluntary choice. Such a view, however, ignores the detriment this would cause to the individual, economy and society, by closing some professions to a potentially well-qualified workforce.¹⁸⁹ Whereas the former stance can be understandable in cases where the duties of the employee obviously comprised the debated issue, this cannot simply be the case if duties changed after the employment had commenced, or where the debated

¹⁸⁵ Fitzpatrick B, "Sexual Orientation and Religion or Belief Cases", <http://www.tuc.org.uk/extras/SORBreport.pdf> (accessed 22 January 2013), at 25-27; McColgan A, "Class Wars? Religion and In(equality) in the Workplace", at 12-13.

¹⁸⁶ Böckenförde E-W, "'Kopftuchstreit' auf dem richtigen Weg", at 727.

¹⁸⁷ McColgan A, "Class Wars? Religion and In(equality) in the Workplace", at 13.

¹⁸⁸ Ahdar R and Leigh I, *Religious Freedom in the Liberal State*, at 300.

¹⁸⁹ *Ibid.*

duties are not an essential part of the position. This chapter has already clarified that several statutory exemptions prevent typical conflicts between employees' conscience and what would otherwise be required in the workplace, effectively resembling reasonable accommodation. This does not, however, generally extend to other than the legislated contexts.

The cases of *Ladele* and *McFarlane*,¹⁹⁰ which have been assessed and rejected by the ECtHR, provide helpful insights into a scenario of moral incompatibility of religion and a work requirement, but also, more specifically, where two protected discrimination grounds compete with another for protection. The two cases reflect the difficulty of coherently arguing under the current statutory regime and possibly, also, how reasonable accommodation could overcome this dilemma.

In *Ladele* the ET granted a right to conscientious objection based on religious beliefs against carrying out a civil partnership ceremony.¹⁹¹ This was reached on the conclusion that Ms Ladele had been discriminated directly and indirectly, and harassed, under the then 2003 Regulations. The finding of direct discrimination resulted from the threat of dismissal that she was subjected to after having voiced her beliefs.¹⁹² The employer's conduct also amounted to indirect discrimination, since Ms Ladele was ordered to carry out civil partnerships, the same as other registrars. In terms of conflicting discrimination grounds the ET found the employer had given greater weight to the sexual orientation ground than to religion. As there was sufficient presence of other registrars willing to perform partnerships, the tribunal found no proportionate measure for a legitimate aim that would have justified this weighting.¹⁹³ Effectively, the ET thus gave Ms Ladele a right to be accommodated.

The EAT disagreed with this reasoning and found in favour of the employer.¹⁹⁴ For the EAT, the issue was not a balancing of rights, but that a legitimate aim (the policy of providing a discrimination-free service) was reached by proportionate means.¹⁹⁵ Accommodation was seen as inappropriate, because her motivation involved discrimination based on sexual orientation.¹⁹⁶ Thus, the EAT also considered accommodation as a possible avenue in addition to the legally provided justification test. The rejection of the latter based on Ms

¹⁹⁰ For the fact of the cases, see Chapter 2.

¹⁹¹ *Ladele v. London Borough of Islington*, ET 2203694/2007 (30 May 2008).

¹⁹² *Ibid*, at 76.

¹⁹³ *Ibid*, at 87.

¹⁹⁴ *London Borough of Islington v. Ladele*, [2008] UKEAT/453/08/RN (10 December 2008).

¹⁹⁵ *Ibid*, at 112.

¹⁹⁶ *Ibid*, at 111.

Ladele's motive, however, hints towards an understanding of accommodation that goes beyond facts and inappropriately considers the content of an individual's religious belief as a determining factor, although courts ought not judge this matter. Admittedly, there is a fine line in this case between a belief as such and external perception of this belief that harms others. Since two homosexual colleagues had complained about her refusal to carry out civil partnerships and there had also been rota difficulties, there were factual obstacles to accommodate. Courts ought to articulate clearly that it is the impact on others and not the motivation that determines the viability of accommodation.

This outcome was validated by the CA, which in addition clarified that Ms Ladele had been dismissed because of her refusal to conduct civil partnerships and not due to her religion.¹⁹⁷ Moreover, the court determined that the Council's "Dignity for All" policy constituted a legitimate aim, which surmounted Ms Ladele's interests in a public sector post, where she needed to "perform a purely secular task".¹⁹⁸ The applicant's wish to have her religious views respected should, therefore, not override the duty of all registrars to provide equal respect irrespective of sexual orientation.¹⁹⁹ Other than the registrar's "purely secular task", secularism, church-state relations or neutrality are not mentioned in this case (or, seemingly, any other UK case within the scope of this thesis). In *Ladele* the issue of power imbalance between a registrar and service users was not considered in order to refine the point that, as a public sector employee, she may have had a duty to comply with legitimate policy that, in this case implicitly, requires neutrality in religious matters. Such an argument could also, for instance, be sustained where teachers have to comply with the curriculum even if the content runs counter to a religious belief held by the teacher. One needs to take into account though, that the UK has not yet established rules that are neutral in relation to equal marriage rights for homosexual couples. As long as the state compromises on this matter for the sake of accommodating the sensitivities of religious groups, it would indeed be inconsistent to deny the same privilege not to endorse sexual identity equality.²⁰⁰

The secular nature left aside, the EAT and CA were right in claiming that it was justifiable to require compliance with non-discrimination policies, not least because the adherence to non-discrimination principles is required by law,²⁰¹ notably undisputed. If a duty to reasonably accommodate existed, this nearly absent neutrality argument could have been

¹⁹⁷ *Ladele v. London Borough of Islington*, [2009] EWCA Civ1357 (15 December 2009).

¹⁹⁸ *Ibid.*, at 52.

¹⁹⁹ *Ibid.*, at 55.

²⁰⁰ Stychin CF, "Faith in the Future: Sexuality, Religion and the Public Sphere", (2009) 29(4) *Oxford Journal of Legal Studies* 729, at 752.

²⁰¹ *Ladele* CA, at 30.

decisive in weighing up the interests. So would the rights of her colleagues and service users not to be discriminated against, even tough, likely, homosexual couples would not choose their partnership to be conducted by a registrar who may not share their joy at the ceremony. If this were the case, then this factor could be worth considering in councils where a sufficient number of registrars are willing to carry out civil partnerships.

Sandberg is rightfully critical of the point that Ms Ladele was not dismissed because of her religion, which he deems “artificial”, since this reasoning disregards that her religion caused her to refuse the activity that led to the dismissal.²⁰² Similarly questionable are the judges’ findings that Ms Ladele was able to freely hold her beliefs, was not prevented from “worshipping as she wished”, and that her view of marriage was “not a core part of her religion”.²⁰³ This overlooks the detail that carrying out civil partnerships in this case intrinsically impaired her beliefs, as the ECtHR correctly clarified. Acting contrary to one’s beliefs can cause severe internal conflicts. Even though she could ‘hold’ her belief as such, there is little value in such a right, if one cannot act in accordance with it. In spite of the fact that this aspect was not relevant to the case’s result, it dangerously approaches determining religious doctrine on behalf of the individual in question²⁰⁴ and, therefore, ought to be omitted.

The CA could have considered also, more carefully, that law provides exemptions in other fields for religious reasons. It is, however, conceivably legitimate for an employer not to permit a ‘religion defence’ to harassment based on sexual orientation, especially since there is an legal obligation to create a respectful environment preventing offence in such cases.²⁰⁵ In a preferable opinion, religious interests ought not trump any other interest protected by discrimination law.²⁰⁶ Usefully, McColgan complements that a fair balance between competing discrimination grounds would have been endangered, had the EAT and CA followed the ET in its wider scope for direct discrimination, in particular where the employer cannot establish a genuine occupational requirement.²⁰⁷

Stychin approaches the dilemma of conflicting discrimination grounds from another angle. His idea of an inclusive public sphere represents contrasting views that may not be

²⁰² Sandberg R, *Law and Religion*, at 107.

²⁰³ Freedland M and Vickers L, “Religious Expression in the Workplace in the United Kingdom”, at 51.

²⁰⁴ Edge P, *Legal Responses to Religious Difference*, at 184.

²⁰⁵ Freedland M and Vickers L, “Religious Expression in the Workplace in the United Kingdom”, at 611-612.

²⁰⁶ *Ibid*, at 618.

²⁰⁷ McColgan A, “Class Wars? Religion and In(equality) in the Workplace”, at 14.

reconcilable, but can be accommodated.²⁰⁸ Regarding *Ladele*, he suggests finding shared points of principle between religious and homosexual persons' interests to emphasise common values and solidarity.²⁰⁹ He is optimistic that compromise based on detailed facts and civility at least can be achieved in such cases, if a harmony cannot be established.²¹⁰ Especially where two discrimination grounds are involved, the common underlying themes of cause and effect of exclusion are comprehensible to both parties. Indeed, another commonality is Stychin's tempting idea that a "public-private dichotomy...is damaging to all humanity", which fits well with the conclusions of Chapter 1 on the artificial divide of individuals' private and public life.²¹¹

The implementation of Stychin's mediation-based solution depends, just as other accommodation models, on practicability and thus may seem ambitious at this point. Nevertheless, if there had been a sufficient number of registrars to cover demand, then testing the described type of mediation could have been a worthy option. The key difference to McColgan's proposition is that Stychin is more sensitive towards Ms Ladele's views.

Involving similar issues, the case of *McFarlane v. Relate Avon Ltd* was also successful for the employer.²¹² In assessing indirect discrimination, both ET and EAT found a legitimate aim in the provision of a service, regardless of the clients' sexual orientation.²¹³ Before the ET, it was considered that accommodating Mr McFarlane could lead to the rejection of clients, which would endanger the purpose of the service as such.²¹⁴ The EAT mentioned that both actual accommodation would be impractical in such a case (difficult to keep secret from clients) and that the employer could refuse to accommodate where personal ideas run counter to its basic, declared principles. LJ Laws also explained that no protection is to be given to a moral standpoint, just because it is based on a religious belief.²¹⁵

Considering that the reasoning in *McFarlane* as regards the employer is the same as in *Ladele*, it can be presumed that the term "secular" referring to the tasks expected of a registrar in *Ladele*²¹⁶ is not a specification assigned to the public sector work but refers to any non-faith employment. As an alternative to the courts' findings, it is proposed that a duty

²⁰⁸ Stychin CF, "Faith in the Future: Sexuality, Religion and the Public Sphere", at 748.

²⁰⁹ *Ibid*, at 749 and 754.

²¹⁰ *Ibid*, at 749 and 755.

²¹¹ *Ibid*, at 754.

²¹² [2010] EWCA CivB1 (29 April 2010).

²¹³ *McFarlane v. Relate Avon Ltd*, ET (5 January 2009) and [2009] UKEAT/106/09 (30 November 2009), at 30.

²¹⁴ *McFarlane ET*, at 46.

²¹⁵ *McFarlane v. Relate Avon Ltd*, [2010] EWCA CivB1 (29 April 2010), at 24.

²¹⁶ *Ladele CA*, at 52.

to reasonable accommodation could overcome such difficulties and lead to more objective evaluations.²¹⁷ Such a method is indeed preferable, especially in cases where the religious practice is much less invasive to the rights of others, as for instance, in *Eweida*. Given that exemptions are made, for instance, for carrying out abortions, it would be fair to enable other opt-outs for employees for reasons of conscience. The conclusions in *Ladele* and *McFarlane* would probably have been the same under an accommodation model, since both affected the rights of others to receive public services without discrimination. Also, in relation to *McFarlane*, accommodation would probably not have been practically possible, given that Relate offices usually host a small number of counsellors. Even if colleagues could have easily covered activities undesirable for the two, there would still remain the interests of the employer to offer a respectful environment to other employees, as well as to service users. In particular in the public sector, the state has to protect the dignity and equality of others.²¹⁸ Ideally, of course, such protection should also exist in private sector employment.

Sandberg suggests that the Council policy in *Ladele* accorded an unduly narrow scope to religion, as opposed to sexual orientation.²¹⁹ This argument, again, speaks in favour of accommodation, as the competing interests would have to be assessed to more detail than was done at national level or before the ECtHR. Presumably, accommodation would be classified as unreasonable if it resulted in the discrimination of another person.²²⁰

7. Harassment

An ET case, *Elgadawy*, successfully established harassment on grounds of religion under the then 2003 Regulations.²²¹ The reasons given were that another employee had named the claimant's refusal to eat non-*halal* meat "pathetic" and made other negative remarks concerning her religion. In addition, the employer did not react in a timely manner to her complaint about this behaviour. In *Ladele*, similarly, the ET's finding of harassment had been grounded on disrespectful behaviour, such as ignoring a written request, breach of confidentiality and insulting remarks.²²²

²¹⁷ Connolly M, *Discrimination Law*, at 73 and Vickers L, *Religious Freedom, Religious Discrimination and the Workplace*, at 129-130, drawing a parallel to accommodation of disabled persons by virtue of the rationale that religious manifestations can resemble in effect problems faced by disabled persons.

²¹⁸ Freedland M and Vickers L, "Religious Expression in the Workplace in the United Kingdom", at 618.

²¹⁹ Sandberg R, *Law and Religion*, at 111.

²²⁰ In the cases of *Ladele* and *McFarlane* this would trigger the more intricate question, if this other person can be fictitious, or whether the employee would have to have rejected a service to a specific person.

²²¹ *Elgadawy v. Hanover Park Commercial*, ET/2600981/06 (7 December 2006).

²²² *Ladele* ET, at 104.

V. Compatibility of the Law in the UK with the ECHR

Intention of compliance with the ECHR and ECtHR's jurisprudence is expected, since the HRA requires law to take these into account. As far as the statutory law examined above is concerned, no problematic aspects have been discovered. For instance, the notion of religion is open under the EA, thus being sufficiently inclusive. Courts in the UK have held that not all beliefs are protected by law, for instance, nationalism, patriotism and the duty to carry out charity work. Under the jurisprudence of the ECtHR, a wider notion of belief has been promoted, including nazism, thus probably including BNP members' mindset, which has been rejected as a philosophical belief similar to religion at national level (*Baggs*). Similarly, the element of respectworthiness in a democracy (*Nicholson*) will also not be met by beliefs with content contravening democratic values. Whether these cases are relevant for religion in the work environment is not clear yet. A possible scenario could be proselytism that includes the promotion of radical views to fellow employees, which then presumably would not fall under the ambit of the EA, if such political beliefs remain excluded. For now, the UK cases do appear too narrow to fulfil the wide definition afforded to religion and belief by the ECtHR, however, this does not affect the given cases dealing with religious beliefs.

Uniform policies have confronted religious employees with a number of challenges. Cases showed, nevertheless, that employers did generally not find fault in the religious nature of the manifestation, but with the impact on appearance that contravenes company policies (*Mohamed, Harris*). Since the relevant employers required just a tidy look which could be reconciled with the religious requirements in question, it is not conceivable that the result in court will be questionable before the ECtHR. The question of justification in *Harris* might have to be elaborated though, as the legitimate aim of representation to clients does not per se make for a proportionate response at all costs. This should be seen in the light of *Eweida* (ECtHR), where the judges highlighted the limits of corporate image, which has to be weighed up against the employee's interest in manifesting his or her religious belief. In *Mohamed* and *Harris* the outcome would likely remain for the given reasons, but in *Eweida* the ECtHR, as is known, found in her favour. Compared to the two other cases, the manifestation in form of a cross does not contravene tidiness or what is commonly accepted in this regard, which also speaks for this prediction. The case of *Noah* had already reflected the concrete weighting of business image and religious interests the ECtHR would like to see. Employees' appearance in the context of religiously neutral appearance has not been mentioned in any case.

ECtHR jurisprudence relating to hours of work has been unfavourable towards employees' requests, though the relevant cases are dated. Thus, it is highly likely that UK post-2003 case law exceeds the ECHR's parameters. Still, after the *Eweida* ruling, a more detailed weighting of interests can be expected of the Strasbourg judges, also in regard to hours of work. In this scenario, again, the UK courts effectively requiring reasonable accommodation of employees (*Khan*, *Williams-Drebbble* and *Fugler*) would surmount compliance. Similarly clear-cut appears compatibility in health and safety cases. In *Chaplin*, specifically, the ECtHR clarified that the conclusions reached at national level had been sufficient to meet the Convention's standards. *Azmi* is expected to reach these standards, too, since the ECtHR would have to rely on evidence that her *niqab* hindered communication with pupils and that it was not practicable to create an all-female adult work environment within a school, in case the judges would look for further details that may have determined another outcome of the case.

Notably, *Ladele* and *McFarlane* have been found not to breach the ECHR. Unlike the CA in *Ladele*, the ECtHR did not refer to the 'secular' nature of the task used as mentioned the domestic judgment.²²³ It was not a decisive point of the CA, and it seems the ECtHR viewed this aspect as minor or irrelevant, too, or, in the absence of a European consensus, did not see a need to assess the case in light of *Ladele*. If the ECtHR had looked into the church-state argument, it would have likely appreciated the complex variety of church-state relations throughout the UK, as well as the fact that the ties between church and state do not extend to rules concerning city councils (other than opening times). Thus, it should expectably be within the UK's discretion to deem its councils secular.

It is expected that UK courts will assure compliance with the 2013 ECtHR rulings in *Ladele*, *McFarlane*, *Eweida* and *Chaplin*. Furthermore, the EHRC has amended its guidance for employers in accordance with the four ECtHR rulings,²²⁴ which reflects the entity's alertness to change and awareness of the obligation to comply with the ECHR. The guidance explicitly mentions, taking into account *Ladele*, that public service employees may not due to their religion "discriminate unlawfully against customers and service users".²²⁵ This recommendation is in line with substantive neutrality, since it permits public service employees a maximum of freedom to exercise their religion as long as they do not overstep

²²³ *Eweida and others v. UK*, Appl.No. 51671/10 and 36516/10 (15 January 2013), at 29; CA, at 52.

²²⁴ "Religion or Belief in the Workplace: A Guide for Employers following the recent European Court of Human Rights Judgments", http://www.equalityhumanrights.com/uploaded_files/RoB/religion_or_belief_in_the_workplace_a_guide_for_employers.pdf (accessed 15 March 2014).

²²⁵ *Ibid*, at 6.

the limits of law. At the same time the law in the UK has been identified as substantially neutral itself with the exception of the Christian-inspired day(s) of rest or holidays. A further ECHR document echoes from *Eweida* and *Chaplin* that religious practices need to be only influenced by religion and not mandatory to receive legal protection.²²⁶ Under these circumstances, it seems that the law in the UK does and will comply with the standards set in Strasbourg.

VI. Compatibility of the Law in the UK with EU Law

Similarly to the UK's direct linkage to the ECHR through the HRA, the literal transposition of the EFD by the 2003 Regulations creates the impression that the legislator intended a close adherence to the standards provided. Compliance of UK statutory law with EU law is, therefore, highly likely, even more so after the improvement of the 2003 Regulations through the inception of the EA. In the absence of relevant preliminary references, the assessment of judgements here is, nevertheless, entirely hypothetical. Since the controversial cases of *Eweida*, *Chaplin*, *Ladele* and *McFarlane* have already been decided before the ECtHR, it is presumed that the CJEU would support the outcomes found in Strasbourg (although the reasoning may vary).

The notion of religion is not (yet) defined at EU level, much less so than in the national legal sphere. In Chapter 3 the impression was that a wide concept was intended and, given the connection between the EU and the CoE, this will presumably be reflected in jurisprudence. Many religious discrimination cases, as detailed in this chapter, will fall under the discrimination characteristic being a genuine and determining occupational requirement under Article 4 EFD, which is justified if proportionate and pursuing a legitimate aim. For example, in all cases where health and safety needs were proven to necessitate restrictions on religious manifestations, such requirements have been recognised. Discriminatory practices related to religion, as found in the UK, fall mostly under this justification, alternatively also under the scope of Article 2(5) EFD, which allows for measures to protect health.

In all cases, the CJEU can be expected to carry out a detailed assessment of interests to determine proportionality, including all facts of the cases, at least as much as the ECtHR did in *Eweida*. Cases where headscarves are a matter of debate will be most interesting from

²²⁶ "Religion or Belief in the Workplace: An Explanation of recent European Court of Human Rights Judgments", at 4-5, http://www.equalityhumanrights.com/uploaded_files/RoB/religion_or_belief_in_the_workplace_an_explanation_of_recent_judgments_final.pdf (accessed 15 March 2014).

the EU law perspective. These have, however, not caused fundamental controversy in the UK (*Noah*). The post-2003 UK cases regarding outward appearance are prone to be in line with the EFD, as long as the domestic courts provide a genuine assessment of whether the religious attire can be reconciled with the needs of the employer. Since employers' uniform policies tend to consider religious requirements, there will hopefully not be many difficult cases.

Eweida, *Chaplin*, *Ladele* and *McFarlane* were not referred to the CJEU for a preliminary ruling (Article 267 TFEU). Seemingly, the courts in these decisions felt confident about their understanding of the law, including the interpretation of the EFD, and therefore did not believe it necessary or appropriate to refer the matter to the CJEU. It is also possible that awareness of applications to be made to the ECtHR hindered the domestic judges from making use of a parallel authority. Especially in view of the ECtHR finding in favour of the applicant in *Eweida* a similar outcome could be expected before the CJEU. As for the outcome in *Chaplin*, the health implication for the patients and, perhaps, the attempts to accommodate the employee are likely to fulfil the requirements of Article 2(b)(i).

Difficult questions would have been posed by *Ladele* and *McFarlane*, as two discrimination grounds protected by the EFD were to be weighed against each other. Unlike the ECtHR, the CJEU would not enjoy the ease of referring the decision to the UK's margin of appreciation. The CJEU would have faced the decision of whether this situation warrants some form of accommodation, or whether other reasons would determine the protection of one protected interest at the detriment of another. It would be interesting to see if the judges would set up criteria for weighing up the interests involved, such as power relations, or if the cases in question would be tested against the given parameters of non-discrimination law only.

Whereas originally hours of work were entirely under the control of the employer, a shift has already taken place in many European jurisdictions towards greater autonomy for employees.²²⁷ The EU's take on flexible working arrangements in its Employment Strategy is also steering towards social inclusion and social cohesion more generally.²²⁸ Although the primary concern is offering family-friendly policies, there is no reason why this ought not to be extended to serve a wide conception of "private life".²²⁹ In this light, and in the light of the

²²⁷ Collins H, "The Right to Flexibility", at 100-103 and 113-114.

²²⁸ Ibid, at 99; for example, Council Decision of 22 July 2003 on guidelines for the employment policies of the Member States (2003/578/EC), OJ-L 197/13.

²²⁹ Collins H, ibid, at 108-109.

Prais ruling, it is possible that CJEU judges would consider wider EU goals that are not explicitly mentioned in the EFD. The relevant post-2003 national cases clarify that employers have to genuinely assess employees' requests for working-time adjustments in order to show proportionality. Like the ECHR/ECtHR, EU law does not command accommodation, although *Prais* seems to go in that direction in relation to time arrangements. Hence, the national cases that already effectively require attempts to reasonably accommodate will tend to comply with EU law. Overall, it is concluded that the UK case law is at the current time aligned closely to the requirements posed by EU law.

VII. Conclusions

British statutory law has changed dramatically since the implementation of the EFD and has moved on towards more progressive anti-discrimination law through the EA. Statutory exemptions concerning religious practices of employees are scarce but, in conjunction with some judgments, reveal an understanding and appreciation of the need to accommodate the relevant practices. This finding led the chapter to assess and conclude that, despite obstacles, a duty of reasonable accommodation would further the interests pursued by non-discrimination law, in particular substantive neutrality. Northern Irish law on religious discrimination holds a special position in the UK, reflecting an established sectarian conflict. Cases have mostly involved the relationship between Catholic and Protestant Christians, reflecting deep rooted and widespread prejudice. Considerable fines issued in response to religious discrimination cases have, combined with specialised legislation alleviated sectarian discrimination. No part of the UK bears rules on church-state relations that directly affect religious freedom of employees in non-faith organisations.

In the past, uniform policies have often conflicted with religious manifestations in the UK, though even before more detailed equality legislation came into place, judgments reflected the will to reconcile the interests involved. Not least since the ECtHR's evaluation of the uniform policy in *Eweida* it is likely that employers will carefully adjust any policies concerned with appearance with their employees' potential religious requirements. A type of case to watch out for remains, where two discrimination grounds conflict with each other, such as in *Ladele* and *McFarlane*. At a technical level, it appears, reasoning could be improved to come to a fairer, less conflict-laden result in such cases. Reasonable accommodation is suggested as an avenue that courts (or the legislator) will choose to resolve such scenarios.

The selected cases reflect a wide spectrum of religious interests that are relevant to the employment context, as well as the diverse and changing approaches of the courts. The

judiciary largely tend to assess each case on its own merits, where religion is seen as extraneous to work, unless the employer can pinpoint an actual conflict. Crucially, the UK judiciary has not expressed prejudice against adherents of minority religions. These have also featured frequently throughout the cases, stemming from working-time or uniform arrangements that unintentionally do not cater for the needs of minority religious practice. Perhaps, courts' effectively required accommodation in working time arrangements happens exactly because this area is a prime example of members of religious minority being affected by the non-neutrality of the state. In general the pluralist, inclusive approach to religion under the law examined leads to greater visibility of religion, arguably, lead to a greater role for religion in public life. The much-appreciated attitudes of the judiciary, such as absence of prejudice and the genuine attempts to account for the interests involved may also impact on public opinion making.

This chapter also concluded widespread compatibility of the law in the UK with the ECHR and EU law. In both cases, it remains to be seen whether the definition of religion, as delineated by case law, will be broad enough to meet the standards at ECHR and EU levels in particular cases. In general, legislator and courts appear to strive for compliance with the ECHR and EU law, reflected in giving effect the ECHR through the HRA and the almost literal transposition of the EFD, tested through a fairly high number of cases.

Church-state relations have not been mentioned in any UK case law apart from in *Ladele*, where its relevance to the outcome of the judgment could not be established. Even if it was a decisive point, it seems to have intended to clarify the importance of adhering to discrimination law in the public sector, rather than explaining the limitations placed on her religious practice. This chapter illustrates that substantive neutrality, seeking to establish a neutral outcome to all faiths with a minimum of state interference and a maximum of choice for the individual, has largely been achieved in the UK. Most importantly, however, the law in the UK largely appears to promote substantive equality and, thereby, offers some useful examples of ways to evenly solve discrimination scenarios. The fact that church-state relations are not a matter debated in cases related to religious discrimination at work or used to the detriment of employees is a major finding and, in conjunction with the aspects of 'hospitable establishment' found in Chapter 1 leads to the confirmation that a national church model can be no obstacle to embracing an inclusive workforce. Apparently for historical and socio-cultural reasons, conditions in UK workplaces are generally prepared to (at least) accept religious minority manifestations different from the mainstream population.

CHAPTER 5 • French Law concerned with Religious Discrimination in Employment and its Compatibility with the ECHR and EU Law

I. Introduction

This chapter assesses the French law relevant to religious discrimination in employment, before measuring it against the parameters of the ECHR and EU law. Just as the previous chapter, this examination includes court structures, legislation and case law, and the respective compatibility with the ECHR and EU law, against the background of church-state relations. Leading on from the findings in Chapter 1, French church-state relations, and the concept of *laïcité* in particular, provide fertile ground for conflicts related to employment. Still, *laïcité* as the supporting element of a neutral state, theoretically, was deemed to have the full potential to provide substantive neutrality. Generally, statutory protection against discrimination in France has been conspicuously strong since the implementation of the Employment Framework Directive (EFD), whereas outcomes of cases are far less clear-cut. Analysis by the judiciary appears to lack coherence and accuracy that would give effect to the anti-discrimination legislation. Particular issues emerge in the context of religious practice of minority religious adherents, with seemingly little space for compromise. Importantly, the relationship between church and state features in French case law as a reason for justifying indirect discrimination on grounds of religion, in particular in public sector employment. One of the questions this chapter, therefore, strives to explore is the extent and the quality of using *laïcité* in cases surrounding religious discrimination at work and the effect on religious minorities.

II. Court Structures and Statistics

Employment disputes from the private sector are adjudicated before *Conseils de Prud'hommes* or before the ordinary criminal courts, if criminal sanctions for discrimination are sought. The *Cour de Cassation* is the highest instance and only assesses matters of law and not of fact. Public sector employees have to file complaints at administrative courts, the *Conseil d'Etat* being the highest instance in this field. Matters of employment are heard in its chamber for social affairs. The *Conseil Constitutionnel* was established in 1958 and assesses law just passed by parliament as to its compliance with the French Constitution.¹

¹ Article 61 of the Constitution, see Dutheil de Lamoignon O, "European Law and the French Constitutional Council", in G Cavinet, M Adenas and D Fairgrieve (eds), *Comparative Law before the Courts* (London: BIICL, 2004), at 91.

Statistical information on cases of religious discrimination is scarce. Even the 2009 Annual Report of the *Haute Autorité de la Lutte contre les Discriminations* (HALDE) only briefly mentioned two incidents in the employment context without detailing the circumstances or reasons for decision.² Whereas the lack of data is in itself not a hindrance to achieving substantive neutrality, it makes monitoring difficult and reduces any assessment thereof to the limited number of available, reported court cases. Meanwhile, Amnesty International found in 2012³ that 1006 complaints of religious discrimination had been made in the first seven years since the inception of the HALDE, amounting to 2% only of complaints made to the HALDE.⁴

III. Statutory Law

Shortly after the French Revolution in 1789, the country's first official declaration was made stating that all people are equal before the law.⁵ This arose from the revolutionists' realisation of the inseparability of freedom and equality, following the idea that natural equality of all persons does not allow for the state to discriminate in the protection of inalienable rights.⁶ In 1791 this idea was incorporated into the first constitution of the French Republic, though, alongside the principle of *laïcité*, little prominence was granted to the right to freedom of religion. *Laïcité* is still a cornerstone principle, prominently enshrined in Article 1 of the current Constitution of 1958.

The *Loi de la Modernisation Sociale*⁷ and the *Loi relative à la Lutte contre les Discriminations*⁸ amended existing legislation for the purpose of the EFD's implementation. Despite the fact that these acts considerably changed the law on discrimination, employment discrimination law is still controversial, in particular concerning the inefficiency of the provisions in this field.⁹ One of the reasons for this phenomenon could be the fact that until two decades ago, human rights in employment had not been a commonly pointed out subject.¹⁰ Further amendments have since taken place to offer protection as required by the EFD. In theory, however, protection against religious discrimination appears to be progressive due to the subsequent allowances:

² HALDE Annual Report 2009, at 26-27 and 61, see below for information on the HALDE.

³ Choice and Prejudice – Discrimination against Muslims in Europe (London, 2012).

⁴ At 40.

⁵ Article 1 of the Déclaration des Droits de l'Homme et du Citoyen, of 26 August 1791.

⁶ Epping V, *Grundrechte* (Heidelberg: Springer, 2004), at 277.

⁷ Loi n.2002-73 of 17 January 2002.

⁸ Loi n.2001-1066 of 16 November 2001.

⁹ Stein S, in Du Feu/Edmunds/Gillow/Hopkins, *EU & International Employment Law: France*, (Bristol: Jordans, 2005), Chapter 6.1, at 73.

¹⁰ Favennec-Héry F and Verkindt P-Y, *Droit du Travail* (Paris: Librairie Générale de Droit et de Jurisprudence, 2007), at 205.

After extending the provisions regarding religious discrimination in the *Code du Travail*, Article L.1132-1 now stipulates considerably comprehensive employee protection. It provides the prohibition of direct and indirect discrimination for all aspects of employment, such as remuneration, entering professional training, mobility, renewing fixed-term contracts and redeployment, thus taking a holistic stance in this regard. Religion is amongst the many grounds explicitly prohibited by virtue of sentence 1,¹¹ which is further, startlingly, supported by a twin provision within criminal law.¹² The concept of indirect discrimination found its way into the *Code du Travail* for the first time also due to the EFD, initially without further comment, then with reference to the EU Law parameters.¹³ Under Article L.1132-2, such protection is extended to the ordinary exercise of strike, and, under Article L.1132-3, to those witnessing and reporting discriminatory incidents. Article L.1321-3 expands this broad protection to internal regulations of companies. By virtue of Article L.1133-1, exceptions can only be made if there is an essential and determining professional requirement and if there is a legitimate aim and the requirement is proportional. Generally, there is also Article L.1121-1, according to which human rights in employment can only be restricted if justified by the nature of the task and a proportionate aim is pursued.

Defendants in employment discrimination cases have to prove that they did not carry out the discriminatory conduct, more precisely that their conduct is objectively justified. The judge then, if required, carries out all investigations s/he considers necessary,¹⁴ a rule which was also introduced through changes emanating from the EFD for the first time. After the burden of proof had previously rested on the employee and this had been ineffective,¹⁵ now merely presenting the elements of facts that suppose the existence of discrimination is required. If the employer fails to prove the opposite, the relevant discriminatory conduct is void and thus not enforceable.¹⁶ Smartly, Article R.516-31 *Code du Travail* contains a strong remedy, in that interim injunction can be sought, which allows for any restorative measures deemed necessary to prevent imminent loss or to stop manifestly unlawful activities. Such a rule seems valuable in an employment context where incidents concerning discrimination can otherwise lead to a sudden loss of income.

¹¹ Sentence 1.

¹² Article L.225-1, see discussion below.

¹³ Ibid.

¹⁴ Article L.1134-1.

¹⁵ Favennec-Héry F and Verkindt P-Y, *Droit du Travail*, at 211.

¹⁶ Article L.1132-4.

Article L.1132-1 thus reflects a generous approach of the French parliament towards employee protection. The statutory law concerned with religious discrimination thus institutes a powerful regime that prevents discrimination in the first place. Although the effect of the various changes to the *Code du Travail* are still to be seen and scrutinised, Stein hopes that there will be at least some improvement with regard to the outcome of civil claims, an area considered insufficiently facilitated before.¹⁷ As the *Code du Travail* has since improved protection even further, this expectation may well transpire due to Article L.1132-1's broad scope of application, and the increasingly precise improvements made due to the EFD.

Article L.1132-1's post-EFD twin provision in criminal law significantly intensifies statutory protection against religious discrimination. Under a section of offences against dignity, Article 225-1 of the *Code Pénal* defines discrimination as the application of any distinction on the basis of, amongst other grounds, religion. In cases where the discrimination *inter alia* consists of obstructing the normal exercise of any given economic activity, of the refusal to hire, to sanction or to dismiss a person, of subjecting an offer of employment to a condition based on one of the factors referred to under Article 225-1, punishments of two years imprisonment and a fine of €30,000 may arise. From the victim's perspective, the main problem in criminal proceedings of this kind is proof of the employer's intention in relation to the discrimination.¹⁸ Whereas this is an obvious weakness, it ought to be seen in the light of the severity of the penalty. The seemingly immense sentence for discrimination may at the same time reflect a changing perception of this type of conduct and, therefore, deserves a deterrent of this degree. Imprisonment and the potentially immense fine in themselves indeed offer a strong deterrent to employers, thus having a function in their own right. The criminal law rule also creates a responsibility of the state to protect employers from false claims. The same as for other criminal provisions, the burden of proof remains a necessity to maintain justice. Furthermore it can be hoped that the severity of the penalty of Article 225-1 acts as a publicity tool to promote awareness of discrimination in employment.

In 2004, the anti-discrimination authority HALDE was set up in accordance with the EFD.¹⁹ This had since then been the official and independent authority in this field and its main function was advisory. In addition, the HALDE had veritable means of investigation, as well as the power to mediate, make recommendations and reach a private settlement between

¹⁷ Stein S, *France*, at 73.

¹⁸ *Ibid*, at 73.

¹⁹ Loi du 30 décembre 2004, JO, 30 décembre 2004.

the parties of a dispute.²⁰ The future of institutional support in France is, however, uncertain, since the HALDE has been discontinued and its work is carried out by the more general *Défenseur des Droits* (DDD) as of 1 May 2011.²¹ It is questionable, that religious discrimination will gain prominent observation and analysis under a framework that is to a lesser degree dedicated to discrimination than the HALDE (which had already neglected the topic).²² Indeed, the minimal information available on the DDD website on the religion ground points towards a continuation of this neglect. The only problematic scenario mentioned for employment are requests for time off.²³

Further, there are statutory provisions that have not been affected by the EFD. As the preamble of the 1958 Constitution explicitly refers to employment, rulings of the *Conseil Constitutionnel* are paramount to gain a more complete understanding of employment law.²⁴ For instance, the *Conseil Constitutionnel* held that there is no hierarchy of national rules in employment law, since the ‘principle of favour’ requires the application of the most favourable rule from the viewpoint of the employee.²⁵ This is a praiseworthy provision, perhaps especially in the discrimination law context, where employees may be particularly vulnerable in comparison to employers. There are exceptions, however, relating to specific work environments. In addition and more specifically, soldiers are prohibited from expressing religious opinions whilst on duty, based on the relevance of discipline, loyalty and a spirit of sacrifice.²⁶ Presumably, this prohibition also relates to the display of religious insignia. Whereas the latter can be justified in the military from a health and safety perspective, limits on expressing opinions may be questionable depending on the circumstances. In any case, opinions ought not be excluded without additional reasons.

Instances of accommodating religious interests are known in French law, though no general concept of reasonable accommodation is embedded in legislation. An exemption from participating in abortions is granted to medical staff, who object to the operation, by virtue of the Public Health Act.²⁷ Considering that some objections to abortion are based on religious principles, this rule can be classified as accommodation of religious beliefs. This is an

²⁰ Favennec-Héry F and Verkindt P-Y, *Droit du Travail*, at 213.

²¹ <http://www.halde.fr/La-HALDE-tirera-sa-reverence-sur.html>; this move has been subjected to severe criticism from equal rights NGOs, see, for instance, <http://yagg.com/2011/05/02/lutte-contre-les-discriminations-la-halde-nest-plus/> (both accessed 15 March 2014).

²² See above under II.

²³ <http://www.defenseurdesdroits.fr/connaitre-son-action/la-lutte-contre-les-discriminations/critere/appartenance-ou-non-ou-une-religion> (accessed 15 March 2014).

²⁴ Favennec-Héry F and Verkindt P-Y, *Droit du Travail*, at 23.

²⁵ *Ibid.*, at 42-43.

²⁶ Article 7 of Act No.72-662 (13 July 1972).

²⁷ Article L.2212-8.

example of statutory law preventing irreconcilable conflicts between workplace duties and religiously motivated moral duties.

Finally, as of October 2010 clothing that conceals the face is not permitted any more in public spaces.²⁸ Public spaces are any places open to the public, as well as premises designated for public service.²⁹ As a consequence, women who wear a *niqab* or *burqa* can no longer participate in employment, except in their home or other private spaces that fulfil the person's requirements. Although few employees wear garments that cover the face, this ought not conceal the wider problems surrounding a broad-brush prohibition. It is not only the prevention of a small number of potential employees engaging in work and thus the missed opportunities to integrate in society as one wishes, but also a symbolic exclusion of a religious manifestation practiced by a minority. Unashamedly, the circular accompanying the 2010 statute creates a dichotomy between mainstream values and minority religion. For instance, the preamble states that the inferior and exclusionary position of individuals covering their face is incompatible with the Republican principles of liberty, equality and human dignity.³⁰

Laïcité is not explicitly stated as a principle in the context of employment. Apart from the generally applicable 2010 act on face coverings, none of the statutory law seems to favour formal over substantive neutrality. The deterrent features in employment discrimination law, to the contrary, can help promote a climate where employers take their employees' interests seriously and, hence, promote substantive neutrality.

IV. Case Law

1. The Notion of Religion

French statutory rules make inconsistent use of terms related to religion, for example 'religious convictions',³¹ 'denomination'³² and 'religion'.³³ So far, case law does not lead to clear conclusions as to the scope of religion, since it has exclusively dealt with religions and manifestations that are fairly well-known as such or even organised: Catholicism, Judaism, Islam and Jehovah's Witnesses.³⁴ In terms of principle, administrative court jurisprudence has developed a concept of religion with a subjective element, the belief in a divinity, in

²⁸ Article 1 of Loi du 11 Octobre 2010, No.2010-1192, interdisant la dissimulation du visage dans l'espace public.

²⁹ Ibid, Article 2.

³⁰ JORF n°0052 of 3 March 2011 at 4128.

³¹ Article L.1132-1 *Code du Travail*.

³² Article L.324-11-2 *Code du Travail*.

³³ Article L.255-1 *Code Pénal*.

³⁴ Berthou K, "The Issue of the *Voile* in the Workplace in France: Unveiling Discrimination", (2005) 21(2) *International Journal of Comparative Labour Law* 281, at 295.

conjunction with an objective element of an existing community of those practicing the belief.³⁵ In effect, this definition means that some individuals or sects that cannot be categorised in this way, are unable to access the legal regime governing religion³⁶ and, thus, are more exposed to religious discrimination. At the same time, the issue of courts deciding over what is a religion is seen as a more serious issue in a declaredly neutral state.³⁷

In an officially neutral state it is, perhaps, harder for the judiciary to find a balance between not touching religious doctrine on the one hand, and providing a definition that allows for the inclusion of minority religions on the other. Basdevant-Gaudemet goes as far as saying that the refusal to define religion creates difficulties to acknowledge new religious movements.³⁸ A fixed definition as the above suiting the mainstream population is exemplary of formal neutrality presiding over its substantive counterpart.

2. Discrimination based on Religious Appearance

a) Religious Appearance in French Private Sector Employment

French case law concerning dismissals based on religious appearance has focused on Islamic headscarves, with formally neutral rules affecting only those who outwardly show their religion (see Chapter 1). Both before and after the inception of the EFD, employers defended restrictions on headscarves on the basis of business interests. This strategy successfully classified abstract business interests as a legitimate aim, where the notice of dismissal did not refer to a religious affiliation of the clothing being the cause to end the employment relationship,³⁹ but not where religion was explicitly mentioned.⁴⁰ In the latter case the burden of proof was then shifted to the employer to show that religious discrimination did not take place.⁴¹ This effectively means that only if employers mention religion, protection against religious discrimination will be assessed in court. Similarly, a case on dress in the workplace, albeit not religiously motivated, also supports that clothing can be prohibited if it obstructs business needs, again without setting any conditions for proportionality of the means to achieve a legitimate aim.⁴²

³⁵ Conclusions of Arrighi de Casanova J, Avis d'Assemblée du Conseil d'Etat, 24 October 1997.

³⁶ Onno J, book review of *Droit des Cultes, Personnes, Activités, Biens et Structures*, (2006) 30(1) *Les Petites Affiches* 1, at 14.

³⁷ Basdevant-Gaudemet B, "Staat und Kirche in Frankreich", in Robbers G (ed), *Staat und Kirche in der Europäischen Union* (Baden-Baden: Nomos, 2005), at 176.

³⁸ *Ibid*, at 181.

³⁹ Conseil de Prud'hommes de Lyon, 16 January 2004, *Fatima Amrouche v. Sté Téléperformance*.

⁴⁰ Cour d'Appel Paris, 18C, 19 June 2003, *Tahri v. Téléperformance*, RJS 2003/767.

⁴¹ Berthou K, "The Issue of the *Voile* in the Workplace in France: Unveiling Discrimination", at 317-318.

⁴² Cour de Cassation, Chambre Social, 28 May 2003, *Monribot v. SAGEN*.

The notion of business interests included the employee being able to hear the telephone more easily without a headscarf,⁴³ a headscarf disturbing the fashionable atmosphere of a shop and the corresponding expectations of “young and modern” customers,⁴⁴ as well as a headscarf being an unusual sight in a business area.⁴⁵ The employee’s case in *Davienne* failed, although the employer could establish neither why a headscarf worn by an employee harvesting fruit created difficulties for the company, nor why this had not presented a problem in previous years.⁴⁶

The courts used to accept, in the absence of other indication, employers’ explanations that headscarves are simply contrary to their business needs, thus not fulfilling their contractual duties, which then justifies a dismissal. The only set criteria applied by the courts for assessing the employers’ justification, are that the request to remove the headscarf or other items needs to be in line with public order and good custom, as well as being objectively grounded in the company’s interest.⁴⁷ Consequently, setting the standards for what constitutes public order and good custom is left to the employers and leaves protection against this form of religious discrimination entirely at their will. Accordingly, no concrete weighing of interests in a proportionality test as required by legislation will take place, unless there was such mention of religion in the dismissal paperwork. In the absence of any idea or examination of how these conditions are met, such random criteria are insufficient.⁴⁸

French courts seem to readily accept abstract interests of the employer, without much concern for the severity of the detriment to employees. The absence of a proportionality test is disastrous considering constitutionally protected rights are at stake. Effectively, the relevant rulings have coincided with minority religious practice based on incidental visibility, as explained in Chapter 1.

Overall, there appears to be little scope for private sector employees to successfully claim religious discrimination concerning appearance, except for perhaps one niche scenario identifiable in the case of *Tahr*.⁴⁹ Here the employee was reinstated in her position, because the principle of good faith under the *Code du Travail*⁵⁰ was deemed to require the employer to state the opposition to the headscarf before employment is taken up. In this case the

⁴³ Conseil de Prud’hommes de Lyon, 16 January 2004, *Fatima Amrouche v. Sté Téléperformance*.

⁴⁴ Cour d’Appel Saint Denis de la Réunion, 9 September 1997, *Sté Milhac Nord v. Meraly*.

⁴⁵ Cour d’Appel Paris, 16 March 2001, 18ème, *Charni v. SA Hamon*, RJS 2001/1252.

⁴⁶ Conseil de Prud’hommes Chalons en Champagne, 12 July 1999, *Naoual Davienne v. Grouget*, 98/001710.

⁴⁷ Cour d’Appel Saint Denis de la Réunion, 9 September 1997, *Sté Milhac Nord v. Meraly*.

⁴⁸ Berthou K, “The Issue of the *Voile* in the Workplace in France: Unveiling Discrimination”, at 305.

⁴⁹ Cour d’Appel Paris, 18C, 19 June 2003, *Tahr v. Téléperformance*, RJS 2003/767.

⁵⁰ Then Article L.120-4.

employee was able to produce an identification card with a photo issued when she initially entered the employment, which was accepted as proof that she had already worn a headscarf at this point. Although this may be a route for some employees, it is very narrow, as it firstly requires the employee to provide evidence and, secondly, does not cover cases in which the employee decided to wear the religious attire after having started to work.

Another doubtful path for justification in dress cases has been the lack of intention to discriminate. French courts have widely accepted that employers do not intend to discriminate if they prescribe that headscarves should be worn in a particular way, such as in *Tahn*, assuming this reflects the employers' willingness to accommodate the religious needs of the employee.⁵¹ Whereas a spirit of compromise is certainly wanted, limits are overstepped where this turns into an excuse for effectively altering the purpose of a headscarf. One can even coin this approach as paternalistic, insofar as this apparent form of accommodation is not based on mutual problem solving. For instance, in *Charni*, it was concluded that the correct and discreet way to wear a headscarf was to show ears and neck as opposed to a more traditional Islamic style.⁵² Any such approach that includes the evaluation of religious content by judges and employers, is also very ill-fitted with the concept of state neutrality, but that did not seem to bother the judiciary in *Charni*.

Furthermore, employers can easily gain knowledge through legal consultation, which may be sought prior to a dismissal anyway, of the relevance of not naming religion in the dismissal note. In addition, employers are able to use the existence of a generally diverse workforce as an example of not disliking Muslims.⁵³ Both ways of proving that there was no intention to discriminate appear overly simplistic, especially if the court does not assess the facts of the case in question.

French courts have also promoted the broad-brush view that the employee must observe contractual duties, unless the duty contravenes law and order.⁵⁴ In consequence, however, this would lead to the absurd situation that only if religious requirements are mentioned in the employment contract, then the employee can address discrimination.⁵⁵ It is also suitably countered that business interests should not justify, generally, human rights violations in private sector employment and that "religion has a broader social context and the wish to

⁵¹ Cour d'Appel Paris, 18C, 19 June 2003, *Tahri v. Téléperformance*, RJS 2003/767, also *Charni* and *Amrouche*.

⁵² Cour d'Appel Paris, 16 March 2001, 18ème, *Charni v. SA Hamori*, RJS 2001/1252.

⁵³ *Amrouche* and *Tahri*.

⁵⁴ Savatier J, "Conditions de Licéité d'un Licenciement pour Port du Voile Islamique", (2000) 4 *Droit Social*, at 354-358.

⁵⁵ Conseil d'Etat 2004 Report, at 345.

limit religion to the private sphere falls foul of the broad field covered by the guarantee of freedom of religion”.⁵⁶

Further criticism is voiced to the effect that the French model of handling religious discrimination paradoxically aims at ignoring all the visible religious differences amongst individuals, as if their visible characteristics are causing the discrimination they experience in the first place.⁵⁷ In accordance with *Berthou*, there is no necessity for employers to explain themselves, since religious needs of employees are not even addressed in court.⁵⁸ According to him, the *Cour de Cassation* deliberately ignores differences in employees’ needs and thereby covers the fact that discrimination takes place, aiming to prevent excessive numbers of claims as regards religious observance at work.⁵⁹ This is a severe allegation that, if true, sheds a very different light on the strong protection against religious discrimination in the statutes.

A breakthrough *Cour de Cassation* decision (*Afil*)⁶⁰ of 2013, however, may herald moving away from the seemingly random assessment of religious appearance cases towards an acknowledgement of the EFD. In *Afil*, a nursery school deputy was dismissed for wearing a headscarf, as this contravened internal rules of the company. The *Cour de Cassation* overturned two lower courts’ judgments, declaring the constitutional principle of *laïcité* not to apply in private sector employment. In particular, the court emphasised that religious freedom can only be restricted if the specific work activities or context involved require limitations by their nature. Furthermore, restrictions must constitute a genuine and determining occupational requirement that serves a legitimate aim and uses proportionate means. Contrary to previous case law, *Afil* thus evaluated the particular circumstances of the case, for instance, the company’s internal regulation was found to be too general and imprecise to justify limitations under Article 1321-2 *Code du Travail*. The dismissal was declared void and €2500 were to be paid in damages.

Though this case finally brings much needed clarity to the provisions dealing with religious discrimination under the *Code du Travail*, the reactions, once more, reflect the politicised nature of *laïcité*. Prime and Interior Minister immediately opposed the judges, followed by President Hollande, going as far as demanding legislation to ban religious insignia from

⁵⁶ Berthou K, “The Issue of the *Voile* in the Workplace in France: Unveiling Discrimination”, at 298 and 306; see also Chapter 1.

⁵⁷ Simon P, “L’Encombrante Visibilité”, in *La laïcité dévoilée – Quinze Années de Débat en quarante Rebonds* (Paris: Libération Editions De l’Aube, 2004), at 93.

⁵⁸ Berthou K, “The Issue of the *Voile* in the Workplace in France: Unveiling Discrimination”, at 299.

⁵⁹ *Ibid*, at 298.

⁶⁰ Cour de Cassation, 21 March 2013, *Fatima Afif v. Association Baby Loup*, No.536, 11-28.854.

private sector workplaces.⁶¹ François-Cerrah reports that many sense “the discourse on *laïcité* [i]s a cover for a stigmatisation of French Muslims who already face widespread discrimination and racism”.⁶² Since, and likely as a reaction to the *Affif* ruling, a new Charter related to *laïcité* has further limited religious manifestations at schools⁶³ and the government has commissioned report suggesting a renunciation of assimilation and a redefinition of French identity that accounts for the religious and ethnic composition of the population. The report also claims that the ban of headscarves at schools is used to justify sanctions in the field of employment. Since the report was apparently received with anger from the government,⁶⁴ it will likely be ignored.

Apart from *Affif*, all cases reflect France’s formal approach to neutrality, under the cover of an interpretation of *laïcité* presented as the sole interpretation. Effectively this means partial outcomes to the detriment of minorities, with only *Affif* leading to substantive neutrality. The pre-*Affif* body of case law had even been recognised in the Stasi-Report, which named both customer contact and internal peace of the company as factors to consider in future employment legislation, allowing employers to limit religious observance in the workplace.⁶⁵ This suggestion was subsequently even opposed by an employers’ organisation, which highlighted that compliance with the Stasi-Commission’s recommendation will impair access to employment and thus hinder integration.⁶⁶

Detrimental effects on Muslim employees are indeed anticipated in view of the Stasi-Report reinforcing prejudice held against this group.⁶⁷ In fact, a parliamentary proposal is under way to the end that private businesses are encouraged to prohibit the display of religious clothing or items where customer contact takes place and for the internal peace of the company.⁶⁸ Especially worrying is the argument of a religious manifestation being an unusual sight in a particular environment, as its acceptance means that the sight is destined to remain unusual and this state of homogenous appearance is positively viewed. Such views compound the effects of already formally neutral legislation. This runs counter to promoting diversity and

⁶¹ François-Cerrah M, “French Court Ruling Reignites ‘Laïcité’ Vs Headscarf Debate”, http://www.huffingtonpost.co.uk/myriam-francois/french-court-ruling-reign_b_3085656.html (accessed 15 March 2014).

⁶² Ibid.

⁶³ Samuel H, “France unveils controversial ‘secularism charter’”, <http://www.telegraph.co.uk/news/worldnews/europe/france/10296500/France-unveils-controversial-secularism-charter.html> (accessed 15 March 2014).

⁶⁴ Mulholland R, “France mulls overhaul of ‘assimilation’ policy towards immigrants”, <http://www.telegraph.co.uk/news/worldnews/europe/france/10516342/France-mulls-overhaul-of-assimilation-policy-towards-immigrants.html> (accessed 15 March 2014).

⁶⁵ Stasi-Report, 2004, at 62.

⁶⁶ Declaration of 17 December 2003, statement of Seillière EA, president of the *Mouvement des Entreprises de France* (MEDEF).

⁶⁷ Fehr S, “Intersectional Discrimination and the underlying Assumptions in the French and German Headscarf Debates”, in D Schiek and A Lawson (eds), *European Union Non-Discrimination Law and Intersectionality* (Farnham: Ashgate, 2011), at 113-115.

⁶⁸ <http://www.assemblee-nationale.fr/13/propositions/pion3397.asp> (accessed 15 March 2014).

inclusion as positive goods and, also, prevents dialogue amongst adherents of different religions.

b) Religious Appearance in the French Public Sector

Public servants have a particular status in France in that they are seen as extensions of the state and therefore have to appear religiously neutral to the public.⁶⁹ Any display of religious affiliation constitutes a breach of duty.⁷⁰ Hence, the *Conseil d'Etat* acclaimed, for example, the sanctions imposed on a public agent working for a polytechnic school, who had included his membership in the Christian moon sect in the signature of his work e-mail.⁷¹ This express reference to a religion was seen to violate the principle of *laïcité* of the French state.

Public sector cases tend to deal with personal religious appearance, especially with Islamic headscarves. The landmark case of *Marteaux* was concerned with a supervisor at a hall of residence for a state school, who was dismissed for wearing a headscarf for religious reasons.⁷² The *Conseil d'Etat* provided a detailed reply, starting with a reminder of the close link between freedom of conscience, *laïcité* and neutrality of public agents. Regardless of whether public agents are involved in education or not, discrimination of others on grounds of conscience had to be avoided completely. From this the court derived that any sign marking the affiliation to a religion amounted to a violation of professional duties and, also, that visible religious attire amounts to discrimination. Finally, the *Conseil* set the condition that such cases need to be heard by a judicial body, which ought to consider all circumstances, as well as the degree of conspicuousness of the religious symbol. The term 'conspicuous' can obviously be interpreted flexibly, which is problematic. A headscarf, for example, may be seen as completely normal by some and as prominent by others, and the same could be said for any item of a potentially religious nature. The real problem are minority adverse decisions at court which are effectively not neutral in effect, if strict neutrality is applied.

Alternatively, another ruling found that a headscarf worn by a public servant of the labour division was a matter of professional misconduct, based on the reasoning that neutrality was required in order to protect the rights of those using public services.⁷³ Previously, strict

⁶⁹ Commission sur Réflexion sur l'Application du Principe de la Laïcité dans la République, "Rapport au Président de la République" (11 December 2003), 'Stasi Report', at 22-23; Conseil d'Etat, Avis, 3 May 2000, *Melle Marteaux* 217.017.

⁷⁰ Garay A, Chélini-Pont B, Tawil E and Anseur Z, "The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in France", (2005) 19(2) Emory International Law Review 785, at 810.

⁷¹ CE, 15 October 2003, *Jean-Philippe M*, No.244428.

⁷² Conseil d'Etat, Avis, 3 May 2000, *Melle Marteaux* 217.017, *Revue de la Recherche Juridique – Droit Prospectif*, 2001, at 2108-2131.

⁷³ Cour Administrative d'Appel de Lyon, 27 November 2003, *Nadjet Ben Abdallah*, 03LY01392, *Dalloz*, 2004, IR 32.

neutrality had also already been called for, in the case of those collaborating with the public service,⁷⁴ but before *Marteaux* there had been no explicit link to the concept of *laïcité*. Despite the clear stance of the law in regard to neutral appearance, an increasing number of cases of employees who wish to wear a headscarf at work are reported to have reached the *Conseil d'Etat* since 2001.⁷⁵ This trend may be indicative of a genuine conflict of interests imposed on public agents in France, as well as of an ongoing debate.

The above case law on religious signs in public service was agreed with and confirmed by the 2004 Stasi Commission. The *Conseil d'Etat*'s reference in *Marteaux* to future cases to assess how ostentatious the religious sign is, is likely to discriminate indirectly against adherents to those religions, that by the nature of the duties involved and the minority character of the religion, are more visible than others. Bearing in mind that mostly followers of minority religions, such as Muslims, Jews and Sikhs, are disadvantaged by this rule, it is a highly undesirable solution from this perspective. Such a concern is warranted in view of the *Weiss* case, where the *Conseil d'Etat* found excessive a school's disciplinary measures against a teacher insisting to wear a cross on a neck chain, confirming the previous court's perception that the cross was not ostentatious.⁷⁶ Although a cross would regularly be smaller than a headscarf or a turban, it nevertheless gains prominence, if it is the sole religious symbol or item permitted. This issue reflects the bias exercised in this matter and lends hand to the accusation that majority religious manifestations are treated more favourably than those of minority religions. Doubts can, thus, also be raised as to the *Conseil d'Etat*'s neutrality.

Viewing the public sector case law at a deeper level, Garay *et al* explain that, psychologically, induced through the state's history, the French tend to mistrust religious singularity and, also for historical reasons, republican ideals depict religion as a danger for personal freedoms, for which a high price was paid.⁷⁷ There is a corresponding readiness to defend Republicanism as a cultural identity that can then create problems of discrimination, because non-religious thought enjoys a higher level of protection than religious thought.⁷⁸ 'New' religions, such as Islam, suffer the most and are in addition subjected to security policies.⁷⁹ This historical background sheds light on the currently 'strict'

⁷⁴ CE, 3 May 1950, *Jamet*, Rec. CE, at 247.

⁷⁵ VEIL-Project, French Team Executive Summary, at 4; an overview of the project's findings and proposals was available at <http://www.gemmaproject.eu/VEIL.aspx#researchfindings> (accessed 27 June 2011, not available any more).

⁷⁶ CE, 28 April 1938, *Demoiselle Weiss*, Rec. CE, at 379.

⁷⁷ Garay A, Chélini-Pont B, Tawil E and Anseur Z, "The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in France", at 820-821.

⁷⁸ *Ibid.*, at 821.

⁷⁹ *Ibid.*

application of *laïcité* in France, however, it is not clear why such rigidity still applies during a time when churches do not remotely have the same power as where these fears originated from. Therefore, and because this interpretation of *laïcité* severely affects public servants who follow minority religions that require outward manifestations, an 'open' reading of *laïcité* leading to substantive neutrality as proposed, amongst others, by Baubérot,⁸⁰ would be preferable.

3. Religious Discrimination related to Hours of Work

French courts have not ruled in favour of private sector employees requiring particular time off. Although the *Cour de Cassation* does not grant a right to leave in order to observe one's religion, it nevertheless held that abstinence from work after being refused such a request may only be answered with an ordinary dismissal, so that severance pay has to be issued to the employee.⁸¹ This case also provided that a single absence for the purpose of a religious festivity can be the cause for dismissal, due to the fact that an important delivery was delayed because of the employee's absence.⁸² Whereas this is comprehensible, if the employee was informed of the importance of attendance, it is remarkable that the concrete interests involved are examined by the court, whereas generally this had not taken place until *Affil*, where the wearing of headscarves was involved.

In contrast to this stern approach, employees in the public sector enjoy the privilege of designated leave for the principal occasions of Christian, Jewish, Muslim and Buddhist beliefs, as prescribed by a yearly updated government circular.⁸³ Because of the Catholic heritage inherent to rules granting Sunday as a day of rest, *Berthou* finds it difficult to accept this arrangement.⁸⁴ Given the absence of proposals for alternatives, however, it is a laudable start to create more equitable relations, at least between the major religions. The circular's silence on other religions is still a problem, until all employees can benefit from the rule. It would be preferable to grant a specified number of days to be used for celebrations and occasions, so that all public (and ideally also private) sector employees can enjoy additional time off.

Maintaining Sunday as a day of rest can be understandable in the light of some business interests, but an urgent claim must be made concerning the lack of legal arrangements for

⁸⁰ See Chapter 1.

⁸¹ Cour de Cassation, chambre sociale, 16 December 1981, *Dame Balkiv. Sté le Poulet du Roy*.

⁸² Ibid.

⁸³ Circulaire FP, no.901 (23 September 1967).

⁸⁴ Berthou K, "The Issue of the *Voile* in the Workplace in France: Unveiling Discrimination", at 293.

public holidays of private sector employees. Since the officially prescribed holidays are entirely linked to Christian events, reforms of this system are suggested.⁸⁵ In view of the strict separation of church and state in France, one could even argue that bank holidays ought not to be linked to religious events in the first place, but rather spread evenly throughout the year. Whereas neither interpretations of strict nor open *laïcité* can justify the current arrangements for leave, the introduction of leave for adherents of well-known religions is a move towards substantive equality, which can be the starting point for more inclusive arrangements.

4. Religious Discrimination based on Health, Safety and Security, and on Work Activities physically incompatible with Religious Beliefs

No such cases have been identified. Presumably, affected employees have complied with employers' requests, sought other employment and/or have not had the confidence to question such decisions in court. This may also be due to lack of prospect of success, an understandable presumption in view of the above case law and, perhaps, because of obvious objective justifications.

5. Discrimination based on Work Activities morally incompatible with Religious Beliefs

Few cases seem to deal with the non-participation in work activities. In one incident a court held that the employer was under no duty to reimburse employees for canteen meals missed during the month of *ramadhan*.⁸⁶ Though it is debatable if participating in a regular meal in a canteen is part of employment, the case may be indicative of lacking will to acknowledge religious differences or needs. Perhaps a stronger example of this type of case was the refusal of a court to give in to a butcher's request not to touch pork for religious reasons, on the ground that he had handled pork for two years prior to his claim, implying a lack of genuine religious need.⁸⁷ This ruling, however, ignores that under public international law, for instance, there is a right to change one's religion as part of freedom of religion.⁸⁸ Correctly, everyone ought to be able to develop their religious beliefs and this in itself should not be an aspect employers can use to reprimand the employee. It is not unusual for an individual to change religion, so that at least credibility of such a decision ought not be questioned by a court, regardless of whether the concurring religious manifestation can be

⁸⁵ Delsol X, Garay A and Tawil E, *Droit des Cultes* (Paris: Dalloz, 2005), at 370.

⁸⁶ Cour de Cassation, 16 February 1994, *Hassine v. Sté Albizzati GBA*, 833.

⁸⁷ Cour de Cassation, 24 March 1998, *Azad v. Chamsidin*, 2056.

⁸⁸ Berthou K, "The Issue of the *Voile* in the Workplace in France: Unveiling Discrimination", at 299; see Articles 18 UDHR and 18 ICCPR.

reconciled with workplace requirements or not. These two examples mirror a somewhat inflexible approach, both from French employers and courts, even where genuine discussion could take place regarding the interests involved to avoid discrimination. Once more, such a weighing of interests seems to be avoided by silencing any claims at an early stage of assessment, excluding the idea of accommodation that could serve to move from formal to substantive neutrality. In view of the year of decision, though, decisions under this category may look different in the future, when courts are expectably more likely to consider EU law.

6. Harassment as a Form of Religious Discrimination

In France, no cases have been identified relating to harassment as a form of religious discrimination. The reason for this is thought to be that, historically, harassment was not connected with discrimination, but with abuse of power on behalf of superior staff, resulting in the violation of dignity or health and safety law.⁸⁹ Concluding from the case law above, employees struggle to establish any discrimination, so that perhaps there is also little confidence to make additional claims of harassment linked to religion.

V. Compatibility of French Law with the ECHR

1. The Notion of Religion

In general, it is presumed that statutory law complies fully with the ECHR due to its advanced nature. The benchmark is therefore the case law analysed above. The conditions to determine whether a belief constitutes a religion (belief in a divinity of some sort and existence of a community of followers) may be too narrow compared to what has been interpreted to fall under the ECHR, in particular the required existence of a community which is contrary to the ECtHR's wide definition as applied, for instance, in *Campbell*.⁹⁰

2. Appearance

a) Private Sector

A great deal of domestic cases have dealt with religiously motivated dress in the workplace. Within this group of cases a distinction needs to be made between judgments before and after *Afil*. Due to the political opposition voiced pursuant to *Afil*, and the potential legislation prohibiting such garments in private sector workplaces, the future of relevant law is still uncertain. A number of issues were identified with the pre-*Afil* cases.

⁸⁹ Berthou K, *ibid*, at 310.

⁹⁰ *Campbell and Cosans v. UK*, Series A no.48, 4 EHRR 293 (25 February 1982).

The tentative and formless business interests that French employers can successfully use to defend indirect discrimination in national courts would probably not per se be seen as necessary in a democratic society by the ECtHR. Maintaining the internal peace of companies may fall under the public order ground, but the supposition that any customer contact justifies limitations possibly not. Such a law would, for example, void the *Kokkinakis* finding of the dearly won pluralism (inseparable from democracies) being a precious asset for each single person, whether religious or not. Arguably, if anyone who feels obliged to wear religious dress would be excluded from most forms of employment and basic education, this would mean pluralism is only protected under very scarce circumstances. It would, in that case, depend on near uniformity of clothing.

Then again, *Kokkinakis* has been fairly toothless so far and might even be compromised by the constrictions of *Doğru*. *Doğru*, though, is different, as the justification was *laïcité* and not a ground more accessible to the ECtHR. This ruling is therefore more helpful in public sector cases. There is, however, some hope that the Court would consider evidence of discrimination collated by NGOs, as it did in *Ivanova*, perhaps opening a route through the Article 13 right to an effective remedy, since conviction rates in France do by no means reflect the occurrence of religious discrimination instances reported.

In any weighing of employer-employee interests, it can be concluded from *Eweida* that mere image or brand recognition would not suffice alone to override a religious obligation. In relation to French cases of headscarves to be worn at work, this would even more so be the case, because the duty to wear a headscarf is more established than a duty to wear a cross. *Aïff* exceeds the standards set by the ECtHR, in that the *Cour de Cassation* did not recognise nursery age children's needs to be protected from religious affiliation of their educators, unlike in *Dahlab*. The determining factor, however, will be whether cases (or statutes) in the future will deviate from *Aïff*, which will raise the question as to *laïcité* having to be weighed against the religious obligation. Until then, it can be presumed that private sector cases that are justified by virtue of abstract business interests contravene the conclusions in *Eweida*, and are, thereby, not compatible with the ECHR.

b) Public Sector

In French public sector cases, *laïcité* determines the outcome of religious discrimination cases, following the *Marteaux* judgment. So far, the ECtHR has, seemingly, always decided in favour of the state, whenever church-state relations had been applied to justify indirect religious discrimination. To recall, in *Karaduman*, the Commission even rejected the right to

have a photo taken with a headscarf, thus denying a woman either her integrity or her university degree (based on *Arrowsmith* and *Şahin*). By virtue of how secularism is interpreted in Turkey specifically, the state was permitted to enforce considerable limitations to religious freedom, amounting to indirect discrimination.

The question is how this relates to the French context. Within Europe, the strength of the standing of *laïcité* in French public affairs is feasibly comparable to Turkey only. This reminds of the *Şahin* ruling, where mere suspicions of the headscarf affecting neutrality were deemed sufficient to prevent the applicant from studying. Still, in view of *Şahin*, employment cases in France may be an unsuitable comparator since the person in question wishes to serve the state (as opposed to a student).

It is, nevertheless, over-optimistic to hope that the ECtHR would re-evaluate the findings in *Dahlab* and *Şahin* in the French context, not least due to the findings in *Doğru* and because of the political sensitivities involved. It is somewhat predictable that an application from a teacher or other civil servant in France would follow the route of the *Dahlab* ruling, since this plainly accepted the state's submission of the neutrality argument. For the time being, a turning point in Strasbourg has not yet been reached and may be far away.

Doğru highlighted explicitly that pluralism requires a “spirit of compromise”, with concessions to be made by the individual and not the state, and considered the Islamic headscarf of pupils an illustration of a religious manifestation that potentially collides with the rights and freedoms of others, public order and public safety.⁹¹ If the ECtHR lets France prohibit minority religious items worn by school pupils (as a form of justified indirect discrimination), a similar result will likely emerge in respect of public sector employment. Even where the promotion of *laïcité* is accused of reaching levels of indoctrination (‘secular fundamentalism’, see Chapter 1), the Strasbourg judges would probably struggle to take this allegation into account in favour of an employee, given the abstract form *laïcité* appears in. Even though in *Lautsi* the Strasbourg judges asserted that religious symbols did not impact, as such, on those in contact with them, even in a compulsory setting, the judgment is to be viewed cautiously since no minority religion was involved. Even if decisions are not political to this degree, there is still a pattern to the effect of the ECtHR accepts church-state relation arguments without much concern for individual outcome.

⁹¹ *Doğru v. France*, at 62 and 64 Appl.No.27058/05 (4 December 2008).

Alternatively, comparing the French case law to the ECtHR's rulings in *Valsamis*⁹² and *Efstratiou*⁹³ can give insights into what is required in terms of (*de facto*) accommodation. At national level it was criticised that the factual, apparent accommodation does not take into account employees' interests, but courts decide what is required for religious manifestations. Though such an interference with personal autonomy can be deemed extreme, it is currently probably covered by *Valsamis*, *Efstratiou* and *Kalaç*, to the extent that Greece was also permitted to externally determine what affects a belief. Depending on the facts of the case, the Court may decide differently though, due to the *laïc* label of the French state, as opposed to the public endorsement of religion in Greece. Yet, the church-state relationship in Greece is not expounded so that the ECtHR probably did not see any connection between the issue of who decides over doctrine and the potential infringement of rights. Rather, as discussed in Chapter 2, the Court permits claims concerned with the national judiciary's perceived accuracy of a belief, instead of insisting on a more detailed assessment of justification. Generally, this means that French judgments preventing such assessment would most likely also be found to be in line with Strasbourg jurisprudence.

One also has to consider the adjunct question of whether the Court differentiates civil service from private sector employment in terms of what constitutes unlawful discrimination, given the varying criteria at national level. So far, such an understanding has, however, not featured in ECtHR's jurisprudence, as for instance in *Dahlab*. Then again, former KGB agents being prevented from entering private sector employment was evaluated as disproportionate, significantly in regard to the distinction between public and private made by the state.⁹⁴ The Court may, accordingly, recognise the public-private divide to a lesser extent than the French state. Whether this will be of use to French public sector employees is questionable though, since ECtHR jurisprudence related to church-state relations currently, at least, would find in favour of the state based on its reluctance to evaluate the domestic interpretations of church-state relations.

The way *Laïcité* it is interpreted currently by law-makers and judges appears compatible with the parameters of the ECHR. Legally or politically, it is thus unlikely that the ECHR will find the French *laïcité* to be in breach of the Convention, due to the controversial views and differing outcomes throughout its member states. Despite more recent decisions, like *Thlimmenos*, pointing at an increasing recognition of substantive equality under Article 14,

⁹² Appl.No.21787/93, (18 December 1996).

⁹³ Appl.No.24095/94, (18 December 1996).

⁹⁴ *Sidabras and Dziantas v. Lithuania*, 2004-VIII, 42 EHRR 104, at 58-62.

the Court is still likely to rely on France's margin of appreciation, in particular because there is no pan-European consensus on church-state relations, let alone on interpretations of state neutrality, or the issue of headscarves in the workplace. As *Doğru* reflects, this is especially true in relation to religiously motivated dress in a public, compulsory environment.

3. Hours of Work

The rulings in *Stedman* and *Ahmad* set the current standard for cases of working time adjustments for religious worship. Unless cases were to be examined more sympathetically today, it seems that French law refusing days off in private sector employment is compliant with the ECHR.

4. Moral or Physical Conflicts

As already suspected, *Azad* is not compatible with the ECHR, for the sole reason, though, that the right to change one's religion is explicitly covered by Article 9(1) ECHR. Hence, the court's argument that the employee had previously handled pork is not relevant under the Strasbourg regime. This case would likely be decided on the basis of whether Mr Azad could be required to touch pork but the national court's justification would not comply with the ECHR.

VI. Compatibility of French Law with EU Law

1. The Notion of Religion

In the absence of EU law definitions of religion, Chapter 3 presumed a wide concept to be desired, similar to the one promoted by the ECtHR. Such a wide concept is then, accordingly, likely to clash with the French closed definition of religion which excludes those who cannot show the existence of a community. There is, therefore, a high likelihood that the French definition would not comply with EU law.

2. Appearance

a) Private Sector

For a number of reasons, the national case law before *Afif* is problematic if measured against the requirements of EU law.

In effect, French cases, bar *Afil*, expose a formal, rather than a substantive approach to equality. Along with Berthou, it is presumed that a formal approach is no longer reconcilable with EU law.⁹⁵ Bearing in mind that EU law favours substantive equality, it is submitted that

⁹⁵ Berthou K, "The Issue of the *Voile* in the Workplace in France: Unveiling Discrimination", at 300-301.

French case law in the private sector (under which employees must observe any contractual duties, unless the duty contravenes law and order) is not compliant with EU law.⁹⁶ More specifically, the CJEU may also take issue with the fact that French employees can address discrimination in court only if religious requirements are initially mentioned in the employment contract or in the dismissal note. A mere silence on religion is not expected to outweigh the actual assertion of a fundamental right before the CJEU.

Under the EFD's Article 2(5), discriminatory law within the Directive's ambit may be justifiable if it constitutes a necessary measure in a democratic society for "public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others". As Chapter 3 found, these exceptions refer to very serious matters. Accordingly, CJEU would probably not accept a justification as under Article 2(5) in cases where, for instance, an employee wore a turban or a headscarf. Even if this was the case, the reasons given in national case law above, such as abstract business interests, are unlikely to compare in magnitude to the situations described in Article 2(5).

The question then moves on to Article 4(1) EFD, and whether religious appearance, by "nature of the particular occupational activities concerned or the context in which they are carried out", is "a characteristic [that] constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate". In none of the cases assessed this question can be affirmed. In particular, apart from *Afil*, courts did not even look for the link between the actual activity to be carried out and the outward appearance of the employees. Therefore, it is not even possible to assess if (and not probable that) such a link exists consequently. Also, assuming a lack of intention to discriminate in *Tahri* likely clashes with the burden of proof as declared in Article 10 EFD, because the courts' assumptions undermine the employer's burden to show that discrimination did not take place. The pre-*Afil* body of cases under this category consequently, would therefore likely fail to comply with the level of justification demanded by Articles 4 and 10 EFD.

b) Public Sector

In the French public sector, the overarching argument to justify indirect religious discrimination of employees is the concept of *laïcité*. A violation of EU law, therefore,

⁹⁶ In agreement, Savatier J, "Conditions de Licéité d'un Licenciement pour Port du Voile Islamique", (2000) 4 Droit Social, at 354-358.

depends on the CJEU's standpoint on using church-state relations as a justification. First of all, preliminary rulings sought regarding public sector employment are not categorised differently, the same provisions apply as to the private sector. In accordance with Willaime, French *laïcité*, which attempts to limit religious freedom in public and imposes the philosophical authority of the state, may be under threat from the EU's conception of church-state relations.⁹⁷ Through the recognition of, and dialogue with, all religions and philosophies, the *Soul for Europe* programme and most of all Article 17 TFEU are, actually, in direct opposition to French policies to (theoretically) ignore any religious reality. From the perspective of protecting minorities, the impression made by EU law and action points to a model of minority integration other than assimilation as practiced in France. Clearly, religious practice is not regarded as a matter to be confined to the private sphere at EU level, but reflects the idea of substantive neutrality. The practical implications of this visual presentation of religious manifestation are, however, limited to a signal effect to those who consult the relevant documents.

Giving weight to Willaime's proposition, Article 17(1) TFEU grants only the status of churches and religious communities to be respected by EU law, not the church-state model. The equal recognition of all such recognised organisations (Article 17(2) TFEU) may also work to the advantage of minority religions, when their adherents are indirectly discriminated against. This provision probably leads to an objective perspective and assessment related to the national church-state setting.

The fact that the EFD applies indistinctly to the private and public sector is a further marker of the likelihood of the CJEU making no extra allowances for the French imposition of formal neutrality on public servants. McGoldrick and Berthou toy with the possibility of the prohibition of employees wearing headscarves violating the EFD, which ought to protect, for instance, teachers and other public sector employees who wear this garment for religious reasons.⁹⁸ They may well be right, if the prohibition established in *Marteaux* cannot be justified under Articles 2(5) or 4(1) EFD.

Laïcité might fail to justify indirect religious discrimination for reasons of "public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others" of Article 2(5). The

⁹⁷ Willaime J-P, "European Integration, *Laïcité* and Religion", (2009) 37(1) Religion, State & Society 23, at 32.

⁹⁸ Berthou K, "The Issue of the *Voile* in the Workplace in France: Unveiling Discrimination", (2005) 21(2) International Journal of Comparative Labour Law and Industrial Relations 281, at 314;

McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Oxford/Portland, Oregon: Hart Publishing, 2006), at 257.

degree of severity required for these factors will only be reached if damage is plausible. Discussions surrounding religious markers of individuals in the public (and private) sector, however, show exactly that “danger” is neither imminent, nor clear-cut, nor necessary. In the case of public sector employees, where a careful selection process usually takes place, it is submitted that impairments of the rights of others of this magnitude will not materialise simply due to wearing religious symbols. Hence, the CJEU would probably not accept a justification as under Article 2(5).

Article 4(1) EFD in regard to *laïcité* as a potential genuine and determining occupational requirement would probably only be relevant if the employee in question was unable to carry out an actual work activity, for instance, if a teacher refused to convey the curriculum as provided by the authorities. Since Article 4(1) EFD requires a practical link to the work activity, it depends on whether this link exists, in the view of the CJEU judges, in the case of outward appearance of civil sector employees. Though French courts will expectably vehemently argue that neutral appearance is an occupational requirement for their public servants, further clarification will be needed as to the actual significance of the employees’ appearance. In this case, it is presumed that the relevance of religiously neutral appearance is too abstract to comply with Article 4(1) EFD.

Further, tentative answers can be obtained by consulting CJEU jurisprudence. Since interferences with fundamental rights have been subjected to a detailed and case-oriented proportionality tests, and because substantive equality seems to be the current goal, French courts may not succeed with a blanket excuse of *laïcité*. Only serious counter-interests are taken into consideration before the Court, an issue that can be debated in view of the presently indefinable conception of *laïcité*.

Another issue the CJEU may have to consider is the impact of differences in protection against religious discrimination on the free movement of workers. It is, for instance, foreseeable that a small number of Muslim employees (and their dependents) leave France to live in other MSs, due to the prohibition of *niqab* in public. It is even more likely that those who wear *niqab*, or have family members who wear *niqab*, will not move to France from other MSs. A first incident of a couple who left France for the UK for this reason has been reported.⁹⁹ To a lesser degree, anyone who feels obliged to wear outward religious signs known as problematic may be deterred from moving to France, because of the state’s

⁹⁹ http://www.google.com/hostednews/afp/article/ALeqM5jBmzJ-CE_RDcivTRZcKb6e_TOAMq?docId=CNG.8a8d0252fc37e292cdfbd4988e7aeee9.611 (accessed 15 March 2014).

general reputation as anti-religious. Empirical research into this area would be useful to underline the extent and nature of this problem. In the meantime, movement of workers constitutes another reason why the CJEU ought to subject any preliminary references from French courts to a high degree of scrutiny.

3. Hours of Work

It is not yet predictable what the CJEU would make of cases where employees take off time for religious observance. In case French courts would follow the example of *Afif* and assess whether denying time off collides with concrete interests of the employer, then this would in any case be in compliance with the EFD.

4. Moral or Physical Conflicts

For the same reasons for which *Azad* is incompatible with the ECHR, it will likely also contravene EU Law. The additional absence of cases concerned with dignity and health and safety in the above sections, also shows that unequal treatment, if on the basis of religion, is not perceived to enter these spheres. Taken together, it seems that French courts intend to be reactive, rather than proactive in complying with EU standards for religious discrimination at work.

VII. Conclusions

French statutory law on religious discrimination at work is considered advanced in some areas. In particular, the severe criminal charges available to answer discrimination cases exceed the EFD's guidelines and the ECtHR's standards. The regulation of days of rest in the public sector is a good start towards substantively neutral law, but still flawed due to excluding lesser-known religions. French case law stands in stark contrast to these statutory provisions. Since the latter indicate a tough line towards employers, the judiciary may be overly cautious aiming to avoid claims, however, this results in severe consequences for employees, especially those professing a minority religion. Employees who wear religious attire are easily excluded from workplaces by virtue of (seemingly) generally applicable rules regarding appearance.

Until *Afil*, courts failed to assess justification for the resulting indirect discrimination in a detailed way, or avoided to address the issue of discrimination altogether. Consequently, no actual debate takes place as regards the non-discrimination articles of the French Constitution or of the *Code du Travail* in relation to weighing the interests involved. Indeed, a remarkable ease is exhibited, with which employers' demonstrations of business needs, no matter how vague and speculative, are accepted by the judiciary. The judiciary's wide

acceptance of employers prescribing headscarves to be worn in a particular way, cannot lead to the assumption of employers' willingness to accommodate the religious needs of the employee. Hence, employees are in fact left with little protection against religious discrimination and this was found in nearly all cases, particularly if minority religion was involved. In practice, due to the absence of a doctrine of accommodation and the avoidance of courts to thoroughly assess cases of indirect discrimination, protection against religious discrimination in private sector work appears weak. What will happen after *Afif* remains to be seen, however, the discussion of *laïcité* in private sector employment is now on the table.

In the public sector, no religious affiliation may be displayed, with *laïcité* given as the reason for such line of case law. *Laïcité* features in all aspects of French law concerning religious discrimination at work, with regard to the public and private sectors, in discussions surrounding statutory and case law. Although Chapter 1 considered *laïcité* in theory to be flexible enough to support substantive neutrality, its interpretation by the legislature and the judiciary appear problematic in several ways. Whereas the efforts made towards providing days of rest to adherents of some religions and the *Afif* case are examples of law that promotes substantive neutrality, the indirectly discriminatory effect of most other relevant law excludes many employees from the protection against religious discrimination. The position of public sector employees and minority religion adherents stands out as those insufficiently protected against religious discrimination as a consequence of indirect discrimination. *Laïcité* is used as a tool to justify these results and, thus, fails to provide state neutrality. Therefore, *laïcité* ought to be interpreted as to allow for dialogue and negotiation that represents all interests involved in the workplace.

This Chapter concludes that there is widespread compliance of French law with the jurisprudence of the ECtHR yet. The definition of religion in domestic law may be too narrow and, clearly, so is the aspect in the *Azad* decision relating to the right to change their religion under the Convention.

Additional conflicts were identified between French law and EU law. Astonishingly, statutory law was changed significantly due to the EFD, whereas case law has seemingly not been affected that much, with the exception of the 2013 *Afif* case. Unless *Afif* will remain as precedent for further indirect discrimination cases, non-compliance with EU law is presumed in several regards. All other cases examined effectively expose a formal, rather than a substantive approach to equality, likely to be non-compliant with EU law, due to the absence

of analysis of facts, and, for instance, by disregarding the demands of occupational requirements and the burden of proof under the EFD.

The lack of engagement with the religion ground by the former HALDE and its discontinuation are further markers of the French reluctance to embrace the EU's model to fight against discrimination. The absence of reports on religious discrimination may also be noteworthy when assessing the commitment to the EU's non-discrimination cause. Taken together, there is a question mark over France's genuine interest in non-discrimination causes and willingness to fund research, as is to generate publicly accessible information and data on religious discrimination in employment (and in other fields).

Bar the ground-breaking *Aïff* judgment, French law has been characterised by a reluctance to give effect to legislation, to consider employee interests and the facts of each case, French case law has created an environment where challenges to employers' discriminatory conduct seem almost futile, which seems to be confirmed by the scarce reporting. In the public sector, restrictions to exercising religious interests based on the tenet of *laïcité*, endorsing a formal conception of neutrality. Courts otherwise follow a formal neutrality concept that hinders a spirit of compromise and dialogue to weigh up the interests of employers and employees, to the disadvantage of the latter. Formal neutrality as offered in most cases clearly disadvantages adherents of minority religions in France, but there is no indication that the concept of *laïcité* cannot be interpreted to include a substantive neutrality concept. The negative effect on manifestations of minority religions raises further questions as to French case law and the religious neutrality of judges. Considering the reactions to *Aïff*, there seem to be insurmountable political hurdles to an interpretation of *laïcité* other than a formal one at this point in time.

CHAPTER 6 • German Law concerned with Religious Discrimination in Employment and its Compatibility with the ECHR and EU Law

I. Introduction

This is the final of the three chapters assessing national law and its compatibility with the ECHR and EU law. Chapter 6 analyses German law related to religious discrimination in the workplace. Legislation dealing with this area of law has been heavily influenced by the Employment Framework Directive (EFD), which has led to the enactment of a new statute, the *Allgemeines Gleichbehandlungsgesetz* (AGG). Germany only concluded its debate surrounding the EFD's transposition in 2006, thus surpassing the deadline for implementation significantly. Aspects of the transposed legislation, as well as some rulings, will require particular attention in the final part that examines compatibility with the ECHR and, more clearly, with EU law. The politically controversial lead-up to the AGG is strongly reflected in the German 'headscarf debate', based on a series of cases that vividly illustrates the emotive nature of some discussions surrounding religious discrimination and the difficulties this poses for the interpretation of legislation. This chapter specifically highlights the role church-state relations play in these debates, and also the effect of arguments surrounding church-state relations on minority religious adherents.

II. Court Structures and Statistics

German employees can rely upon a dedicated three-tier employment court structure, with the *Bundesarbeitsgericht* (Federal Employment Court) as the final instance. Civil servants need to make their religious discrimination claims before administrative courts, also comprising a hierarchy of three courts, where the *Bundesverwaltungsgericht* (Federal Administrative Court) is at the top. From both of the highest national courts in each system, workers can refer their case to the *Bundesverfassungsgericht* (Federal Constitutional Court), which assesses compatibility with the *Grundgesetz* (the German Constitution) and interprets its provisions.¹ National statistics are not available, however, according to the website of one second instance or *Landes*-employment court, religion and sexual orientation are the discrimination grounds claimed the least, together accounting for less than 10% of the 109 discrimination cases filed during a one-year period.²

¹ Article 93 *Grundgesetz*.

² Press release of the *Landesarbeitsgericht Baden-Württemberg* of 27 June 2007, "Erste Erfahrungen in der Rechtsprechung mit dem Allgemeinen Gleichbehandlungsgesetz", <http://www.lag-baden-wuerttemberg.de/pb/site/jum/get/documents/jum1/JuM/import/landesarbeitsgericht%20baden-w%C3%BCrtemberg/pdf/pr/Pressemitteilung27.06.07.pdf> (accessed 15 March 2014).

III. Statutory Law

1. Constitutional Law

Article 4 *Grundgesetz* protects both the freedom of religious belief and moral conscience, as well as the outside expression of religious and irreligious ideologies: '(1) Freedom of faith, conscience and freedom of religious denomination and of worldview are inviolable. (2) The undisturbed practice of religion is guaranteed.' In addition, Article 3(1) *Grundgesetz* provides that all people are equal before the law. This means that state administration and the courts are under an obligation to treat everyone equally when applying the law, and that acts of parliament need to be compatible with this rule.³ Providing further detail, Article 3(3) prescribes that no person shall be favoured or disfavoured because of their sex, parentage, race, language, homeland and origin, faith or religion or political opinion.

Justification of conduct under Articles 3 and 4 depend on the individual case. According to the *Bundesverfassungsgericht* Article 3 is violated if a group of persons is treated differently to another group, despite there being no differences between them of a type and weight that can justify the differentiation.⁴ As is the case with Article 4 violations, the lack of express mention does not allow for justification unless in the case of collision with other constitutional law in addition to proportionality. The proportionality test applied is based on the rule of law and requires the measure to be suitable to promote a legitimate aim, necessary, i.e. the most harmless mean to achieve the legitimate aim, and adequate, i.e. a reasonable/proportional relationship between the harm caused and the legitimate aim.⁵ This test is rigid and allows for fairly balancing the concrete facts of the case, as well as wider implications.

Article 33 *Grundgesetz* includes some specific rules on public sector employment, offering equal access to public service positions, the allocation of positions in line with suitability, ability and objective performance, irrespective of *inter alia* religion. Although 'access' is a wide concept that encompasses entry and promotion, the provision is only available to German citizens. The component concerned with religion duplicates Article 3(3)(1) *Grundgesetz* and therefore is *lex specialis*.⁶ Justification can be claimed in the same way as for Article 3.⁷ No link to church-state relations is established.

³ Epping V, *Grundrechte*, at 285.

⁴ BVerfGE 55, 72 (88).

⁵ Epping V, *Grundrechte*, at 287.

⁶ Gubelt M, *Grundgesetz Kommentar*, at 477.

⁷ Jarass HD, in HD Jarass and B Pieroth (eds), *Kommentar zum Grundgesetz*, 11th ed (München: Beck, 2011), at Article 3.

2. Customary Principle of Equal Treatment

In addition to the constitutional equality norms, there is a customary principle of equal treatment in employment.⁸ This rule simply lays down that employers may not treat one or some employees of theirs worse than others, thus being an immensely vague concept that needs further clarification to be an effective tool. Little is clear in relation to justification, except that objective reasons are required.⁹ Not only is there a lack of detail, but there is also a debate on the origin and the understanding of the principle, which increases disconcertment. For example, some think it has developed from the constitutional rule of equality,¹⁰ others say it is based on the imbalance of power between employer and employee,¹¹ or a matter of justice.¹² In court it is, however, unquestioned that this equality principle constitutes a basis for employees' claims and that the employer has to apply the principle to all his/her collectively applicable conduct.¹³ In contrast, within the individual sphere outside the regulated employment framework the principle of contractual freedom prevails, so that negotiations can take into account personal circumstances of a particular employee.¹⁴ German employees have so far hardly filed lawsuits grounded on a violation of this principle, most of the rare occasions being job applicants allegedly rejected because of their sex.¹⁵

Finally, constitutional rights are foremost available for claims against emanations of the state, which is a constant interpretation¹⁶ that used to be occasionally debated by the *Bundesarbeitsgericht*.¹⁷ Nevertheless, although scholars and courts agree that constitutional rights are not directly applicable to the law dealing with private persons, there is a well established concept of indirect effect,¹⁸ due to the fact that constitutional rights not only protect individuals, but also reflect objective values that cannot be disregarded when creating and enforcing private law.¹⁹ For instance, the interpretation of private law in court needs to be performed with due regard to the spirit of the *Grundgesetz*.²⁰ How exactly this indirect effect is to take place in the courts, is one of the most controversial issues in German

⁸ Hromodka W and Maschmann F, *Arbeitsrecht*, at 258-259.

⁹ Hewson C, in Du Feu, Edmunds, Gillow and Hopkins, *EU & International Employment Law: Germany* (Bristol: Jordans, 2005), Chapter 6.1, at 60D.

¹⁰ Ibid and *Bundesarbeitsgericht*, NZA 1993, 215, at 216.

¹¹ Hromodka W and Maschmann F, *Arbeitsrecht*, at 259.

¹² Lieb M, *Arbeitsrecht*, 8th ed (Heidelberg: CF Müller, 2003), at 34.

¹³ *Bundesarbeitsgericht*, NZA 1993, 215, at 217.

¹⁴ Lieb M, *Arbeitsrecht*, at 35.

¹⁵ Hewson C, *Germany*, at 60F.

¹⁶ Pieroth B and Schlink B, *Grundrechte Staatsrecht I*, 19th ed (Heidelberg: CF Müller Verlag, 2003), at 119.

¹⁷ BAGE 1, 185 (193) and 7, 256 (260).

¹⁸ The so-called *mittelbare Drittwirkung*; Hromodka W and Maschmann F, *Arbeitsrecht Band I - Individualarbeitsrecht* (Heidelberg: Springer, 2005), at 128, and Pieroth B and Schlink B, *Grundrechte Staatsrecht I*, at 120.

¹⁹ BVerfGE 6, 32 (40).

²⁰ BVerfGE 7, 198 (205f.).

constitutional law. In relation to religious discrimination, it is not hard to imagine that it could form a basis for argumentation brought forward in unequal treatment cases.

3. The Betriebsverfassungsgesetz

Another potential pathway for employees to argue in favour of practicing their religious freedom is the *Betriebsverfassungsgesetz* (Company Constitution Act) of 1972.²¹ This act provides that employer and works council have to guarantee that all employees are treated according to the principles of law and fairness, in particular that there is no unequal treatment due to *inter alia* employees' religion. Going even further, employer and works council have to protect and promote the free development of personality of the employees in the workplace.²²

Whereas this could be a sign that there is will to embrace a culture of non-discrimination through the involvement of the works councils, this should not cover the fact that enforcement is limited. In theory, every employee has the right to complain to the competent authority in the workplace if he/she feels disadvantaged or treated unfairly or otherwise restricted by the employer or by employees. Support and mediation facilities are available from the works council²³ and no disadvantage may arise for the employee filing a complaint.²⁴ Section 84(2) *Betriebsverfassungsgesetz* stipulates that the employer has to comment on the complaint in writing, but remedial action only needs to be taken if he/she deems the complaint to be justified. Leaving it for the employer to decide, rather than to a more impartial or democratic body such as the works council, may significantly lower the chance of successful complaints.

4. The Allgemeines Gleichbehandlungsgesetz

The AGG transposing the EFD in Germany merely took effect in August 2006. Surpassing considerably the implementation deadline, the Commission had successfully initiated an infringement procedure before the CJEU, resulting in a decision *aux dépens* due to a confirmation of non-transposition.²⁵ Reason for the late transposition was the unexpected end of a legislative period, but the drafts had also lacked consensus regarding the format and content of the implementation and were held up by vehement opposition of industry.²⁶

²¹ *Betriebsverfassungsgesetz* (BetrVG), BGBl. I 1972, 13 (last amended 18 May 2004).

²² Section 75(2) BetrVG.

²³ Section 84(1) BetrVG.

²⁴ Section 84(3) BetrVG.

²⁵ OJ-C 82, 15 (2 April 2005) and C-45/05 (23 February 2005), OJ-C 131/23 (2006).

²⁶ Fehr S, "The Implementation of the Employment Framework Directive in Germany", in FN Nereo and KJ Taylor (eds), *Manchester Jean Monnet Centre of Excellence Yearbook 2006*, available at <http://www.scribd.com/doc/12388644/2/Stephie-Fehr-University-of-Manchester> (accessed 15 March 2014), at 15.

The initial draft had been generous in various ways, for instance, in relation to levelling the protection across discrimination grounds that would have meant major improvement for the protection against religious discrimination.²⁷ Objections were raised in particular based on fears that businesses would be deterred from establishing themselves in Germany²⁸ and that the act would enable an abusive ‘compensation poker’.²⁹ This criticism is arguably over-cautious, as it misunderstands the rules on compensation already in place that prevent excessive claims³⁰ and underrates the intrinsic value of any human rights protection which can always justify financial losses of some sort. Under the then new Christian-Democrat government, a more modest statute was finally agreed upon, after several further months of discussions. The protection of employees from religious discrimination is now governed by the AGG,³¹ in addition to the above provisions that were in place before its enactment.

On 29 June 2006 the AGG was approved and entered into force on 18 August of the same year. For reasons of clarity and simplicity the German government opted for a single act to unite and give effect to all pending equality directives.³² The new act is divided into seven parts, all of which - except for Part 3 on discrimination in private law relations - originate *inter alia* from rules of the EFD. The subsequent overview of its provisions will reveal some aspects in which the act exceeds, but also several in which it may fall short of the EFD’s demands.

Part 1 contains general provisions detailing the scope of application and the terminology used in the AGG. Explaining the overall aims, Section 1 informs that the purpose of the act is to remove or prevent discrimination on grounds of race or ethnic origin, sex, religion or ‘worldview’, disability, age or sexual identity. Instead of the notion of belief as is found in the EFD, the act applies the expression ‘worldview’. In effect this can be regarded as the same since the undisputed definition of worldview is held to be teachings without a link to religious denomination seeking to understand universal values and to establish and evaluate the

²⁷ Ibid, at 16 and 17; ADG-E, Bundestags-Drucksache 15/4538.

²⁸ Steinau-Steinrück R von, Schneider V and Wagner T, “Der Entwurf eines Antidiskriminierungsgesetzes: Ein Beitrag zur Antidiskriminierung?”, (2005) 22 Neue Zeitschrift für Arbeitsrecht 28, at 32.

²⁹ Bauer J-H, Thüsing G and Schunder A, “Entwurf eines Gesetzes zur Umsetzung europäischer Antidiskriminierungsrichtlinien”, (2005) 22 Neue Zeitschrift für Arbeitsrecht 32, at 36.

³⁰ Fehr S, “The Implementation of the Employment Framework Directive in Germany”, at 17.

³¹ BGBl I 2006, 1897 (14 August 2006), hereafter ‘the Act’.

³² In addition to the Framework Directive, this Act also transposes Directives 2000/43/EC, 2002/73/EC and 2004/113/EC.

position of the human being in the universe.³³ A wide scope is anticipated for the term religion, in line with the current jurisprudence of the *Bundesarbeitsgericht*.³⁴

Section 2(4) excludes dismissals from the scope of the AGG, stating that the already existent rules on dismissals will continue to apply without amendments. This contradicts Section 2(1)(2), which deems conditions of ‘ending employment’ to fall under the protection offered by the AGG. The decision to exclude dismissals was taken shortly before formal enactment and is believed to be a result of fears expressed by business representatives that the act would otherwise impact negatively on the economy. These worries, nevertheless, cannot be confirmed by the experience in other Member States which had at the time transposed the EFD already.³⁵ As a solution, Steinkühler proposes that Section 2(4) AGG be interpreted in line with EU law as to include dismissals through this route.³⁶ This is possible, since dismissal based on discriminatory considerations is void by virtue of Sections 134 (legal acts contrary to law are void) and 242 (good faith) of the German Civil Code.

Corresponding to Article 2(2)-(4) of the EFD, Section 3 AGG clarifies the terms of direct and indirect discrimination, harassment and instructing to discriminate as being different types of discrimination. The AGG uses the word ‘disadvantage’ rather than discrimination. This was again a conscious choice of the legislator, due to the fact that discrimination in its common use implies illegal, socially condemned, disadvantaging treatment, which would in itself exclude the possibility of justification.³⁷ It is pointed out that, whereas this reasoning is suitable for direct discrimination, it fails in cases of indirect discrimination, the legal definition of which leaves the possibility of justifiable conduct.³⁸ As a consequence, ‘discrimination’ and ‘disadvantage’ are necessarily to be seen as the same, as the meaning is identical.³⁹

Direct and indirect discrimination thereby received the first ever statutory mention in Germany and are defined more broadly than in previous case law, in that direct discrimination can now be based on a comparison with a hypothetical comparator and that statistical evidence is no longer required to prove indirect discrimination.⁴⁰ Whereas the

³³ Nollert-Borasio C and Perreng M, *Allgemeines Gleichbehandlungsgesetz (AGG) Basiskommentar zu den Arbeitsrechtlichen Regelungen* (Frankfurt am Main: Bund-Verlag, 2006), at 50.

³⁴ Steinkühler B, *Allgemeines Gleichbehandlungsgesetz* (Berlin: Erich Schmidt Verlag, 2007), at 24.

³⁵ Nollert-Borasio C and Perreng M, *Allgemeines Gleichbehandlungsgesetz*, at 6.

³⁶ Steinkühler B, *Allgemeines Gleichbehandlungsgesetz*, at 88.

³⁷ Bundestags-Drucksache 16/1780, at 30.

³⁸ Nollert-Borasio C and Perreng M, *Allgemeines Gleichbehandlungsgesetz*, at 76.

³⁹ *Ibid.*, at 77.

⁴⁰ *Ibid.*, at 78 and 81.

wording of Section 3(5) dealing with instruction to discriminate is clear, the explanatory notes are confusing. These state that, in order to be subsumed under this provision, the instruction needs to be intentional.⁴¹ The effect of this comment is questionable, since it is possible that indirect discrimination occurs as a side effect of an instruction and because neither the required intention nor the need to prove it can be concluded from the statutory text.⁴² On a more positive note, the mere potential of discrimination as a result of the instruction is sufficient, so that pre-emptive action is possible.

Section 4 rules that in cases of multiple discrimination justification needs to be found for each ground in order to defend the conduct. Furthermore, Section 5 makes way for positive measures preventing or balancing out existing disadvantages, thus being the counterpart of Article 7 of the EFD, under the prerequisite of being suitable and proportionate in consideration of all parties' positions.⁴³ In this the AGG reaches further than Article 3 *Grundgesetz*, which only caters for positive measures with regard to rectifying inequalities based on sex and disability. As is stated in the explanatory notes, the intention of parliament in this regard is not only to even out existing disadvantages, but also to prevent future inequality.⁴⁴

Concerning Part 2 on 'occupation',⁴⁵ the legislator intended to effectively handle disadvantages in this area of life and expects individual efforts to create a discrimination-free environment, which it categorises as a matter of economic sense.⁴⁶ The central tenets of Part 2 are specific compensation rules attempting to link EU Directives to the German law of tort.⁴⁷ First of all, Section 6 lines out the Part's personal scope, namely who is in occupation and who is an employer. 'Occupation' is used as a wide generic term to prevent problems related to the fact that the notion of employee has differing meanings under German statutes.⁴⁸ Listed are employees, trainees,⁴⁹ and those similar to employees, including home workers, job applicants, agency workers and those whose employment contract has ceased. Employers are all those who occupy the previous. Concerning access

⁴¹ Bundestags-Drucksache 16/1780, at 33.

⁴² Nollert-Borasio C and Perreng M, *Allgemeines Gleichbehandlungsgesetz*, at 90.

⁴³ *Ibid.*, at 94.

⁴⁴ Bundestags-Drucksache 16/1780, at 34.

⁴⁵ The German term 'occupation' includes the notion of 'employment'.

⁴⁶ Bundestags-Drucksache 16/1780, at 25.

⁴⁷ Nollert-Borasio C and Perreng M, *Allgemeines Gleichbehandlungsgesetz*, at 43.

⁴⁸ *Ibid.*, at 96.

⁴⁹ Trainees are defined by Section 1(1) BBiG and include internees and certain volunteers.

to employment and promotion, Section 6(3) includes self-employed and executive board members within the act's scope.

Section 7(1) contains a prohibition of discrimination regardless of whether it is based on real or presumed existence of determining characteristics. The duty extends to anyone who may discriminate in a working context (the employer, other employees and third parties such as business partners or customers) and is valid irrespective of the employer's intention.

Literally corresponding to Article 4 of the EFD, Section 8 of the act offers the possibility of justifying discrimination due to an occupational requirement. More specifically, Section 8(2) excludes discrimination in the form of lower pay based on laws offering protection to particular groups because of the grounds listed in Section 1.

Section 9 makes discrimination based on religion or 'worldview' justifiable under the condition that this is a justified occupational requirement related to adherence to the religious community's self-conception or due to a specific activity involved. The rule also establishes that the general prohibition of discrimination does not impair the right of religious or worldview communities to demand loyal and honest conduct of their employees.

Specifying that no advertisements for posts may be published that are contrary to the prohibition of discrimination in Section 7(1), Section 11 restricts the employer in this aspect. A corresponding rule⁵⁰ already existed in relation to sex discrimination and was found useful to establish a presumption of discrimination in court.⁵¹

Section 12 of the act is a novel introduction to the German law, as it explicitly lists the duties of the employer in relation to dealing with and preventing discrimination. For the purpose of the former, employers now need to undertake necessary and suitable measures, and for the latter, training needs to be provided to all employees and the AGG needs to be publicised in all workplaces.

Another first time occurrence is Section 13, which gives employees the right to complain about discriminatory conduct and an entitlement to have their case investigated. Further strengthening the employee's position, Section 14 grants a right to refuse work whilst being

⁵⁰ Section 611b BGB.

⁵¹ Nollert-Borasio C and Perreng M, *Allgemeines Gleichbehandlungsgesetz*, at 133.

fully paid, if the employer does not take measures to end harassment and this is necessary for their protection.

Section 15 demands fault-based responsibility of the employer resulting in the payment of damages if monetary loss occurred due to discrimination. For non-pecuniary damage there is no requirement of fault. This is, however, limited to the amount of three months wages, in addition to being limited by 'appropriateness'. The time limit for making claims is two months⁵² and there is no right to be employed or to enter a position, even if it is still available and the discrimination claim was successful. Apparently, this is a short period to decide whether to pursue a claim and damages seem to be modest.⁵³ It is, however, the first time that under German law damages and compensation can be claimed simultaneously.⁵⁴ Both the amount of maximum damages and the period for making a claim are worrying, since in many cases neither will be a deterrent factor.

Section 16 is the counterpart to Article 11 EFD and does not allow for disadvantages for claiming rights under the AGG. It is irrelevant whether claims are true. The mere feeling of being discriminated against is sufficient and there is no right to have the complaint recalled unless it is consciously untrue or was made with gross negligence.⁵⁵ Section 17 contains encouragement for collective agreement parties, employers, employees and their representatives to adhere to the act. Where applicable, works councils or trade unions can sue on behalf of the employee.⁵⁶ Section 18 applies to memberships to professional bodies and can be enforced if discrimination was the reason for denial of entry.

Another provision the compatibility of which is questionable is Section 22 AGG. Unlike the draft act proposed by the former government and Article 10 of the EFD, the burden of proof is not reversed after the claimant provides plausible facts. Under Section 22 a reversal of the burden requires 'indication' of facts leading to the presumption of discrimination. 'Indication' is positioned between 'proof' and 'claiming facts', defined by the *Bundesarbeitsgericht* as 'according to general life experience there being predominant likelihood that discrimination occurred'.⁵⁷ Usefully, Section 23 facilitates the option of support

⁵² Section 21(5).

⁵³ This provision was amongst those that were amended shortly before enactment in order to prevent the Act from being blocked by the *Bundesrat*, which demanded changes favourable to the employers, see *Bundesrats-Drucksache* 329/06, Beschluss.

⁵⁴ Nollert-Borasio C and Perreng M, *Allgemeines Gleichbehandlungsgesetz*, at 151.

⁵⁵ *Ibid*, at 160.

⁵⁶ Section 17(2).

⁵⁷ BAG 05/02/04 – 8 AZR 112/03 – NZA 04, 540.

from anti-discrimination organisations with more than 75 members, which can take the case to court or act as representatives where no legal representation is required.

Importantly, public servants⁵⁸ enjoy at most a similar level of protection to private sector employees, due to Germany's tradition of distinctive differences between the two sectors in view of duties and privileges. The application of the AGG is restricted by authority of Section 24, according to which the act only applies to public servants under the condition that their special legal position is taken into account. The underlying reason offered is that public service employees will not be granted a right to refuse working insofar as this would impact on the fulfilment of their duties. This is based on the view that common welfare necessitates the appropriate and continuous fulfilment of public services.⁵⁹ Regardless of whether this necessity constitutes a realistic problem, Nollert-Borasio and Perrong rightly suggest that Section 24 may only be used in extreme exceptions and these are not applicable in case of employees in the alternative civilian service.⁶⁰ This should definitely be that case, as the state as an employer must set an example of work environments free from unlawful discrimination.

The federal anti-discrimination authority *Antidiskriminierungsstelle des Bundes* (ADS) was established under the framework of Part 6 AGG. It is noteworthy that for the purpose of the authority the term 'anti-discrimination' was considered suitable, rather than the notion of 'disadvantage' found throughout the act,⁶¹ possibly to indicate an action-oriented role. Until mid-2011, however, the only online information available on this authority was a postal address, it had not yet established its own web page.⁶² In the meantime the ADS has assumed comprehensive functionality.⁶³ This authority was established under the umbrella of the Federal Ministry for Family, Seniors, Women and Youth, and is responsible for conducting general research and raising public awareness in the field of discrimination, as well as for supporting single cases through information, referrals and mediation.⁶⁴

The ADS is headed by a person nominated by the government, who will ordinarily be replaced after parliamentary elections. In accordance with Sections 28 to 30, cooperation

⁵⁸ Including civil servants (*Beamten*, in Germany a majority of those working for public authorities), judges and, until this was abolished, those in alternative civilian service.

⁵⁹ Bundestags-Drucksache 16/1780, at 49.

⁶⁰ Nollert-Borasio C and Perrong M, *Allgemeines Gleichbehandlungsgesetz*, at 187.

⁶¹ Bundestags-Drucksache 16/1780, at 30.

⁶² <http://www.bmfsfj.de/Kategorien/Ministerium/antidiskriminierungsstelle.html> (16 June 2011, no longer available).

⁶³ http://www.antidiskriminierungsstelle.de/DE/Home/home_node.html (accessed 15 March 2014); publications of the ADS predate its online debut by approximately two years, therefore, it can be assumed that the authority has operated at least since 2009.

⁶⁴ Section 27.

with other authorities, and NGOs at local, national and European level will be promoted with the support and guidance of a council of up to 16 volunteer experts and representatives of society nominated by the Ministry. The provisions of Part 6 thus generally exceed the specifications of the EFD. Implementation of the aforementioned tasks is now present; for instance, mediation on behalf of employees has taken place, and research and pilot projects on innovative measures to prevent discrimination are being undertaken and reported in detail.

5. Staatsverträge

The *Länder* of Hessen, Hamburg and Bremen have concluded *Staatsverträge* (contracts) with representative organisations of the Muslim community in relation to leave for religious purposes. As a result, Muslim employees in these three *Länder* have an enforceable right to three days of unpaid leave annually, in addition to the legally prescribed bank holidays.⁶⁵ In itself, this is a good move with regard to cooperation and accommodation. More effective, however, would be granting this right to adherents of all religions (better even, to everyone) and through a nationally applicable contract, judgment or statute. Although the current approach appears unnecessarily complicated and exclusionary and hence not neutral concerning other religious communities, it is likely that in practice all employees will be able to claim additional days of leave, at least for religious reasons, and thus will equally benefit.

IV. Case Law

1. The Notion of Religion

The *Bundesverfassungsgericht* interprets freedom of religion broadly, far beyond the traditional understanding of what is included in religious cult and custom. Thus the relevant scope not only includes action such as wearing symbols, processions and call for prayer, but also religious education, irreligious and atheist acts, as well as other expressions of religious and philosophical life.⁶⁶ A later judgment rendered this more precise by ruling that Article 4 *Grundgesetz* allows the individual to align his/her conduct with the teachings of one's personal understanding of the belief.⁶⁷

Whereas there is a clear tendency of the *Bundesverfassungsgericht* to interpret the right of freedom of religion generously, it needs to be emphasised that there are indications that constitutional rights of employees in the public sector can be restricted as a counterbalance

⁶⁵ See also <http://www.dw.de/anerkennung-des-islam-geht-voran/a-16545686> (accessed 15 March 2014).

⁶⁶ BVerfGE 24, 236 (246).

⁶⁷ BVerfGE 32, 98 (106).

to the privileges they enjoy.⁶⁸ As a consequence, the previous remarks on the provision's ambit need to be handled with caution regarding cases of public employment. Generally speaking, the rights embodied in Article 4 are granted without restrictions, meaning they are absolute, which reflects their significance.⁶⁹ In a judgment concerning freedom of religion, the *Bundesverfassungsgericht* held that all fundamental rights free from express limitations may only be restricted if they clash with other constitutional rights or principles.⁷⁰ The path to determine which right prevails in collision cases is to consider this within the application of a proportionality principle, which examines legitimate aims, suitability, necessity and appropriateness, a test which has to be carried out in all cases where state action limits the practice of a constitutional right.

The *Bundesarbeitsgericht* opts for a non-formalistic approach to defining religion and belief. It acknowledges that due to the superhuman, transcendental questions involved, all religious and denominational commitment should be included, beyond the association with a particular faith.⁷¹ Although Steinkühler considers this a wide notion of religion, he reckons that, for the purpose of discrimination law, adherents to the Christian, Muslim and Jewish faith will be included at any rate.⁷² This seems almost contradictory, considering that there are other well-established religions besides merely these three, for instance, Hinduism, and the many belief systems under the umbrella of Buddhism. Supposedly, 'sects'⁷³ are not viewed as religions, since Scientology has been consistently held to be purely a commercial undertaking.⁷⁴ Thus, the current definition of what constitutes religion under German law is insufficient to adequately answer the needs of a diverse society, in which religion may have a content significantly different from what is envisaged by the judges. Whereas safeguards may be justified against organisations that systematically exploit their members under the cover of being a religion, any legal consequences in this context should remain within the remit of the subject of criminal law and not of fundamental rights.

⁶⁸ This is a debated point throughout the courts and was argued in the *Ludin* case, BVerfGE 108, 282, see Chapter 3.

⁶⁹ Pieroth B and Schlink B, *Grundrechte Staatsrecht I*, at 123.

⁷⁰ *Ibid.*

⁷¹ BAG, (1996) *Neue Juristische Wochenschrift* 143, at 146.

⁷² Steinkühler B, *Allgemeines Gleichbehandlungsgesetz* (Berlin: Erich Schmidt Verlag, 2007), at 24.

⁷³ In German, *Sekte* does not mean a sub-division of one faith group (although this used to be the original meaning in German, too), but is a term with a negative connotation, similar to 'cult' and often associated with groups that proselytise to the end of economic advantage.

⁷⁴ BAG, (1995) *Neue Zeitschrift für Arbeitsrecht* 823; for the questionable status of Scientology as a 'cult', see Edge P, *Legal Responses to Religious Difference* (The Hague: Kluwer Law International, 2002), at 393-394.

2. Discrimination based on Religious Appearance

a) Religious Appearance in the Private Sector

Cases under this category decided since the inception of the EFD have followed a fairly clear path. The facts of what constitutes the leading case⁷⁵ as regards religious dress in private sector employment were as follows: After returning from maternity leave, a Muslim shop assistant decided to wear an Islamic headscarf and explained to her employer that this was for religious reasons. The employer disagreed with this choice and, since the Muslim woman refused to take it off, dismissed her on personal and behavioural grounds. Having taken her employer to court,⁷⁶ she finally succeeded in the third and last instance. The *Bundesarbeitsgericht* held that the dismissal was unfair, since she could, with a headscarf on, fulfil her contractual duties and it did not affect her ability and suitability for the post, thus rejecting the arguments accepted by the lower courts that the assistant's headscarf would lead to unacceptable disturbances and the economical decline of the business. The judges explained that, although there is a right of the employer to direct his or her employees, this needed to take into account the freedom of religion of the employee as protected by the *Grundgesetz*. They also argued that opposing rights needed to be balanced out. In the case in question, this balancing act would be to the detriment of the employer since the mere fear of a negative impact on the department store did not justify a dismissal as an appropriate measure. Adding that the employer could have tested whether the fear materialised or alternatively offered the employee another position without customer contact, the judges made clear that these options were clearly to be expected of an employer.

This ruling was generally criticised for unduly restricting the contractual freedom of employers.⁷⁷ It is accepted, however, that contractual freedom in relation to employment contracts is naturally limited in Germany due to constitutional constraints and the numerous rules from collective agreements impacting on this freedom.⁷⁸ *Thüsing* argues that it would have been unacceptable for the employer to test whether the assistant's headscarf would cause damage to the undertaking, since the impression gained by the public cannot easily be mended once established.⁷⁹ He also claims that the decision shows how the protection against dismissal impairs the flexibility of the employment relationship and can constitute a major reason for abstaining from employing persons in the first place.⁸⁰ It is also proposed,

⁷⁵ BAG, Az 2 AZR 472/01 (10 October 2002).

⁷⁶ Previous instance: LAG Hessen, Az 3 Sa1448/00 (21 June 2001).

⁷⁷ Thüsing G, "Vom Kopftuch als Angriff auf die Vertragsfreiheit", (2003) *Neue Juristische Wochenschrift* 405 at 405.

⁷⁸ Lieb M, *Arbeitsrecht*, 8th ed (Heidelberg: CF Müller 2003), at 37.

⁷⁹ Thüsing G, "Vom Kopftuch als Angriff auf die Vertragsfreiheit", at 406.

⁸⁰ *Ibid.*

that instead of relying on economical detriment as a vague measure, a preferable criterion would be to test if the undertaking is endangered in its existence.⁸¹

Opposing those who claim that it is not the employer's intolerance, but the potential intolerance of the customers that lead to the dismissal,⁸² it was rightfully asserted that this cannot justify exceptions from the principle of non-discrimination.⁸³ Otherwise, any individual can undermine the goals of non-discrimination law, in particular the diminishment of prejudice. This judgment indeed shows that the outcome of such cases is not entirely predictable. Clearly, the *Bundesarbeitsgericht* considered all the circumstances of the case in their evaluation of what was an appropriate reaction of the employer. It is not clear from the judgment how cases will be dealt with if the customer preferences turned out to be as expected by this department store.

It is worth mentioning that this particular employer took the case to the *Bundesverfassungsgericht*, claiming that not allowing her dismissal the employee was a violation of Articles 2 and 12 *Grundgesetz*, the rights to personal and professional freedom.⁸⁴ The claim was declared inadmissible due to the conclusion that the *Bundesarbeitsgericht* had correctly assessed the case by interpreting employment law in the light of the relevant constitutional freedoms. Whereas the professional freedom of both parties was impaired, it was noted, the shop assistant additionally had her freedom of religion infringed, which clearly supported the correctness of the decision.⁸⁵ Both courts thus support the view that, when balancing interests, concrete, actual detriment surpasses abstract, potential business interests.

An employment court ruling decided after the AGG came into place reflects the political nature of religious discrimination cases and provides important insights. The judges found in favour of an applicant who was refused a position as dentist's assistant solely for wearing a headscarf.⁸⁶ Declaring a headscarf a religious manifestation, the court detailed that this was a direct exercise of religion, inseparable from religious belief and, accordingly, not a matter of choice.⁸⁷ The court also considered some practical issues and ruled out any

⁸¹ Thüsing G and Wege D, "Das Kopftuch der Muslima vor deutschen und vor britischen Gerichten: Rechtsinstitute zur Sicherung der Religionsfreiheit des Arbeitnehmers im Vergleich", (2004) *Zeitschrift für Europäisches Privatrecht* 399, at 407.

⁸² Müller-Glöße R, in *Münchener Kommentar*, 3rd ed (München: CH Beck, 2001), § 611a at 28.

⁸³ Thüsing G, "Vom Kopftuch als Angriff auf die Vertragsfreiheit", at 406.

⁸⁴ BVerfG, (2003) *Neue Juristische Wochenschrift* 2815.

⁸⁵ Pressemitteilung Bundesverfassungsgericht, 30 July 2003, "Zum Kopftuch einer muslimischen Verkäuferin in einem Kaufhaus".

⁸⁶ AG Berlin, 28 March 2012, Az 55 Ca 2426/12.

⁸⁷ *Ibid*, at 33 and 34.

problems for hygiene.⁸⁸ Whereas the judges saw contractual freedom violated, it held that the AGG as a legal basis justified this violation, since its aim is to reform society to the end of contractual parties not being guided by xenophobic considerations.⁸⁹ This judgment represents an unapologetic standing, promoting non-discrimination law at its core, beyond the wording of the statute.

Prior to these rulings (and therefore prior to the inception of the EFD) an employment court had already held that a dismissal of a supermarket worker who wore a headscarf was not justified.⁹⁰ This outcome was based on the findings that there was no objective reason to dismiss the person, that intolerance, fear and a lack of understanding on behalf of the customers was no reason for dismissal, and that the employer has a duty to respect the employee's freedom of religion. Another case related to religious dress was also decided in favour of the claimant who refused to wear a paper hat instead of his turban whilst working in a fast food restaurant.⁹¹ Case law related to religious appearance in the private sector hence shows that church-state relations or neutrality are not invoked as a matter of justification, and that these are decided on a balance of interests of employees and employers, with due respect paid to individual freedom of religion.

b) Religious Appearance in the Public Sector

From the year 2000 onwards a legal and public discourse labelled 'headscarf debate' (*Kopftuchstreit*) has taken place. This term stands for a number of cases in which schoolteachers brought claims to establish the legitimacy of wearing a headscarf whilst working. Due to the late implementation of the EFD, none of the relevant cases took the AGG into consideration. The subsequent addition of the AGG is likely to nourish discussions and court activity. Several of the contentious points raised in the German 'headscarf debate' have been discussed under the *Dahlab* ruling in Chapter 2 and are, therefore, not fully explored here again. Particular attention will instead be paid to the references made to the arguments relating to German church-state system.

At the outset, two cases were filed almost simultaneously by teachers who wished to wear headscarves to work, in two different *Länder* (federal states), with different outcomes. In one of these, a court in Lower-Saxony ruled in favour of a Muslim convert teacher, Ms Alzayed.⁹²

⁸⁸ Ibid, at 38.

⁸⁹ Ibid, at 42.

⁹⁰ AG Frankfurt, 24 June 1992, Az 17 Ca 63/92.

⁹¹ AG Hamburg, 03 January 1996, Az 19 Ca 141/95.

⁹² VG Lüneburg, 16 February 2000, (2001) Neue Juristische Wochenschrift 767; however, this judgment was later overturned by OVG Lüneburg, 2 LB 2171/01 (13 February 2002).

Though the judges reached the conclusion that there is no general right of teachers to wear religious symbols, they found no reason specific to the case justifying a restriction to the teacher's right to freedom of religion.⁹³ The ruling pragmatically stated that a headscarf cannot be seen in isolation, but only as part of the full picture of a person, including their personality.⁹⁴ Bizarrely, this included the finding and praising that Ms Alzayed wore headscarves of different colours in combination with fashionable clothing. Although this may have achieved a favourable conclusion in this case, such an assessment would inevitably beg the question as to whether and to which degree the judiciary may decide on what is normal or fashionable in relation to clothing. Contemplating the considerations made in this case by the judges on the claimant's dress sense, it is questionable whether they would have come to the same conclusion had it been, for example, a Sikh teacher wearing a turban – a religious symbol largely unknown in Germany and thus likely to be classed as uncommon and unfashionable.

Furthermore, the judgment clarified that the premise of neutrality does not exclude teachers from having opinions on moral questions, but demands showing mutual acceptance and tolerance in line with the *Grundgesetz*.⁹⁵ This line of reasoning was underscored by educational goals⁹⁶ established in the Lower-Saxony School Act, such as support for the thought of international cooperation and living together with individuals from different national or cultural backgrounds.⁹⁷ Böckenförde agrees with this finding. Since state neutrality is not expressly mentioned in the *Grundgesetz*, he emphasises that neutrality is merely a theme identified on the basis of other constitutional principles.⁹⁸ This may indicate that courts ought to avoid an over-reliance on neutrality as a basis for arguing against the acceptance of teachers and other public sector employees wearing headscarves.

In contrast to *Alzayed*, the more prominent case of *Ludin* was rejected by the regional administrative court. Ms Ludin, who is German of Afghan origin, had qualified as a teacher and subsequently applied for a position at a school in the federal state of Baden-Württemberg. Based on the fact that she wore a headscarf, the school authorities denied her access to the teaching profession. The authorities relied on Article 33(2) *Grundgesetz*, which obliges civil servants to fulfil their duties (in general), which in their opinion was not

⁹³ VG Lüneburg, *ibid.*, at 770, for instance, there was no disruption of 'peace at school' (*Schulfrieden*).

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*, at 768.

⁹⁶ *Aufträge*.

⁹⁷ *Völkerverständigung*.

⁹⁸ Böckenförde E-W, "Kopftuchstreit' auf dem richtigen Weg", (2001) *Neue Juristische Wochenschrift* 724, at 726.

possible if someone wears a headscarf. The court concurred and went beyond this reasoning, ruling that teachers belonging to non-Christian denominations can practice their religion only under limited conditions compared to their Christian counterparts.⁹⁹ Although this remark may have been made in view of protecting Christian nuns from being excluded from teaching in state schools, it is incompatible with Article 3 *Grundgesetz*. Not only would the outcome be directly discriminatory, but it would also be an unquestionable violation of the principle of state neutrality.¹⁰⁰

The case was eventually heard before the *Bundesverwaltungsgericht*,¹⁰¹ which confirmed the decisions of the previous instances. The judges assured that access to public service professions as such is independent from the religious belief of the applicant, this being derived from Articles 3 and 4 *Grundgesetz*.¹⁰² It was also sustained that freedom of religion included the adjustment of one's lifestyle and conduct in a compatible way to one's belief.¹⁰³ Yet, with reference to the limitations of the rights enshrined in Article 4, the judges pointed out a collision with other constitutional rights¹⁰⁴ and the fact that Article 4 does not grant an unlimited right to manifest or express one's religious belief within a public institution.¹⁰⁵

In the *Bundesverwaltungsgericht*'s opinion anything capable of endangering 'religious peace' in society needed to be avoided in order to guarantee peaceful coexistence in a pluralistic society. This was held to be true specifically for state schooling, because of its compulsory character. It was asserted that a multi-faith environment leads to tensions between the positive and negative freedom of denomination, with preference given to religious freedom of children and their parents. Implicitly, these arguments reflect a formal interpretation of neutrality.

Explicitly detailing the effect on neutrality, the judges submitted that a headscarf is a symbolic expression of Muslim faith and that, in the context of state schooling, the headscarf of a teacher results in the pupils continuously and inevitably being confronted with an obvious symbol of a particular belief during the lessons. It went on assuming that primary school children could be influenced by the headscarf. Another fundamental aspect raised was that a headscarf was solely worn by women, which signalled inequality to the children and thus

⁹⁹ VG Stuttgart, (2000) *Neue Zeitschrift für Verwaltungsrecht* 959, at 961.

¹⁰⁰ Triebel M, "Kopftuch und staatliche Neutralität", (2002) *Bayerisches Verwaltungsblätter* 624, at 627. The statement also reveals the judges were unaware of the similarities between the habit and the *hijab*.

¹⁰¹ BVerwGE 116, 359 (4 July 2002).

¹⁰² Based on a *Bundesverfassungsgericht* ruling, BVerfGE 79, 69, at 75.

¹⁰³ BVerfGE 32, 98, at 106; BVerfGE 93, 1, at 15 [text refers to BVerwG ruling].

¹⁰⁴ BVerfGE 52, 223, at 247.

¹⁰⁵ BVerfGE 93, 1, at 16 and 24.

contradicted and undermined the state's efforts to ensure gender equality as enshrined in Article 3 *Grundgesetz*. A minority of the judges even regarded headscarves as a threat to democratic values. Thus, the ruling uncovers a range of ideas held about the motivations behind wearing a headscarf.¹⁰⁶

This judgment received some applause, mainly based on the arguments that a headscarf is not reconcilable with the principles of neutrality and sex equality,¹⁰⁷ but also considerable criticism. Concerning the portrayal of values contrary to sex equality, numerous sound counterarguments were provided that have already been presented under the discussion concerned with *Dahlab*.¹⁰⁸ The German debate raised further points that underscore the flaws of the court's findings in relation to sex equality. Unless the individual's behaviour is examined, religions would automatically be classed as positive or negative towards sex equality and even Muslim teachers without a headscarf would have to be excluded from their profession.¹⁰⁹ Even though Islamic dress differentiates in most interpretations between men and women, Britz relates this to the fact that the principle of equality can neither prevent women from choosing traditional roles, nor has Christian society achieved ideal equality either.¹¹⁰ A headscarf can have several meanings and can therefore not simply be viewed as a symbol for discrimination,¹¹¹ unless such a meaning was authorised from within the Muslim community,¹¹² or, even better, from the woman who wears it. Emancipation is, furthermore, a personal issue that does not correlate with any religion and, hence, cannot be defined in religious terms in a courtroom.¹¹³ These arguments once more show the complexity and the dimensions involved in a debate on religious content, but also that civil judges do not necessarily possess the required degree of information. There is also a strong argument relating to personal autonomy as per Judge Tulkens in *Şahin*: telling a woman how to dress displays the judges' paternalistic tendencies, antithetic to women's agency.¹¹⁴

¹⁰⁶ For a detailed overview of the interpretations accorded to headscarves, see McGoldrick D, *Human Rights and Religion – The Islamic Headscarf Debate in Europe* (Oxford and Portland, Oregon: Hart Publishing, 2005), at 15–22 and, more specifically, as regards the German debate, at 110.

¹⁰⁷ Bertrams M, "Lehrerin mit Kopftuch? Islamismus und Menschenbild des Grundgesetzes", (2003) 113 *Deutsche Verwaltungsblätter* 1225, at 1234; Campenhausen A von, "The German Headscarf Debate", (2004) 29(2) *Brigham Young University Law Review* 665; Ipsen J, "Karlsruhe locuta, causa non finita", (2003) 22 *Neue Zeitschrift für Verwaltungsrecht* 1210 at 1212; Pofalla R, "Kopftuch ja – Kreuzifix nein?", (2004) *Neue Juristische Wochenschrift* 1218, at 1219.

¹⁰⁸ Britz G, "Das verfassungsrechtliche Dilemma doppelter Fremdheit: Islamische Bekleidungsvorschriften für Frauen und Grundgesetz", in C Müller-Magdeburg (ed), *Unsere Aufgaben im 21. Jahrhundert* (Baden-Baden: Nomos 2002), at 101; Debus A, "Machen Kleider wirklich Leute – Warum der 'Kopftuch-Streit' so spannend ist", (2001) 20 *Neue Zeitschrift für Verwaltungsrecht* 1355, at 1359.

¹⁰⁹ VG Lüneburg, (2001) *Neue Juristische Wochenschrift* 767, at 770.

¹¹⁰ Britz G, "Das verfassungsrechtliche Dilemma doppelter Fremdheit: Islamische Bekleidungsvorschriften für Frauen und Grundgesetz", at 99–100.

¹¹¹ Czermak G, "Kopftuch, Neutralität und Ideologie", (2004) *Neue Zeitschrift für Verwaltungsrecht* 943, at 943.

¹¹² Muckel S, "Religionsfreiheit für Muslime in Deutschland", in J Isensee W Rees W Rüfner (eds), *Dem Staate, was des Staates – der Kirche, was der Kirche ist – Festschrift für J Listl zum 70. Geburtstag* (Berlin: Duncker & Humblot, 1999), at 248.

¹¹³ Britz G, "Das verfassungsrechtliche Dilemma doppelter Fremdheit: Islamische Bekleidungsvorschriften für Frauen und Grundgesetz", at 103.

¹¹⁴ Baroness Hale with regard to the *Begum* case, [2006] UKHL 15, at 95; Roseberry L, "The Assimilationist Anti-Discrimination Paradigm and the Immigrant Muslim Woman: Suggestions how to Re-Conceptualise Discrimination Claims", in D Schiek and A Lawson (eds), *European Union Non-Discrimination Law*

As was argued under the discussion of *Dahlab*, a headscarf ban is likely to constitute indirect sex discrimination, which in Germany is prohibited by virtue of Article 3 *Grundgesetz*.

As regards state neutrality, it is reasonable for critics to demand actual evidence that the teacher impaired state neutrality the way it was done in *Alzayed*.¹¹⁵ Since teachers are required to swear an oath of respect for the *Grundgesetz*, with sanctions in place should this ever be disregarded, there ought to be no doubt as such as to the compliance of a teacher wearing the headscarf with the constitutional values.¹¹⁶ Moreover, it can be conveyed that the *Ludin* decision opted for an understanding of neutrality that contradicts former rulings of the *Bundesverfassungsgericht*,¹¹⁷ which had envisaged an 'open' concept with a mere creation of a distance leaving space for pluralistic inclusion of the diversity of opinion in fact prevalent in the school sector.¹¹⁸ Gerstenberg also sees a misconception in the belief that occidental traditions and beliefs are neutral and, unlike headscarves, based in the presumption that "Christian culture...is...a postulate of German political identity and social cohesion".¹¹⁹ Importantly, Ms Ludin's rights ought not be sacrificed for the concept of neutrality, which is not even explicitly found in the *Grundgesetz*.¹²⁰ If specific clothing is required by a religious belief, both are adjoined, this clothing ought to be principally accepted, too, without seeing in it a violation of the neutrality principle to prevent indirect discrimination.¹²¹

Siding with the *Bundesverwaltungsgericht*, von Campenhausen points out that crosses on the walls of classrooms (which are outlawed) are less conspicuous than headscarves, as the former are familiar and just a "cultural symbol and trademark".¹²² Morlok and Krüper add to this aspect by claiming that the headscarf is more than a mere symbol and that it cannot be viewed as normal yet. They express a wish that, in order to reduce conflicts arising from cultural and religious differences, the law should determine how much "foreignness" and "offensiveness" is acceptable, whilst taking into account the continuous changes in

and *Intersectionality* (Farnham: Ashgate, 2011), at 200-204; Spinner-Halev J, "Liberalism and Religion: Against Congruence", (2008) 9(2) *Theoretical Enquiries into Law* 553.

¹¹⁵ Britz G, "Das verfassungsrechtliche Dilemma doppelter Fremdheit: Islamische Bekleidungs Vorschriften für Frauen und Grundgesetz", at 96; Czermak G, "Kopftuch, Neutralität und Ideologie", at 944.

¹¹⁶ *Gesetze gegen Kopftücher*, www.br-online.de/bayern-heute/artikel/0311_kabinett/ (not available any more, last accessed 12 March 2012).

¹¹⁷ BVerfGE 41, 29 and BVerfGE 41, 65.

¹¹⁸ Gerstenberg O, "Germany: Freedom of Conscience in Public Schools", (2005) *International Journal of Constitutional Law* 94, at 98; Britz G, "Das verfassungsrechtliche Dilemma doppelter Fremdheit: Islamische Bekleidungs Vorschriften für Frauen und Grundgesetz", at 96; Czermak G, "Kopftuch, Neutralität und Ideologie", at 945; Debus A, "Machen Kleider wirklich Leute – Warum der 'Kopftuch-Streit' so spannend ist", at 1358.

¹¹⁹ Gerstenberg O, *ibid*, at 92 and 96.

¹²⁰ Morlok M and Krüper J, "Auf dem Weg zum 'forum neutrum'? – Die Kopftuch-Entscheidung des BVerwG", (2003) *Neue Juristische Wochenschrift* 1020, at 1021.

¹²¹ Britz G, "Das verfassungsrechtliche Dilemma doppelter Fremdheit: Islamische Bekleidungs Vorschriften für Frauen und Grundgesetz", at 96; Czermak G, "Kopftuch, Neutralität und Ideologie", at 945.

¹²² Campenhausen A von, "The German Headscarf Debate", at 688.

society.¹²³ Counterarguments to these views have been found to be persuasive in Chapter 2 when examining the *Dahlab* ruling.

What Morlok and Krüper's opinions reveal, however, are their very specific preconceptions held about Islam, clearly positioning this religion in an outsider role, a negative one at that. Similarly, von Campenhausen's statement attempts to play down well-established meanings of the cross, thus indicating that the headscarf cannot also simply be a cultural item. Unsurprisingly, Berthou observes that the German debate on the objection to headscarves contains a hint of assimilationism and reflects "Western hegemonic thinking".¹²⁴ Berthou's reflection is indeed warranted, seeing the stereotyping of minority religion to a degree that resembles racism and pre-empts a religiously neutral standpoint, whether formal or substantive.

Another contentious issue is the influence of the headscarf over pupils' religious freedom. In *Ludin* this was more expressive of the underlying sentiments than in the discussions surrounding *Dahlab*. In rejection of the court's argument that the right to freedom of religion of pupils and their parents might be violated, it is stipulated that, as long as a teacher does not try to actively influence or to make pupils convert, there is no danger evolving from the headscarf to the educational mandate of the parents.¹²⁵ In any case, parents have no right to influence the curriculum and conditions of the school lessons.¹²⁶ The idea that children might imitate the dress code is seen as unrealistic considering the thinking patterns and knowledge of this particular age group.¹²⁷ Furthermore, terms such as 'danger' or 'threat' used by the court are seen as out of context, as they are usually reserved for the criminal law context.¹²⁸ Also, it is suggested that showing a denomination promotes "mutual understanding and respect among heterogeneous and conflicting religious beliefs, her own included, and is vindicated precisely through the pedagogic practice that encourages dialogue".¹²⁹

Having seen her appeal rejected at the *Bundesverwaltungsgericht*, Ms Ludin filed a constitutional complaint at the *Bundesverfassungsgericht* against the judgment.¹³⁰ Her submission included the claim that the school authority had infringed some of her

¹²³ Morlok M and Krüper J, "Auf dem Weg zum 'forum neutrum'? – Die Kopftuch-Entscheidung des BVerwG", at 1021.

¹²⁴ Berthou K, "The Issue of the *Voile* in the Workplace in France: Unveiling Discrimination", at 310.

¹²⁵ Gerstenberg O, "Germany: Freedom of Conscience in Public Schools", at 99.

¹²⁶ Ibid.

¹²⁷ Britz G, "Das verfassungsrechtliche Dilemma doppelter Fremdheit: Islamische Bekleidungs Vorschriften für Frauen und Grundgesetz", at 96.

¹²⁸ Gerstenberg O, "Germany: Freedom of Conscience in Public Schools", at 100.

¹²⁹ Ibid, at 101.

¹³⁰ BVerfGE 108, 282 (24 September 2003).

constitutional rights of freedom of religion, the right to dignity, and the right to equality before the law. The *Bundesverfassungsgericht* ruled that the *Bundesverwaltungsgericht*'s ruling was indeed ill founded, as there was no legal basis to sanction the headscarf ban.

The three dissenting judges, extraordinarily, argued that a headscarf was not to be permitted for teachers since it violated the neutrality of the state. In comparison, the Christian cross was seen as merely an 'everyday item' and 'a general sign of a culture...a culture that has developed tolerance'.¹³¹ Czermak, in reply, rightly complains that no mention was made of the relevant expert opinions, as well as about a lack of legal reasoning, generally reflecting the inability of many lawyers to discuss religious and philosophical matters objectively and free from emotions and personal preferences.¹³²

Since the constitutional complaint was successful, the case was referred back to the *Bundesverwaltungsgericht* for reconsideration. Despite the judgment of the *Bundesverfassungsgericht* it could reconfirm its previous decision due to the fact that, in the meantime, the parliament of Baden-Württemberg had adopted the necessary provision required as a legal basis for limiting the teacher's rights in its School Act.¹³³

This leads to a brief, but significant digression.¹³⁴ Pursuant to the *Ludin* rulings, all *Länder* revised their School Acts, about half of which do not mention display of religion by teachers. Other *Länder* decided to prohibit teachers (or all public servants) from exhibiting their religious affiliation, thus leading to indirect discrimination of those employees whose religion requires specific outward manifestations. Two provisions, however, stand out as scandalous. Section 38(2) of the School Act of Baden-Württemberg bans any religious manifestation in opposition to dignity, equality and the democratic order. The same rule then includes an exception for those manifestations which represent Christian or occidental values. Slightly less explicitly, Section 86(3) of the Hessen School Act also bans expressions disrespecting dignity, equality and democracy, this time under the condition that Christian and humanist-occidental traditions are still 'respected' regardless. Apparently focusing on the protection of nuns' outfits, both parliaments thus issued directly discriminatory provisions to the detriment of non-Christian, non-occidental religions. Such provisions do not only

¹³¹ Ibid, at 333.

¹³² Czermak G, "Kopftuch, Neutralität und Ideologie", at 946.

¹³³ BVerwG 2 C 45.03 (24 June 2004).

¹³⁴ Strictly speaking, the discussion of statutes belongs above under the statutory law section in this chapter, however, thematically, and for a better understanding of their context, it is embedded in the relevant case law.

breach the *Grundgesetz*¹³⁵ and the prohibition of direct discrimination under the AGG, but also no comparable attacks on minority rights have taken place since 1945. Instead of the relevant provisions in the School Acts, the parliaments could have prescribed a religiously neutral appearance to the same effect, but chose to add a geographical dimension, thus adding an element of race discrimination.

A quote of von Campenhausen may in part explain the amendments to the two School Acts, illustrating how severe and deluded the fear of 'otherness' is in some quarters. After claiming that the Muslim population in some parts of Germany amounts to "sixty or ninety percent", he adds:

"Allowing teachers to wear the headscarf will not be the end of it; these special interest groups will only stop once they have effected change in all social institutions: state registrars, judges, and policewomen all who insist on wearing headscarves, and even possibly policemen with turbans. These are the problems that lurk in the background."¹³⁶

An apparent lack of interaction in society and fear of change may have led to this far-fetched analysis, however, the problem is that others who exercise influence over law-making may suffer from the same mental disposition. In two further cases, teachers were banned from wearing Baghwani outfits. Amongst the reasons given was that Baghwani dress had a challenging and religiously influencing character.¹³⁷ Although not explicitly mentioned, an alternative motivation may have been the questionable economical intentions of the sect, which later led to its prohibition. Effectively this means that the judgments and statutes under this section pose particular difficulties to those who wear attire inspired by religions other than Christianity. Regarding the emotive discussions surrounding minority religious appearance at work, it is predictable that express rights to be accommodated will not be scheduled before parliament any time soon. Employees thus have to rely on de facto accommodation, where discrimination does not effectively, already affect religious manifestations.

¹³⁵ Sacksofsky U, "Kopftuchverbote in den Ländern – Am Beispiel des Landes Hessen", in S Berghahn and P Rostock (eds), *Der Stoff, aus dem Konflikte sind* (Bielefeld: transcript, 2009), at 290-291.

¹³⁶ Campenhausen A von, "The German Headscarf Debate", at 689.

¹³⁷ VGH München, (1986) *Neue Zeitschrift für Verwaltungsrecht* 404, at 405 and 406; OVG Hamburg, (1986) *Neue Zeitschrift für Verwaltungsrecht* 406.

3. Discrimination based on Hours of Work, Health, Safety and Security, Work Activities physically or morally incompatible with Religious Beliefs, and Harassment

No such cases were found.

V. Compatibility of German Law with the ECHR

1. The Notion of Religion

The exclusion of 'sects' from any protection from religious discrimination under German law is, apparently, incompatible with the ECHR, because of the ECtHR's inclusion of Scientology, for instance. In such a case, however, German courts may opt for another way to exclude Scientology from legal protection, whenever the manifestation in question involved economic or fraudulent interests primarily. Thus, this finding may have little practical relevance.

2. Appearance

The safeguards available to private sector employees are unproblematic from an employee's perspective and, hence, will almost certainly be at harmony with ECtHR jurisprudence. Also, cases relating to public sector employment are expectably compliant with ECtHR interpretations, the same as was analysed in relation to French law, primarily because of absent consensus on church-state relations and the ECtHR's approach to indirect discrimination of religious minorities. Particularly, in relation to the school working environment, the *Dahlab* decision clearly found no violation in Switzerland, where also no strict neutrality exists, similar to the Germany neutrality concept. Arguments and their contestations were particularly similar in the *Dahlab* and *Ludin* cases and, hence, there would be little point in German teachers filing an application in Strasbourg.

Neutrality of the German state (the way it is interpreted currently by law-makers and judges) appears compatible with the standards set by the ECHR. Legally and politically, it is likely that the ECtHR will consider neutrality as interpreted by German courts, such as in *Ludin*, in compliance with the Convention. Despite *Thlimmenos*, and the potential dawn of substantive equality under Article 14, the ECtHR is still likely to rely on Germany's margin of appreciation, in particular due to the absence of a pan-European consensus on church-state relations and varying understanding of state neutrality. As *Doğru* reflects, formal neutrality is, in addition, especially accepted by the ECtHR regarding religiously motivated dress in public, compulsory environments.

Yet, compatibility with the ECHR is doubtful with regard to the controversial provisions of the Baden-Württemberg and Hessen School Acts, which explicitly permit only occidental religious appearance of teachers. According to the *Hoffmann* and implicitly also *Ivanova* rulings, the ECtHR does not permit discrimination that is solely based on religion. Since there is no explanation as to why such a distinction is made in these statutes, one can presume a case of unjustifiable direct discrimination in violation of the ECHR. Further, in the context of places of worship, the ECtHR decided that law needed to be non-arbitrary and must not be directed against minorities.¹³⁸ Correspondingly, because both School Acts plainly exclude those adhering to minority religion from working as teachers, the ECtHR may also, or additionally, base incompatibility with the ECHR on this fact.

VI. Compatibility of German Law with EU Law

1. The Notion of Religion

The wide definition of religion presumed in Chapter 3 may collide with German courts' exclusion of 'sects' from legal protection. This, however, will depend on whether courts will extend this exclusion to non-discrimination law, or whether courts will follow another route in these cases.

2. Appearance

There is no law governing appearance in private sector employment that raises questions as to compatibility with EU law; in particular, newer judgments seem to seek alignment with the EFD. In the public sector, some rulings concerned with headscarves and Buddhist outfits pose several problems if set against EU law. The question is, in particular, whether church-state relations can be used as an argument to justify indirectly discriminatory rules and interpretations. Similar to what was argued in relation to French law, the argument of state neutrality in Germany will probably not be regarded a "genuine and determining occupational requirement" under Article 4(1) EFD by the CJEU.

The relevant German cases may also prove highly problematic against other EU standards. According to *Ludin*, the two relevant aspects in this regard were the state's duty of religious neutrality and the nature of the teacher's headscarf being irreconcilable with the principle of sex equality. For neutrality, the same can be argued as above for French *laïcité*. The sex equality argument would probably fail to be proportional. The teacher wearing a headscarf does not compromise the sex equality of another person, and thus the rights of others. Thus,

¹³⁸ *Manoussakis v. Greece*, 1996 IV, 23 EHRR 387, where the applicants had waited for more than ten years for authorisation of premises.

the CJEU might not find a legitimate aim for the German headscarf ban. In *Ludin*, no reference was made to proselytism as in *Dahlab*. Perhaps it was considered too far-fetched.

Even if one considers using the portrayal of headscarves as against sex equality, the argument is flawed at several levels. Foremost, a right not to be subjected to depictions contradicting the concept of sex equality does not exist under EU law. Resulting from this, a balancing act between the protected right to practice one's religion and the interest of the client to the public service in question not to see an emanation of sex inequality, rather than experiencing sex discrimination, ought to be decided in favour of the employee. Otherwise, it is conceivable that the CJEU would also have to consider the sex inequality inherent in women's scarce dress in the workplace. Once more, the value of the sex equality argument, as applied to some German civil servants to validate indirect discrimination, is also weakened by the fact that any dress, not necessarily religious dress, is capable of creating a picture of sex inequality. Rather than interfering with women's choices of dress, the CJEU will therefore hopefully focus on the relevance of the religiously motivated dress for carrying out the duties in the employment in question.

Effectively, it appears that only a unisex uniform policy could meet the requirements of those who wish to limit religious emanations to guarantee sex equality. It seems unrealistic that the protection of the rights and freedoms of others could result in such a disproportionate curtailing of the rights of those who are primarily addressed in the EFD. With reference to discrimination of teachers who wish to wear a headscarf, Smith rightly concludes that the CJEU "should embrace the opportunity to apply non-discrimination in accordance with the guidelines for citizenship education – i.e. promotion of tolerance and understanding", the main challenge of which is to overcome reasoning based on the states' church-state frameworks.¹³⁹

The cases analysed in this chapter did not take into account the AGG which transposes the EFD, though. It may be that courts would now examine cases in consideration of the AGG, which is more closely aligned with the EFD.

3. Statutory Law

The Section 2(4) AGG exclusion of dismissals is inapplicable due to the fact that Article 3 of the EFD clearly demands prohibiting discrimination relating to circumstances of employment

¹³⁹ Ibid, at 125.

and occupation inclusive of conditions of dismissal.¹⁴⁰ Although protection in case of redundancy is likely to be dealt with under another, more specific statute, employees in this situation would otherwise still not benefit from the assistance of the anti-discrimination authority, as was intended by the EFD. The short timeframe to file claims and the limited damages available under the AGG may well also fall short of compliance with the EFD.¹⁴¹ In Germany, the compatibility of this section with Article 17 EFD is thus questionable, as this provision requires effective, proportionate and dissuasive sanctions.

It is, furthermore, doubtful whether the restriction of Section 24 AGG to private sector employment, meaning that public sector employees cannot refuse working under any circumstances, would be justified or whether the provision satisfies the default of the EFD to include public sector employees. This exclusion of public sector employment is most likely incompatible with the EFD. To bring public service under the umbrella of the discrimination law as envisaged by the EU, would have effected a contradiction with the statutes enacted in 2004 by eight of the *Länder*, regarding the prohibition of all or oriental religious symbols in schools, or in public sector employment. The banning of oriental religious attire constitutes arbitrary direct discrimination and cannot be justified under EU law, where direct discrimination is in principle not permitted. Consequently, it can reasonably be assumed that Section 38(2) of the Baden-Württemberg School Act and Section 86(3) of the Hessen School Act, in particular, are in breach of the EFD. Despite the EU Commission's request to amend these rules,¹⁴² no such initiatives have taken place at the relevant *Länder* parliaments.

VII. Conclusions

In Germany, employees generally enjoy strong safeguards against religious discrimination, with the constitutional principles extending to the private sector. Since the EFD's implementation the protection of employees from religious discrimination is governed by the AGG, as well as the previously existing constitutional provisions and the customary principle of equal treatment in employment. Though the number of pathways to follow in court seems beneficial to employees, these cannot simply rely on a single, accessible statute and supporting agency. Clarification is also required as to the School Acts of Baden-

¹⁴⁰ Steinkühler B, *Allgemeines Gleichbehandlungsgesetz*, at 68.

¹⁴¹ Hoentzsch S, "Discrimination in Individual-Related Employment – A View from Europe and Germany to Canada, analysing the Requirements and the Background of the European Anti-Discrimination Directives", (2006) 7(10) German Law Journal 795, at 802.

¹⁴² "Kommission schaltet sich im Kopftuch-Streit ein", (2004) Europäische Zeitschrift für Wirtschaftrecht 15. The absence of further activity by the EU Commission in this regard may be grounded on political reasons. It is suspected that the agreement of the MSs to further discrimination law is in the foreground and that this goal could be compromised, if scrutiny was strict on existing domestic law.

Württemberg and Hessen, both of which contain relevant provisions that violate the *Grundgesetz* and the AGG. Neither statutory, nor case law dictate a right to be accommodated due to religious interests, however, the *Staatsverträge* in Hessen, Hamburg and Bremen are an example of explicit accommodation concerned with a specific religious community and hours of work as an aspect of religious practice. There is no mention of church-state relations in statutes dealing with religious discrimination.¹⁴³

In relation to private sector employment, courts have generously offered protection against religious discrimination, characterised by a particularly objective evaluation of the facts of each case. Though the first chapter found that the German church-state arrangements as such do not hinder non-discrimination law, this chapter illustrated how the judiciary interprets state neutrality to the end of being the key element to decide cases where religious manifestations are involved. Numerous concerns were discovered in relation to the treatment of civil servants, in particular the debate on teachers' headscarves which has continued for more than a decade and resulted in profound discussions. Some judgments, commentators, as well as the Hessen and Baden-Württemberg School Acts, display attitudes worryingly resembling those expressed during the Third Reich. It is yet to be seen if the AGG will lead to a different assessment of public sector cases.

With the exception of Section 38(2) of the Baden-Württemberg School Act and Section 86(3) of the Hessen School Act, it is presumed that, currently, German law related to religious discrimination at work is compatible with the ECHR. The reason for this presumption is the abstention of the ECtHR to interfere in cases where states have enacted rules or interpreted these in line with formal neutrality.

Compatibility with EU law is doubtful with regard to several of the German statutory provisions and judgments. Several rules appear to have transposed the EFD incorrectly, with the exclusion of public sector employment, low damages and a short period to file a claim being, as well as obstacles to reversing the burden of proof to the employer are the most worrying of shortcomings. Since direct discrimination is in principle not permitted, it can reasonably be assumed that Section 38(2) of the Baden-Württemberg School Act and Section 86(3) of the Hessen School Act are in breach of the EFD. Arguments based on state neutrality in public sector cases cannot foreseeably be justified under any EU law

¹⁴³ Except in statutes dealing with employment in religious ethos bodies which is outside the scope of this thesis.

provisions or rulings of the CJEU, and the latter may well promote substantive equality in case a preliminary reference were made.

In the absence of relevant statutes, it is down to the German judiciary to interpret neutrality of the state to mean either formal or substantive neutrality. Whereas, welcomingly, neutrality of the state did not infuse into arguments surrounding private sector employment, it has, nevertheless, been used significantly in public sector cases, both in favour and against employees' claims. In Germany, there is clearly an opposition of opinion within the judiciary and *Länder* parliaments, as to whether substantive or formal neutrality ought to prevail. Once more, this chapter identified the advantages of substantive neutrality to the individual and to society, along with insights of severe prejudice against minority religion being at the core of the views of those promoting formal equality for public sector employees.

CHAPTER 7 • Comparing the Law related to Religious Discrimination in Employment in the UK, France and Germany

I. Introduction

This final chapter compares the law dealing with religious discrimination at work in the UK, France and Germany. Having tested the analytical framework and the compatibility of national law against the ECHR and EU law separately in the previous chapters, this thesis now turns to a comparative analysis of the national law and strives to gain additional conclusions as to the question of which jurisdiction and legal solutions within each jurisdiction are favourable towards protecting against religious discrimination. In this quest, the chapter will carefully take into account the use of church-state relations in arguments surrounding religious discrimination at work and the impact on employees in general and minority religions in particular. Read in conjunction, the backgrounds, findings and impact of the relevant national law enable the identification of recommendations as to which solutions are most valuable to combat religious discrimination in employment, particularly also, which aspects serve substantive equality. This chapter will not compare separately which jurisdiction is most likely to comply with the standards set at ECHR and EU law levels, since compatibility has been dealt with in the previous three chapters and will be revisited in a comparative summary in the thesis' conclusions.

II. Court Structures, Statistics and Anti-Discrimination Authorities

All three jurisdictions have dedicated employment courts. In Germany and France, public sector employees make claims to administrative courts and in France, discrimination cases can, additionally, be heard before the criminal courts. The French and German constitutional courts and the UK Supreme Court play an important role in assuring reconciliation and coherence of law across levels and subject areas. None of the systems appear problematic with regard to religious discrimination. In the light of the Employment Framework Directive (EFD) providing equal protection to private and public sector employees, a separation of the two types of employees in French and German courts seems inefficient, though also not severely affecting the protection of employees.

Statistics of court action are most readily available in the UK, with exact numbers and outcomes of cases before the employment tribunals over several years on one website. In stark contrast stands France, where such data is absent, with little to no information online. This phenomenon may be connected with the refusal to collate any discrimination data in

France. Whereas the lack of data is in itself not a hindrance to achieving substantive neutrality, it makes monitoring difficult and reduces any assessment thereof to the limited number of available, reported court cases. Although there is no adverse culture to discrimination statistics in Germany, there is also no single point of reference as to relevant case law. Information about cases' content and outcome is offered on the website of each court, and it looks like the religion ground is not a frequently invoked one. It is, accordingly, useful that reports have dealt with religious discrimination in the EU Member States, so that at least there is an indication as to the extent of the problem. Taken reports and research into consideration, it appears that in all three jurisdictions there is a reluctance to report religious discrimination in court, and also that success rates are fairly low. From the information available, it seems that employees in the UK are much more likely to file religious discrimination claims and are generally aware of their rights in this regard. Reasons for differences in the three jurisdictions may be the level of publicity of anti-discrimination law, as well as claims culture and deterrent success rates.

Although this is not compulsory under EU law, the UK, France and Germany set up institutions that offer support and information, and in the UK and Germany these gather (at least some) data in relation to discrimination. In the UK, this task is split between the Scottish SHRC that conducts research, training and answers inquiries and the EHRC responsible for the other parts of the UK. Through the EHRC, employers and employees, amongst others, can obtain general information, codes of practice and personal advice. Similarly destined, the German ADS is also heading for comprehensive cooperation with employees, employers, relevant authorities and NGOs at local, national and European level, and has started to provide guidance and mediation, as well as pilot projects on innovative measures to prevent discrimination. Comprehensive research reports, as have been conducted in the UK, are also emerging under the commission of the ADS. The German authority is particularly promising, as it is the only one of the three specifically dedicated to matters of discrimination.

The French counterpart authority operates in a patently different manner. The same as under the dedicated anti-discrimination predecessor authority HALDE, the DDD website specifies little to no information related to religious discrimination, bar some abstract scenarios. There is no indication as to the extent of the problem of religious discrimination. Few religious discrimination complaints were made to the HALDE according to an NGO and in any case not publicised, which is seemingly continued under the DDD. The absence of comprehensive guidance for and documentation of religious discrimination cases

arguably hints at neglectful dealings with this field of competence. Again, the absence of statistics perhaps hinders the commissioning of reports, as it is hard to justify allocating resources if there is no proven need. In addition, the HALDE as a specialized advisory body on discrimination had, unlike the DDD, veritable means of investigation, as well as the power to mediate, or make recommendations. Concerns are, correspondingly, raised as to the DDD's ability and willingness to prevent and handle religious discrimination at work. Indeed, the comprehensive services provided by the EHRC, especially the tailored guidance for employers and assistance for employees deliver an example that could be utilised to inform the workings of the still emerging German ADS and, even more so, of the DDD in France.

III. Statutory Law in the UK, France and Germany

The three jurisdictions specify an overarching prohibition of religious discrimination as a higher rank norm, by virtue of provisions under the Human Rights Act (HRA) and the constitutions of France and Germany. Overall, the statutory frameworks in the UK, France and Germany, appear to provide considerable protection against religious discrimination in employment, despite criticism voiced as regards single issues. None of the three states have enacted a general rule of accommodation for religious (or other) interests. This would, perhaps, exceed the negotiable level of protection in the current political climate, despite that, experience from Canada shows that this tool is not particularly problematic. Largely, nevertheless, statutory law in all three jurisdictions is advanced and provides, as far as statutes do, comprehensive models of protection of employees who wish to make a religious discrimination claim.

The implementation of the EFD has led to some similarities of the Law in the UK, France and Germany. In the British parts of the UK, the EFD was almost literally adopted in regulations, subsequently followed by a more holistic and progressive non-discrimination approach in the 2010 Equality Act (EA). In particular, the EA's public sector duty bears remarkable potential to fight discrimination, as long as the interpretation of equality aims towards inclusion and participation. The duty striving for proactive, result-focused equality is likely beneficial to advance substantive neutrality. Unfortunately no equivalent duty exists for private sector employers.

Similarly, the German legislator opted for a single statute (AGG). The advantage of such a single-statute approach is, for instance, the prominence, clarity and accessibility of relevant legislation to employers and employees. Then again, the French strategy of incorporating the EFD's standards into various existing statutes may also have strong points. Particularly

useful to employees, who suffer religious discrimination, appears the inclusion of discrimination under criminal law in France. The deterrent factor of employment discrimination amounting to criminal conduct cannot be underestimated, especially in conjunction with the potential consequences of severe fines and imprisonment.

In contrast to France, the dedicated statute in the UK and Germany makes non-discrimination law stand out more prominently from other legislation and accordingly may receive more public attention. A commendable benefit of the EA compared to relevant French and German law is its user-friendly wording. In Germany the multitude of provisions across statutes concerned with employment discrimination may continue to impair clarity and thus access by laypersons. Certainly, the enactment of the AGG as a main point of reference provides a form of relief regarding simplification.

In the absence of a duty to accommodate religious requirements, statutory exemptions were found in the France and in the UK that aim to prevent conflicts between religious conscience and workplace requirements, including specific provisions for Northern Ireland. Under German law, no such exemptions were found, however, it is presumed that in fact these exist in a manner similar to the UK and France. Also, conflicts of (religious) morality and abortions may not appear in the first place in Germany, since patients will be referred to hospitals which or gynaecologists who are known to carry out the operation.

IV. Specific Issues of Religious Discrimination Law in the UK, France and Germany

1. The Notion of Religion

None of the jurisdictions offers a statutory definition of religion, probably intentionally to circumvent the difficulties attached to such a definition. Based on ECtHR jurisprudence, UK courts tend to be broad and inclusive, with the result of a wide range of religions falling within the scope of legal protection as such. Unlike in France and in Germany, religion is mainly defined on a subjective basis and does accordingly not require the same amount of evidence before the courts. This difference can lead to inconsistencies, for example, Scientology is not dealt with as a religion under German law, because of the organisation's economic activities. The requirement of a community of adherents in France may also be too restrictive, perhaps leaving minorities within minorities outside the scope of protection. Within limits, such as absence of criminal activity, a wide definition as used in the UK is more favourable, since assessing whether beliefs amount to 'religion' is in itself a determination of religious content which ought to be avoided in secular courts.

2. Making a Religious Discrimination Case in Court

Some features were identified as problematic to employees who wish to make a religious discrimination claim at court. Direct discrimination on grounds of religion rarely poses a problem in court, if facts are clear, but facts are likely to be disputed and not recoverable. There is little evidence (Bodi) of successful direct discrimination cases, though Northern Ireland case law indicated that direct discrimination is widespread in practice. Combatting direct discrimination is certainly much needed in all jurisdictions, however, answers will probably centre on preventive measures, such as information and education policies, incentives, transparent decision-making processes.

Whereas in the UK and Germany no element of intention is required to establish a discrimination claim, French courts have used this very point to dismiss claims. The burden of proof for the employers' intention to discriminate sensibly (and commanded by Article 10 EFD) needs to be with the employers, but was simply assumed by the court, where a particular style of headscarf was prescribed (Tahri), even assuming this reflects the employers' willingness to accommodate the religious needs of the employee. In *Tahn*, severely, the assumption of the employer's lack of intention to discriminate prevented further assessment of the case. Though French courts will probably deal with indirect discrimination cases more prudently after *Afil*, the ease with which such cases were previously averted is worrying. It certainly looks like courts pre-*Afil* have tried to dismiss claims at the earliest point.

In comparison to the UK legal sphere in particular there is still no enforceable claim in Germany to enter a post or to be promoted as a consequence of an established discrimination case. For discrimination law to be effective, it seems, that such instruments ought to be available, especially where employers may be well-positioned to pay damages and may, accordingly, not take great interest in non-discrimination. In addition to modest damages, as opposed to the UK and France, this leaves German employees at a considerable disadvantage.

A large variety of proportionality tests were discovered to assess justification of limitations imposed on the exercise of religion in the workplace. Within each jurisdiction these tests have been carried out with slight differences depending on the court and subject area the claim belonged to. To satisfy basic standards of the rule of law, any justification ought to limitations of rights, in any case, include a proportionality test, which ought not be circumvented. Comparing the law in the UK, France and Germany, however, discovered that the crucial aspects of proportionality tests are not the use of particular components as

such. Expectably, with the EFD as a specialised guideline for non-discrimination in employment, minimum standards for components of proportionality are set and will be further developed by CJEU jurisprudence. The crucial element of a proportionality test is for it to be carried out to fairly balance the interests of employers and employees, characterised by the absence of prejudice against the religion the employee is affiliated with. This enables an assessment based on actual facts, instead of presumed, abstract dangers to other individuals or to (personal definitions of) the state's neutrality, as was found in France and Germany.

The situation in private sector employment in France seems to be disburdened though due to the EFD's 'genuine and determining occupational requirement', as *Afif* prescribed an actual reason linked to job requirements is presumably needed to justify limitations of employees' religious appearance. Abstract business interests as have been extensively criticised in Chapter 5 are, perhaps, no longer accepted as justification. The German cases that debated similar abstract business interests were controversial, however, the last instance courts clearly did not accept this as sufficient to justify limitations to fundamental rights.

3. Discrimination based on Religious Appearance

A comparison of case law concerned with religious appearance is immensely insightful. Stark differences in the cases' evaluations became evident. Visible appearance of employees' religious affiliation has occupied the courts in the UK, France and Germany. Conspicuously the relevant case law reflects that the standards of justification applied in court are largely different, and in France and Germany limitations to religious appearance also depend on the classification of employees as part of the private or public sector. In France and Germany religious appearance is also the most contentiously debated aspect.

The stance of the German *Bundesarbeitsgericht* the strictest towards private sector employers, considering that an adherence to constitutional equality standards is expected even in the private sector. In comparison, in French private sector related judgments pre-*Afif* a balance of interests did either not take place, or the relevance of non-discrimination is easily outweighed by a hypothetical business need thus effectively voiding the powerful statutory provisions for (religious) discrimination. The *Afif* ruling may introduce a sea change for private sector cases, as it is closely aligned to the EFD's conditions and provided an objective, fact-based evaluation of the employee and employer interests involved. In the UK, each case is apparently always examined factually and on the basis of the actual

requirements of the job. General business interests are not relevant, and even if specified, the employee's religious appearance needs to amount to a severe disadvantage for the employer.

Whereas French courts readily accept that headscarves worn by public servants are irreconcilable with *laïcité*, demanding neutral appearance, their German counterparts, at least discuss the the abstract or concrete details involved in balancing the interests involved. Both in France and Germany, the use of the church-state model to restrict minority religious practice is arguably the result of political, misleading interpretations, in light of the contended understandings and consequences of the models as found in Chapter 1.

The particular characteristics of employment in the public sector in France and in Germany make it more feasible to view it isolated as a special form of employment. Case law from the UK seems to be the only of the three jurisdictions, which allocates little need to distinguish between employees of the public and private sector. This reflects a completely different attitude and viewpoint of public sector employment in the UK. Both in Germany and France explicit consideration is given to the separation of the church and the state in case law and the concept of state neutrality used to limit religious expression in the public sector workplace.

In the UK, the CA's neutrality-related reflection in *Ladele* voiced and criticised her religious interests in her role as a public sector employee, performing a secular task, could not override the duty of all registrars to provide equal respect regardless of sexual orientation and that public service employees may not discriminate unlawfully against colleagues and service users (ECtHR and EHRC). No other express mention was made of separation of church and state, neutrality or public sector work being fundamentally different from private sector work. *McFarlane* was decided much in the same way and outcome as *Ladele*, though the employee was in the private sector. In the *Azmi* case, the assistant's public sector role was not even stated as a decisive matter. On the contrary, matters of fact were assessed in the UK cases, rather than speculations about employees' intentions towards an acceptable church-state model or mode of neutrality. The EA's public sector duty hints at the employees in question enjoying an enhanced level of protection against religious discrimination, hence the opposite as is the case in France and in part in Germany. A higher level of protection makes sense, since the state in its role as employer ought to lead with good examples of non-discrimination for private sector employers, many of whom also face fewer resources.

French and German cases tend to deal almost exclusively with minority religion. Again, a particular concern relates to the prejudicial arguments used in the debates surrounding headscarves, which have since become an epitome of Islam in France and Germany. Amongst many other arguments, Chapter 6 suggested that subtle messages, inherent to outcomes of cases involving detriment to religious minorities, can be a far weightier threat to state neutrality, credibility and integrity than the public sector workforce reflecting religious pluralism, as is found throughout the population anyway. In conjunction with further questionable reasoning in these cases, the detriment to the employees involved, as well as society as a whole, is likely to be severe.

Due to its disproportionate effect on minority religions and the use of prejudice in court, the law in France and Germany entails the suspicion of partiality towards better-known, majority religions. This suspicion intensified in Chapter 6, where the analysis of relevant cases exposed the consideration of prejudice against minority religions. In contrast, cases from the UK do not concern minorities specifically. In the UK, the focus is on the facts of the case, rather than the potential, imagined implications of the religious practice in question. Therefore, it can be argued that some French and German law judges are biased towards better-known religions and that this is an indicator of intentions, or ignorance, that ought to be irrelevant to legal evaluations. Also, it can be argued that the religious neutrality of the French and German states is questionable as long as exclusively minority religious practice is effectively subjected to specific restrictions.

Turning to the UK, outward appearance linked to religion has been discussed in a vastly different way and context. Uniform cases have been problematic, but these have diminished because uniform policies tend to take into account religious requirements that collide with the standard uniform. The case of *Eweida* is an exception, where the core problems appear to have been lack of communication and cooperation between employer and employee, leading to an unfortunate scenario in court. Limitations to religious apparel in the UK have otherwise been based on very probably genuine grounds of health, safety and in the case of *Azmi*, an inability to carry out the required work. Importantly, cases mirror that uniform policies have not solely or predominantly affected minority religions, or a particular religion as has taken place in French and German law dealing with religious appearance.

These findings highlight a more pluralist approach to religion in the UK, reflected effectively in a visible role of religion in public life, rather than in principle (such as law, or legal definitions of neutrality). In France and Germany there is a perceived need to regulate religion in public

life under the heading of state neutrality, probably because 'otherness' is not encountered with the same ease as in the UK. Hopefully, similar developments will take in France and Germany with increasing interaction between majority and minorities, confidence about own identity due to the experience that, accepting others as they are, is a benefit and not a loss. Underscored by Hill's observations, the acceptance of diversity over time has led to a higher degree of assimilation in society than in states which do not accommodate difference as readily as the UK.¹

A more objective view, dispassionate towards one's own religious affiliation is, therefore, required. The examples provided from the UK not only show that such a factual approach is possible, but also that it prevents the isolated effect on minority religious practices. Taking the 'genuine and determining occupational requirement' to mean that the employee needs to be able to carry out the work activity in question, in addition to a proportionality test as suggested above solves this issue in the desirable way, leaves out prejudice against minorities that raise the doubt whether the judges in question are neutral towards religion themselves. Importantly, law in the UK thus displayed a high degree of substantive neutrality, reflected rather than caused by the idea of 'hospitable establishment' as discussed in Chapter 1.

In addition, some German courts (and the French Stasi Report), find fault in headscarves alleged incompatibility with sex equality and its influencing or deterrent character on others. As Chapters 2 (*Dahlab* and *Şahin*) and 6 (*Ludin*) showed, these arguments could not be substantiated. This input of additional prejudice is bound to create additional detriment to employees, especially those who are placed at the intersecting discrimination grounds of race, religion and sex. Again, none of this particular detriment is found in UK cases, since these do not focus on women, one religion and ethnic minorities. This is no coincidence, but the very result of the law in the UK contributing more to substantive equality. It is also telling that in France, courts have not even reached a level of assessment where proportionality was to be tested to sufficient detail to think about the meaning of a headscarf beyond its non-neutrality.

The presumptions applied in French and German courtrooms to the effect that some religious manifestations are not reconcilable with religious neutrality of the state are flawed and, therefore, were met with strong counterarguments. In particular neutrality cannot be

¹ Hill M, "Legal and Social Issues concerning the wearing of the «burqa» and other Head Coverings in the United Kingdom", (2012) 19(1) Quaderni di Diritto e Politica Ecclesiastica 32.

linked with someone's appearance, because regardless of appearance or religious affiliation a person may hold values that advocate or contradict *laïcité* or state neutrality. Thus, case-by-case action should suffice, if there are reasons for concern, such as is done in the UK in other contexts. The two German *Länder* School Acts that prohibit the wearing of non-occidental religious symbols to teachers, in breach of the ECHR, the EFD, the *Grundgesetz* and the AGG, are the only examples of direct discrimination being permitted. The underlying academic and court discussions vividly illustrated the subjective and prejudicial influences on law in the 'headscarf debate'. German and French cases under this category show how, once more, a duty of accommodation could change general perceptions of non-discrimination law, thus serving an even wider goal as religious non-discrimination only.

Discussing the headscarf as detrimental to women, courts determine on women's behalf the meaning of the headscarf and their religion. This not only means supposedly secular judges evaluate religious thought, but also entails detriment on personal autonomy and perhaps reflects a lack of societal interaction and education. Since there is no equivalent reasoning by judges in the UK, and, at least in the employment context no discussion at all (despite law suits), perhaps the role of religion in public life is considerably different in the three jurisdictions. It may be that in the UK, there is far more information about religions available and interaction between adherents of different faiths. French assimilation policies in particular may hinder genuine, public discussion of religion as it suppresses its visible effects in the first place. Consequently, interfaith action supporting non-discrimination law and the promotion of information and training could help combat prejudice.

In France and Germany the treatment of religious clothing of public sector employees is partially linked to the relationship of church and state. The overriding opinion in French courts is that *laïcité* demands public agents to appear completely neutral as to their religious affiliation, as long as they are at work. Thus courts apply the concept of 'strict' *laïcité* to public agents as individuals. Alarming, a large majority of French judgments deal with Islamic headscarves, but do not address the adverse effect of the law on Muslim women, or ethnic minorities. One category of cases, additionally, illustrates the measure of scrutiny applied to measure the neutrality of French public agents. Three appeals reached the *Conseil d'Etat* by applicants to public sector posts, who had been rejected simply for their education in denominational institutions.² Presumably, the mere fact that an applicant attended a faith

² CE, 25 July 1939, *Demoiselle Beis*, Rec. CE, at 524; CE, 5 January 1944, *Demoiselle Tétaua*, Rec. CE, at 1; CE, 7 July 1954, *Janine*, Rec. CE, at 811; see also CE, 28 April 1938, *Demoiselle Weiss*, Rec. CE, at 379 and CE, 3 May 1950, *Demoiselle Jamei*, Rec. CE, at 247, where the courts had to evaluate whether public sector employees are permitted to carry out religion related activities in their free time.

school, would not even be noted as a matter of necessary investigation in the UK and in Germany. Such cases aid to understand a completely different attitude towards public agents in France and on the surface almost seem fearsome. In Germany, the parallel discussion in court has gone into much detail, to assess these and other issues related to the headscarf. Similar to the situation in France, the restrictions are primarily justified with state neutrality, though depending on the *Land*, either 'open' or 'strict' neutrality apply.

4. Religious Discrimination related to Hours of Work

With regard to religious observance in the workplace and the adjustment of working time to allow for religious worship, the judges in the UK have provided the most practical solutions for employees. Although there is no express duty to accommodate for designated working hours and leave for religious observance, the employer's burden to show that in the concrete case, it was not possible to comply with the employee's request, is closely related to the concept of accommodation. In spite of there being no express right to have one's religious practices accommodated, some UK cases effectively endorse such a concept. For instance, where employees needed time off to worship, courts examined whether the employer could have reasonably granted the request.

In France a flexible offer of religious holidays is made to members of most commonly known religions who work in the public sector. Though the exclusion of those outside the protection is problematic, the idea itself is a move towards substantive equality and thus welcomed. Considering that bank holidays are determined by the state, one could argue that, in addition, such law is much needed for the benefit of private sector employees, too, if neutrality of the state is to be sustained. Similar to France, though to an even smaller extent in Germany, the *Staatsverträge* in Hessen, Hamburg and Bremen are an example of explicit accommodation as regards adjustment of working time. Only in these *Länder* and only Muslim employees are the beneficiaries of these rules. Correspondingly, the same criticism applies as in relation to French law. Working hours and days compared across the three jurisdictions are a prime example of how a duty to accommodate would lead to more equitable results and can move legal systems closer to providing to substantive neutrality.

5. Religious Discrimination and Exemptions from Workplace Requirements

In the UK various statutory exemptions account for specific religious needs, based on experience of conflicting interests in the past, as do some provisions in France. The corresponding jurisprudence, however, reflects that in the UK the actual interests at stake are evaluated, whereas French judgments inflexibly call on employees to consider potential

conscientious objections prior to taking up a particular position. This approach overlooks the reality that job descriptions and the employee's religious understanding may change in the course of employment.

6. Religious Discrimination based on Health, Safety and Security

No case law on health, safety and security could be identified in relation to religious discrimination in France and Germany. Since minority religious expression tends to be more visible in Europe, by nature of the items involved and the fact that Christianity as the majority religion does not generally or commonly require outward manifestations, health and safety rules are more likely conflict with minority practices. If no employees exercising a minority religion have brought cases due to conflict with health and safety rules, this could indicate that those practicing a religion are less likely to be employed in the first place, but also that those who are employed are more likely to voluntarily comply with health and safety rules at the expense of religious requirements. In the latter case this may reflect a lack of voice or confidence of employees striving to reconcile work and religious interests. Such a lack of assertion of religious needs by minorities could then also imply wider issues of discrimination in society.

On the other hand, the absence of relevant cases may simply be attributable to health and safety rules that accommodate religious requirements already. Empirical research into this area would therefore in either case be useful. In the UK de facto accommodation in health and safety sensitive work environments has already taken place. The relevant case law is not only older, but also showed, that in court focus was on the actual practical implications for the work to be carried out by the employee, and not on internal motives of those involved. Hence, the UK health and safety cases confirm the finding that, in this jurisdiction, religious discrimination cases are assessed more objectively and sober. In contrast, concerning the issue of security, the *Farooq* case illustrated that prejudice against minorities also leads to conflicts in the work environment in the UK. Though, this may just be because such cases receive more publicity than in other jurisdictions and, consequently, may not be a problem specific to the UK.

7. Workplace Requirements Physically incompatible with Religious Beliefs

In France and Germany, no such cases have been identified that deal with religious interests that collide with physical requirements of the workplace. It can, therefore, just speculated that there is either discouragement to file such a claim, or that this is because there is a fairly obvious objective justification for the physical requirement. Arguably, the ruling of *Azmi* falls

under the latter category. Only after comprehensive assessment of the facts in court, using detailed expertise, the judges concluded that the *niqab* in this case prevented carrying out the main work activity effectively. Since other, irrelevant motives behind the employer's decision, such as hostility towards Ms Azmi's religious affiliation was not suspected, and because the employer had attempted to reach a compromise, it is expected that the indirect discrimination in question was justified.

8. Workplace Requirements Morally incompatible with Religious Beliefs

A more common scenario is one where workplace requirements collide with moral aspects of religion. Despite this proposition, no relevant case law was detected in Germany. The expectable argument in such cases is that incompatibility with one's religious beliefs can be anticipated when choosing a particular job, but also, in some cases statutory law simply provides exceptions for likely areas of this particular type of conflict. The contentious French case of *Azad* belongs to neither category in that the employee's religious beliefs changed whilst he had already been working for the employer. Though this case was found in collision with public international and EU law, it may be decided otherwise today, if courts took into account the EFD (*Aiff* hinting that this will occur more likely than at the time). Regardless though, *Azad* constitutes an example, again, of how a principle of accommodation would help solve such a conflict. At the very least, credibility of a religious belief ought not be questioned by a court.

Judgments from the UK, in contrast, reflect the complexity sometimes created by cases of moral incompatibility. *Ladele* and *McFarlane* pointed out the difficulty of resolving scenarios in which two discrimination grounds compete, also reflects the confidence of Employees in the UK to voice their religious needs even if these are unpopular, and, once more, how a duty of accommodation can more suitably handle complex evaluation of competing interests. *Ladele* is of interest from a comparative perspective, since this is the only case in which church-state relations were mentioned by the judges. Apparently, the situation where a public sector employee acts contrarily to discrimination law by ensuring his/her own non-discrimination, is the acceptable limit in the UK, at which the court no longer sought to reconcile competing interests in favour of the employee. Importantly, this was a situation where a "purely secular task"³ was to be performed and where equal respect was owed to other staff and clients. In view of neutrality of the state not being mentioned in *Ladele*, it is

³ Ibid, at 52.

presumed that the reference to the “secular task” points to the absence of an exception as is found in case of employment in a religious ethos organisation.

9. Harassment

Harassment cases were only identified in the UK (*Elgadawy* and *Ladele*), where also clearly defined statutory provisions (EA and FETO) exist, and these confirm hope for a subjective ‘offensiveness’ test. If this jurisdiction continues, this means a good level of protection for employees. France does not, probably for historical reasons, have statutory protection against harassment based on religion, which is, obviously, a hindrance to the establishment of cases. Concluding from other French case law, employees have struggled to establish any discrimination claims, so that maybe there is also little confidence to make additional claims of harassment linked to religion. Though German statutory protection is strong, including a right to refuse work and receive full wages whilst harassment continues, there is no information yet as to how difficult it is to establish harassment in court.

V. Conclusions

This Chapter, having viewed several legal provisions on religious discrimination in employment applicable to the law in the UK, France and Germany from an applied comparative perspective, has evaluated the multitude of legal tools, methods and underlying perceptions relating to religious discrimination in the workplace. All three jurisdictions offer considerable statutory law protection against religious discrimination at work, and at least some form of institutional support. The non-collection of relevant discrimination data in France seems to hinder action to fight religious discrimination, leaving France the most passive in this regard. Surprisingly little common ground exists between the UK on the one hand and France and Germany on the other, both in terms of principles applied and factors taken into account. It also seems that in the UK, due to the numbers, the contexts and religions involved, is a certain confidence to voice problems related to of religious discrimination to court. The underlying reasons are, perhaps, the difference of societal status of minorities in general, the treatment received in court and the role of religion in public life being more outward than in France and Germany.

Unlike statutory law, the content of case law largely differs when comparing the UK, France and Germany. Cases have surfaced touch upon a variety of contexts, for instance, dress codes, working hours and participation in certain activities. Differences in results between the jurisdictions are mostly due to the jurisdictions’ immense disparity in approaches to justification. In France and in Germany, the potential reasons for justification depend in part

on the classification of public or private sector employee. French public sector employees are subjected to a duty of strict formal neutrality, whereas German employees in this category are subjected to loyalty duties effectively amounting to support either formal or substantive neutrality. In the case of substantive neutrality, there is no noteworthy effect on the employees and no proven negative effect on service users. In both France and Germany the requirements set for neutrality were dependent on judges' personal interpretations of *laïcité*/state neutrality and the command of formal neutrality has been criticised, not least because of the detrimental impact on minority religious adherents.

Contrasting the French and German employees' duties to reflect to a degree the neutrality of the state, the EA's 'public sector duty' requires the state as an employer to fight discrimination and related issues. Moreover, if one considers the 'public sector duty', employment in the UK public sector is perhaps supposed to entail enhanced, not reduced availability of religious freedom and non-discrimination. In relations to working time arrangements, this can also be said for France, where public sector employees of well-known religions can take time off for religious worship, the same as can Muslims in two of the German *Länder*. Regarding all three jurisdictions, it was recommended that rules ought to apply to employees across sectors. As regards private sector employment, the three jurisdictions offer sound protection to employees, guided by the EFD, though in France this depends on whether courts continue the reasoning as established in *Afil*. Prior to this judgment, there was a clear tendency to dismiss cases for hypothetical reasons provided by employers to avoid any assessment of interests involved.

The link between discrimination and church-state relations becomes clearest in this comparative chapter, since interpretations of state neutrality determine justification of indirect religious discrimination in parliaments and courts of each state. The two controversial German School Acts limiting the non-occidental religious appearance of teachers are symptomatic of the politicians' and judges' otherwise more covert bias towards majority religion. The most striking and alerting occurrence in the German judiciary's approach to religious discrimination of public sector employees lies in the effect on minority religions and the adjunct prejudice expressed. French and German cases have almost exclusively dealt with complaints from adherents of minority religions. Whereas to some degree this phenomenon can be explained with, for instance, working time historically being based on a Christian calendar, the comparison to UK case law suggests otherwise. Quite differently, rulings from the UK also comprise not only a relevant number of complaints from Christian employees, but also a wider range of work contexts. No prejudice against minority religion

is voiced in UK courts and there is an objective examination of the facts, on the basis of which interests can be related to relevance for the job and proportionality of the interference. Clearly, the law in the UK effectively best serves substantive neutrality and thus avoids isolating religious minority employees as targets for discrimination.

French and German approaches to religious appearance in the public sector entailing detrimental effect to religious minorities also, maybe incidentally, disproportionately affect ethnic minorities and women. Courts have missed out on addressing the adjunct problem of intersectional discrimination in 'headscarf cases', where religious, sex and race discrimination overlap. The implications of these cases are, correspondingly, wider and more severe even. Therefore, this approach should even more so be corrected. UK case law shows that an objective assessment of interests to be reconciled better serves the aim of substantive neutrality, but also harmony and interaction in society, though most likely these are cause and effect in both directions. Tellingly, despite cases involving headscarves, no 'headscarf debates' have taken place in the UK yet. The issue of headscarves in the workplace is thus best solved in the UK, which should provide a model for dealing with this matter and similar issues in France and Germany.

Throughout this chapter, the duty of accommodation was identified as a useful strategy to prevent and solve problems of religious discrimination as have occurred, in particular in France and in Germany. This chapter confirms also the finding in Chapter 4, that accommodation promotes substantive neutrality. As Sossin points out, accommodation in Canada has gone hand in hand with a diversity-friendly, non-assimilationist integration policy since the 1960s in a quest to actively promote minorities' participation in social goods, but has since conflicted with the idea of assimilation most strongly promoted in Québec.⁴ Across Canada, however, acceptance of reasonable accommodation amongst the population has been shown to correlate with levels of education.⁵ This, once more, supports the idea that dialogue and education are the fundamental elements in the fight against discrimination. Vitally, immigrant integration can be regarded as a relative success in Canada, as opposed to, for instance, France,⁶ this pointing at assimilation and formal neutrality not contributing towards non-discrimination goals. Dialogue and education ought to take place at all levels,

⁴ Sossin L, "God at Work: Religion in the Workplace and the Limits of Pluralism in Canada", (2009) 30(2) Comparative Labor Law and Policy Journal 485, at 500 (see also Section 3 of the Canadian Multiculturalism Act 1985) and 501-502.

⁵ Ibid, at 503.

⁶ Ibid, at 503-504, and Adams M, *Unlikely Utopia: The Surprising Triumph of Canadian Pluralism* (Toronto: Viking, 2007).

so that the population can adjust political decisions accordingly, and that decision-makers can make intact political choices.

Though previous chapters did not anticipate UK, French and German law to gravely fall short of the standards set by the ECHR, the higher level of compatibility of the law in the UK with EU law, compared to France and Germany, nevertheless, also indicates that the former two states ought to rethink legal protection currently offered against religious discrimination at work. Church-state relations as such are not the root cause for legal problems of religious discrimination, but the interpretation of the state and its subjects towards religion. Chapter 1 and, subsequently, the German 'headscarf debate' highlighted, church-state models are a mirror of deeper-rooted issues, such as fear of 'otherness' reflected in ideas about integration of minorities and concurrent prejudice faced by Muslims as a minority group. Whilst the vehement opposition to headscarves suggest over-confidence and correlating ideas of superiority, the underlying inclination may well be the opposite state of mind, characterised by feelings of inferiority, insecurity and confusion about one's identity in a diverse society. Therefore the fight against religious discrimination also needs to attend to the employers' mindset through education. For now this means that those following minority religions, enjoy much greater opportunities to practice religion in workplaces in the UK, than in France and Germany.

CONCLUSIONS

I. Introduction

This thesis' predominantly legal approach to the analysis of religious discrimination in the workplace in the UK, France and Germany has uncovered significant differences between the three jurisdictions despite those being governed by one specific EU directive. Through the lens of church-state relations, this thesis tested whether one model or concept is most promising to provide effective, integral and principled solutions to improve protection against religious discrimination. The concept of substantive neutrality was identified in Chapter 1 as the most promising to serve these goals and was therefore the benchmark of assessment throughout the thesis. Substantive neutrality was defined as seeking to establish a neutral outcome to all faiths with a minimum of state interference and a maximum of choice for the individual.

Findings show that cases related to religious discrimination, in general, and religious practice of minorities, in particular, are handled in significantly dissimilar ways in the UK, France and Germany, exposing contrasting causes and effects. In relation to minority religions, academic debates, as well as those in court, have been influenced and shaped by ulterior events, with the exception of the EU law and seemingly, also, the law in the UK. This thesis has confirmed the major differences and similarities, underlying reasons, and potential effects, as well as highlighted and devised potential and actual solutions, with regard to religious discrimination in the workplace.

This closing chapter commences with the main findings of and arguments developed in each chapter (II). It then moves on to offer proposals on how to respond to the major points of concern (III), before explaining the thesis' contributions and originality (IV), limitations (V), a proposal for future research (VI) and final remarks (VII).

II. Main Findings and Arguments

1. Religious Discrimination and Church-State Relationships

The thesis' introduction already showed that religious discrimination in employment is influenced by and reflective of various subject areas and sub-topics. Accordingly, Chapter 1 set the scene by examining the historical background to religious discrimination. This first chapter observed that church-state relations in all three jurisdictions are still the product of centuries of political experiences, i.e. a historical product. Henceforth, the respective relationships between 'church' and state are considerably different, as well as subject to contentious debates. All three jurisdictions have formalised and legally regulated church-

state relations. The models that emerged could, arguably and simplistically, be labelled 'establishment' or 'national church' in England (no notable links in Scotland, Wales or Northern Ireland), 'fundamentalist' secularism in France, and 'liberal' secularism in Germany.

The analysis showed that all three systems have a bearing on religious discrimination in employment. Interestingly, the established or national Church of England seemed to have the least problematic impact in this regard. Privileges afforded to the Church of England are fairly isolated and decreasing, and representatives of the Church are keen to integrate other faiths into dialogue, which can lead to their gaining of a voice. The advantage of delegating bishops to the House of Lords is considerable, but partially remedied through the intended inclusion of delegates from other faith groups in the future. The fact that this system is still acceptable speaks for a recognised role of religion in public life, at least in England. In the UK, no incidents were found where the church-state relationship blatantly bears on religious discrimination in the workplace. Thus, the presence of a national or state church can in practice be beneficial to all religions, if these are equitably included in decision-making processes.

In stark contrast, the position of the Catholic Church in France has led to severe controversies in the past and present. Although *laïcité* is and has been understood as a separation of 'church' and state, as a means of protecting individuals from the coercion of the Catholic Church, the concept is now also interpreted to justify restrictions to religious freedom of individuals. Problematically, restrictions are effectively directed to religious minorities and do not affect adherents to Catholicism. This raises the question of a biased reading of *laïcité*. The label of 'fundamentalist' secularism seems justified in the light that *laïcité* currently forces (minority) religious practice into the private sphere, thus imposing a secular life on those who wish to pursue education, or a career.

Germany's church-state model is positioned in the middle, since there is an unwritten rule of state neutrality towards religion, but the state cooperates significantly with religious groups. Like in the UK and unlike in France, religion thereby gains public recognition, presence and influence. Whether the state support is partial towards majority religions and whether the church-state setting as such poses a problem for employees, is something that could not be established with certainty at this point. Chapter 1 concluded that no church-state model is inherently detrimental to protection from religious discrimination, however, interpretations of these models can be powerful tools to limit religious practice.

2. Religious Discrimination under the Council of Europe's Framework

A considerable amount of case law dealing with freedom of religion and religious discrimination has come before the ECtHR. Chapter 2, therefore, comprehensively evaluated the relevant provisions of the ECHR, as well as the respective judgments. In the absence of relevant cases filed against the UK, France and Germany, no direct implications could be derived, as the Court's rulings take into consideration each state's circumstances. Highly commendable principles have been established in Article 9 jurisprudence, however, these principles contrast with other rulings that relate to religious discrimination, including in the work environment. On the one hand, the Court has emphasised the state's role in facilitating religious harmony and tolerance, by remaining impartial towards all religions. In *Kokkinakis*, the judges famously transmitted their view that religious pluralism is an inalienable part of democracy, and that this obliged the state to facilitate dialogue, in order to maintain a variety of faiths. On the other hand, the doctrine of the margin of appreciation has watered down these principles in other rulings, by letting the states determine to a great extent the legitimacy of reasons for justifying religious discrimination.

Case law related to religious discrimination at work was found to be no exception to this dilemma. Moreover, these decisions reflected no specific protection or understanding with regard to minority religious practice. A coherent understanding of religious neutrality has not yet been established in the ECtHR jurisprudence, either under the cover of the margin of appreciation doctrine, or by positioning seemingly irreconcilable individual rights or public interests against each other, which allows the ECtHR to abstain from a meaningful, in-depth analysis of the relationship between religious discrimination and religious neutrality of the member states. The political charge of the topic feeds into the Court's reluctance to make a stand for religious non-discrimination, thus effectively preventing the implementation of its own principles and demanding no more than formal neutrality of the states.

Most problematic were cases dealing with religious manifestations in the workplace. The *Şahin* and *Dahlab* judgments show that states are permitted to indirectly discriminate by limiting religious dress, on the basis of mere suspicions against a person, or his or her religion, without any care taken about the immense consequences for the individuals and society in question. Seemingly, the Court continues to ignore the immense criticism it received regarding these decisions, in order to avoid answering to the many controversial, underlying questions.

3. Religious Discrimination and the EU Framework

Chapter 3 analysed EU law and policy pertinent to religious discrimination. A wide-ranging inspection of the Treaties, the EFD, case law, as well as some relevant communications, declarations and reports, contributed to a fairly rounded message from the EU to the effect of valuing religious diversity and equality as important assets. With the EFD, the EU specifically issued an instrument that required the MSs to review and update their law on religious discrimination in employment. In the absence of directly relevant CJEU case law, the investigations into compatibility of national law were bound to remain hypothetical. Future rulings in the field of religious discrimination will show whether the Court will tilt the balance towards the individual right in this field. In the light of existing jurisprudence, this appears to be a reasonable prospect.

A sophisticated valuation before the CJEU is expected, considering the competence of the EU over matters of employment and the Court's pioneering jurisprudence on non-discrimination at work. Whilst there is no expectation for states to establish a certain church-state model, the EU Treaties and CJEU jurisprudence significantly support and promote substantive equality, diversity and individual rights in employment, in particular non-discrimination of minorities and disadvantaged individuals. The crucial matter will be the way in which the CJEU handles justifications of indirect religious discrimination, in particular if attributed to church-state relations. Jurisprudence and the EFD indicate that the proportionality of measures restricting individual rights is consistently, thoroughly examined already. It is also likely that the free movement of workers will be taken into account when reaching a decision, aiming for the establishment of similar working conditions throughout the EU. So far, the general promotion of substantive equality through non-discrimination provisions and policies suggests that religious discrimination cases will much more likely comply with EU law if a member state acts in line with substantive neutrality.

4. The Law in the UK concerned with Religious Discrimination in Employment and its Compatibility with the ECHR and EU Law

Chapter 4 moved on to assess the domestic statutory provisions governing religious discrimination in the UK, prior to asserting compatibility with EU law and with the ECHR. The HRA and the further effect it gave in UK law to the ECHR, and the introduction of the EA of the EHRC, which is soundly dedicated to non-discrimination also, are considered a vital part of a steady development leading to increasingly comprehensive and proactive protection of employees from religious discrimination. In spite of there being no express right to have one's religious practices accommodated, some UK cases already implicitly endorse such a

concept. For instance, when employees needed time off to worship, courts examined whether the employer could have reasonably granted the request. What UK cases also reflect is a certain confidence to voice problems related to religion in the workplace. Church-state relations did not feature in any relevant way in case law from the UK and it appears that in general UK law fulfils the requirements of substantive neutrality. Compatibility with the ECHR seems to be an actively and genuinely pursued goal of parliamentarians and judges.

Based on a detailed analysis in this chapter, a duty to accommodate seems a predominantly beneficial method of protection against religious discrimination, providing a broader and personalised approach, where it is primarily and initially the employer who has to take action and make his or her efforts credible. A right to adjustment of working time appears to be a particularly fruitful area of exploration because flexible working beyond family-friendly policies is also being promoted by the EU and tested in a number of MSs. The cases revealed that *de facto* an attempt to reasonably accommodate requests for working time adjustment for religious purposes is expected of employers.

Due to the almost literal transposition of the EFD into domestic law and the subsequent improvements to non-discrimination law by virtue of the Equality Act (EA), such as the public sector duty, UK law probably surpasses at large the standards set by EU law. Scenarios like those in *Eweida* are unlikely to appear again, since courts and employers are now better prepared for handling uniform cases. Though perhaps silenced by the ECtHR's decisions, a difficult remaining matter is posed by cases like *Ladele* and *McFarlane*, where two rights protected by the EFD are to be weighed against each other. Until further clarification, the reasoning in these cases is not yet fully developed and standardised. Since the two cases relate to service provision, the chapter predicted that the CJEU may sway towards the employer, too. Such cases, however, would unavoidably be more complex where the individuals whose rights to non-discrimination compete are at an equal level of power (e.g. two service-users). A more detailed reasoning may well lead the CJEU to require the employer to reconcile the competing rights of employees and service users.

5. The Law in France concerned with Religious Discrimination in Employment and its Compatibility with the ECHR and EU Law

French statutes offer comprehensive protection against religious discrimination at work, especially through the inclusion of severe criminal sanctions. Consequently, and in the absence of other contentious provisions, Chapter 5 concluded the compatibility of French statutory law with the ECHR and EU law. Concerns were raised in relation to the human rights protecting agency DDD, as to its ability and willingness to prevent and handle religious

discrimination at work. This is more problematic, since there seems to be a reluctance of employees to bring claims to court and of the state to document the extent of religious discrimination in practice. Until the judgment in *Affif*, developments in French case law concerning private sector employment were alarming, without willingness to prevent and engage with religious discrimination at work. It is, revealingly, questionable if cases comply with the burden of proof as envisaged by the EFD. *Affif* at least that justification of indirect discrimination needs to adhere to Article 4(1) EFD. The narrow definition of religion in France may have the effect of diminishing legal protection against discrimination, because courts command the requirement and the existence of a 'community of followers'. This is unlikely to comply with the ECHR and EU law.

The evaluation of limitations to religious appearance in the public sector workplace since *Marteaux* will depend on the CJEU's interpretation of church-state relations or as the scope allowed to genuine occupational requirements under Article 4(1) EFD. The EFD, however, makes no concessions for the public sector and the notion of indirect discrimination exists also under the directives regarding sex and race discrimination, which may lead the judges to assess such cases rigorously. The argument regarding the specific association of public servants with the state, which is named as the reason for justifying discrimination in France, may fail before the CJEU, because public and private sector employees are seen as equals by the EFD. Whereas there are no specific criteria for those who work in the public service, the EFD took into account special requirements of some types of employment, such as religious ethos organisations, so it can be safely assumed that the EFD's scope intentionally comprises public sector employment. Also, the CJEU is not prone to accept employers' interests *per se*, as a means of justification, but looks into the facts of the case and exercises a proportionality test taking these into account, whilst aiming for substantive equality. The other limitation grounds under the EFD, furthermore, were deemed to require severe situations, which may not be considered to exist if employers claim the need for religiously neutral looks. The fact that the EU endorses recognition of religious pluralism may also generate advantages for employees who wish to reconcile work with religious practice. As a consequence, indirect discrimination justified with *laïcité* would probably not be accepted before the CJEU.

Drawing from the *Dahlab* decision, the impression prevails that, if a French civil servant were to bring a case to the ECtHR, the outcome would rely on the judges' sympathy valuation of *laïcité* as a legitimate reason for the state to discriminate. In light of the Court's decision in *Doğru* to the effect that France may legitimately prohibit minority religious items worn by

state school pupils (as a form of justified indirect discrimination), it is very likely that any complaints by public servants would be answered in the same way. Predictably, the Court would rely on France's margin of appreciation, in particular because of the strength of the standing of *laïcité* in French public affairs compared to most other signatory states. In the absence of a consensus amongst the signatory states of the ECHR, the margin of appreciation afforded to the states is expected to be wide. Given the various understandings of private and public sector employment across member states, in addition, the ECtHR may also leave room for such distinctions to France's discretion. Therefore, French law is probably compatible with the ECHR in relation to religious appearance. Yet, the Court would expectably condemn France in *Azad*, where an employee's right to change of religion was decisively ignored in court.

6. The Law in Germany concerned with Religious Discrimination in Employment and its Compatibility with the ECHR and EU Law

Despite comprehensive legal protection against religious discrimination at work in Germany, some major problems were identified in Chapter 6. The exclusion of adherents to Scientology is contrary to ECtHR jurisprudence, which includes this group under the protection of Article 9. The question of whether Scientology constitutes a religion worthy of protection still needs to be addressed before the CJEU. With regard to statutory law, several shortcomings were exposed in the *Allgemeines Gleichbehandlungsgesetz* (AGG), which was supposed to give effect to the EFD. For instance, the limited damages available, the short period to file a claim, obstacles to reversing the burden of proof to the employer and the exclusion of public sector employees, leave parts of the AGG very likely incompatible with the EFD.

Crucially, the directly discriminatory rules of the Baden-Württemberg and Hessen School Acts that prohibit the wearing of non-occidental religious symbols to teachers are clearly irreconcilable with the EFD. The relevant provisions of the School Acts were also highlighted as incompatible with the ECHR (in addition to breaching the AGG and the *Grundgesetz*). The abolition of these acts may be is just a matter of time until the regime emerging through the implementation of the EFD is fully developed and the expanding competences of the anti-discrimination agency ADS reduce political reluctance.

Concerning case law, the German situation is complex. Whereas in the private sector employees enjoy a great deal of freedom of religion (which leads to substantive equality thanks to the *Grundgesetz* indirectly extending its protection to this sector), cases in the public sector have sometimes resulted in substantive equality of the employees, but in other

cases in mere formal equality. These cases uncovered a number of issues that supported the thesis' quest for solutions involving substantive neutrality. The German 'headscarf debate' launched a reaction from some scholars, media and politicians that expressly denounced minority religious practice (the wearing of a headscarf) as being inferior. Although the implications for the minority are in no way comparable to those during the Third Reich, the similarity in language used to describe prejudice against minority religion was strikingly disappointing, particularly in Germany, where so much emphasis has been placed on learning from mistakes made in the past. It appears clearly that the political dimension of restrictions to religious freedom can dominate over fundamental legal principles and strongly impair an objective, principled approach.

Particularly worrying was the accusation against headscarves of constituting a 'danger', with claims of impairment to *inter alia* state neutrality, when justifying the interference with the individual right to non-discrimination. Prejudicial arguments used in the 'headscarf debate' have since become an epitome of Islam in Germany. Chapter 6 suggested that perpetual prejudice issued in judgments involving detriment to religious minorities can be a far weightier threat to state neutrality, credibility and integrity than the relevant public sector employees reflecting the population's religious pluralism. In conjunction with further questionable reasoning in these cases, the detriment to the employees involved, as well as society as a whole, is likely to be severe.

The additional claim that sex equality is impaired by religious dress only worn by women is an example of how some German courts (and the Swiss counterparts in *Dahlab*) try to divert the attention from the employee's actual right to non-discrimination. This disregards the fact that much clothing and other items, for instance, bags, skirts and jewellery, are gender-specific in Germany, too, yet have not caused any concern to employers. Skirts and high-heeled shoes in particular can be classified similarly as gendered items, namely to make women appear in a specific way, which hinders but does not prevent certain movements in everyday life. Therefore, opinions on many items can sway towards interpreting these as demeaning to women. With the focus of the debate being on Muslim women as employees, it appeared that there is a clear partiality towards certain ideas on Islam and sex equality. In sum, in Europe, skirts and dresses are sex-specific dress in the same way as a headscarf, and may be experienced or evaluated as being restrictive or liberating, too. Since from a global perspective neither skirts/dresses nor headscarves are only worn by women, their meanings ought to be defined by those who wear these items and not in court, as it happens in relation to other pieces of clothing.

German case law regarding headscarves is likely compatible with the ECHR, by virtue of the similarities of arguments *Dahlab*, including the similar understanding of state neutrality in Switzerland and Germany. The CJEU's evaluation of prohibitions of religious appearance in the public sector workplace, similarly to the case of France, will depend on the interpretation of the occupational requirement under Article 4(1) EFD. Correspondingly, the relevant German cases may not fulfil EU standards in this regard. Chapter 6 thus highlighted several potential inconsistencies between national law and EU law, and partially with the ECHR.

7. Comparing the Law related to Religious Discrimination in Employment in the UK, France and Germany

The final Chapter 7 proved to be immensely insightful. In this chapter, not only a variety of contexts emerged, in which religious discrimination occurs in UK, French and German workplaces, but also stark differences in the cases' evaluations became evident. This chapter asserted that, primarily, the vast differences in terms of national legal outcomes propound currently irreconcilable perceptions of permissible justifications of indirect discrimination on grounds of religion, the underlying reasons and solutions. The implementation of the EFD has led to some similarities between UK, French and German law, and the chapter welcomed the partial simplification of law thanks to the EFD. Overall, the statutory frameworks in the UK, France and Germany provide considerable protection against religious discrimination in employment, despite some criticism voiced as regards single issues. In particular, economic detriment on the employer's side has to be substantiated in order to justify discrimination. A further positive development that has taken place in all three jurisdictions, partially in response to the EFD, has been the establishment of institutions that offer support in relation to discrimination. Seemingly, British employees have been those most likely to experience non-discrimination as to their religious needs and to take their complaints of religious discrimination to court.

Due to its disproportionate effect on minority religions, the law in France and Germany entails the suspicion of partiality towards better-known, majority religions. This suspicion intensified, where the analysis of relevant cases in Germany exposed prevailing prejudice against minority religions. In contrast, cases from the UK do not, in general, affect minorities specifically. In the UK, the focus is on the facts of the case, rather than the potential, imagined implications of the religious practice in question. Therefore, I argue that the relevant aspects of French and German law are biased towards better known religions and that this is an indicator of intentions, or ignorance, that ought to be irrelevant to legal

evaluations. A more objective, dispassionate view of one's own religious affiliation is, therefore, required. The examples provided from the UK not only show that such a factual approach is possible, but also that it prevents the isolated effect on minority religious practices. Tellingly, no significant 'headscarf debates' have taken place in the UK yet, at least not nearly to the extent of the French and German 'headscarf debates'. Both in France and in Germany, courts have furthermore missed out on addressing the adjunct problem of intersectional discrimination in 'headscarf cases', where religious, sex and race discrimination overlap. The implications of these cases are, correspondingly, wider than just for religious minorities.

Whereas French courts readily accept that headscarves worn by public servants are irreconcilable with *laïcité* (in its interpretation as commanding assimilation), thereby demanding neutral appearance, their German counterparts, in addition, find fault in the garments' alleged incompatibility with sex equality and its influencing or deterrent character on others, as is known from *Dahlab* before the ECtHR. Both in France and Germany, the use of church-state relations, i.e. *laïcité* and neutrality, to effectively restrict minority religious practice is arguably the result of political, misleading interpretations, more so than a matter of principle. In addition, the presumptions applied in French and German courtrooms to the effect that some religious manifestations are not reconcilable with religious neutrality of the state (or sex equality), were met with strong counterarguments. In terms of neutrality, it was argued that, irrespective of what is visible to others, any person may hold values that contradict *laïcité* or state neutrality. In a work environment, and in schools in particular, such influence can be exercised even if no religious affiliation is visible. A secular attitude, consequently, ought to be reflected in the employee's speech and conduct. Religious appearance in itself cannot give rise to doubts about the person's attitude towards secularism. Thus, case-by-case action should suffice, if there are reasons for concern. Religious neutrality of the French and German states is questionable as long as minority religious practice is subjected to specific restrictions. Regarding the relevant public sector employees, the French and (part of the) German legal systems, by interpreting church-state models accordingly, only offer formal neutrality. In conjunction with the effect on religious minorities (and, incidentally, women and ethnic minorities), Chapter 7 confirmed interpretations embracing substantive neutrality as more desirable to achieve non-discrimination goals.

In the UK, all religious segments appear to be affected to a similar extent, with no prejudicial arguments related to minority religions entering court debates. A distinction between private

and public sector is also not explicit and, opposite to France's and Germany's perception, public sector employees in the UK apparently enjoy an enhanced level of protection against religious discrimination. This suggests that cases from the UK more genuinely centre on the balancing of rights involved, namely the needs of the employer to run a successful business with the need of the employee to follow his or her religious obligations/beliefs. Despite, or (ironically) maybe because of, the national Church in England, religion has a more established role in public life in the UK, leading to a higher level of protection against religious discrimination than in France and Germany. Though the idea of 'hospitable establishment' is not the sole or major cause, it fits in well in a society that in comparison to France and Germany, for instance, embraces diversity with relative ease. Effectively this leads to law offering substantively neutral outcomes across employees of minority and majority religions.

Though Chapter 7 did not elaborate on this to avoid repetition of content, the comparison of the potential incompatibility of the three jurisdictions with the ECHR and EU law provides noteworthy findings in its own right. A fairly unambiguous picture emerges: apart from the potentially too narrow scope of the notion of religion in France and Germany, clear lack of compliance with the ECHR could only be found in relation to the controversial German School Acts. Beyond the differences in national interpretations of the law, there is a notable divergence in how UK, French and German law lives up to the standards set by EU law. Most striking is the UK law's close adherence to the ideas purported by the EU (and the ECHR). This finding may not only be a reflection of complacent verbatim transposition, but also a sign of a fundamentally different, better informed and progressive appreciation of religious discrimination in employment. As far as the legislation implementing the EFD is concerned, it is concluded that the German AGG is partly in breach, whereas UK and French statutes appear to comply. Regarding the discourse on an emerging "European *ius commune*",¹ the thesis thus found no shared emerging perception of religious discrimination in employment,² or of church-state relations and their interpretations.³ As reflected in this chapter, the vast differences in terms of national legal outcomes propound currently irreconcilable perceptions of permissible justifications of indirect discrimination on grounds of religion.

¹ McCrudden C, "Judicial Comparativism and Human Rights", in E Örüçü and D Nelken (eds), *Comparative Law- A Handbook* (Oxford/Portland, Oregon: Hart Publishing, 2007), at 373.

² For an account of the law in further EU Member States, see Vickers L, "Religion and Belief Discrimination in Employment – the EU law", European Commission, 2007.

³ McCrea R, *Religion and the Public Order of the European Union* (Oxford: Oxford University Press, 2010), at 36-37; Robbers G, "Staat und Kirche in der Europäischen Union", in Robbers G (ed), *Staat und Kirche in der Europäischen Union*, 2nd ed (Baden-Baden: Nomos, 2005), at 629.

III. Proposals for Reform

1. Repealing the Baden-Württemberg and Hessen School Acts

Section 38(2) of the Baden-Württemberg School Act and Section 86(3) of the Hessen School Act are incompatible with the prohibition of direct religious discrimination under the AGG, the *Grundgesetz*, the ECHR and the EFD. As a result, these two rules ought to be revoked. This is also warranted due to potential side effects on the wider community. Although one may argue that law has a limited role in promoting respect and tolerance, it can nevertheless be seen as the official voice of any state, sending a clear message to its inhabitants as to what is seen as an appropriate solution to a problem faced in that society. Therefore, and with the help of media reporting, law can influence public opinion and accordingly needs to remain within boundaries, especially within those provided by the constitution and law at higher levels. The two provisions in question openly confront non-occidental religions as unacceptable, if manifested by teachers, thus explicitly excluding and ostracising minority religions. There is a palpable danger that such law will harm the relationship between the adherents of majority and minority religions. Since no action with the aim of eliminating the relevant provisions has been taken at national level yet, their survival will depend on future evaluations before the ECtHR and/or CJEU. In this thesis, I argued that both courts would declare the Sections in question incompatible with the law of these jurisdictions.

2. Duty of Reasonable Accommodation

In this thesis, rare instances were found of statutes exempting a particular religious requirement from otherwise legally prescribed standards. Introducing statutory exemptions, however, may be an unnecessary diversion from establishing a general duty of employers to accommodate any religious requirements within reasonable boundaries. This thesis established that reasonable accommodation of religious practice could constitute a viable alternative to the existing legal options and interpretations. Specifically, Chapters 2, 5 and 6 found a high degree of subjectivity within the reasoning of German courts, as well as the ECtHR, particularly relating to the imagination surrounding Muslim women who wear a headscarf. I therefore suggest that religious discrimination cases take into account only the facts of the case at hand and omit any assumptions made about the religion on the basis of which a certain practice is carried out. The problem of employers' and judges' subjectivity in relation to one or more religions could be alleviated, to some degree, if these had to evaluate the actual possibility of the practice in question. Objectivity towards all religions is key to any *de facto* diverse religious society that strives for fairness and peaceful coexistence. Prejudice voiced in public discourses in court and parliament that is distributed globally by

media will otherwise continue to impair local and international relations. Usefully, discrimination law based on reasonable accommodation automatically avoids that the law is (in)directly discriminatory itself.

A duty to accommodate would, furthermore, offer a workable solution in cases, such as *Ladele* and *McFarlane*, where irreconcilable interests protected by non-discrimination law have to be weighed against one another. In such a scenario where the state needs to weigh up two or more interests that are protected by law, accommodation is technically the cleanest solution and, again, prevents favouring one legally protected interest over another. A pragmatic strategy would be the introduction of the accommodation duty by way of a EU Directive, so that results do not continue to differ immensely across the MSs. Since accommodation is a concept known from disability discrimination and has been used in other jurisdictions as regards religion (for instance, the USA and Canada), lessons could be learned from already existing law. Furthermore, experience from the UK with flexible working time arrangements showed that practical difficulties are limited when balancing individual employees' autonomy and managerial and business interests. The concept of substantive neutrality fits in smoothly with accommodation, since substantively neutral outcomes are best served with decision-making as objective as possible, based on a case-by-case assessment.

3. Recognition of Religion in the Public Sphere

This thesis examined different perceptions of the role religious practice ought to have in the public sphere. Already the assessment of church-state relations in Chapter 1 led to criticism of the French idea that religious practice belongs in the home, complemented by the starkly contrasting views from the UK. Whereas the dividing line between inner and outward religious practice is fluid and which manifestations should be permitted in public is clearly a contentious matter, a complete and general prohibition of religiously motivated conduct or aspects thereof in public, including in employment, leads to indirect discrimination, especially of minority religions. Accordingly, the French prohibition of the *niqab* in public and the French and some German *Länder's* ban on the visibility of religion in the case of public sector employees ought to be reconsidered in the light of their undesirable effects on religious minorities and, thus, on society as a whole. Recognition of religion in the public sphere should not be detrimental to non-religious groups and individuals either; substantive neutrality ought to allocate space, action and resources to all those who require a voice, so that freedom is maximised and fairly distributed.

4. Awareness and Training

Knowledge ought to be distributed formally, informally and accessibly, in order for employers to reasonably assess the impact of religious practices on their business, and for employees to understand issues that may be relevant for the religion of their co-employees. Ideally this would be facilitated through the national anti-discrimination bodies which may cooperate with and utilise information from relevant national and international organisations. Considering the advanced stage of the EHRC in this regard, this authority could be used to inform the service provision of the German and, especially, French authorities. In this way, public authorities could help employers to realistically assess decisions and practices that affect their employees' needs and choices in terms of religion and to promote solutions that are beneficial to all parties involved.

5. Interfaith Dialogue

This thesis confirmed that the problems of religious discrimination at work identified cannot currently be alleviated by classic legal means alone. The statutory law may be sophisticated, such as in France, but this is of little use to employees who rely on their employers', fellow employees', legal practitioners' and the judiciary's application and interpretation of the relevant statutes. This thesis' introduction explained the cycle linking ignorance, discrimination and the consequences for individuals and societies. Also, Chapters 2 and 6 indicated that those cases of religious discrimination at work which this thesis deemed non-justifiable, took into consideration prejudicial, often stereotypical assumptions. The underlying problem of assumptions finally feeding into judicial decision-making can only be remedied by education. Education specific to religious discrimination ought to be based on prior and ongoing interfaith consultation through dialogue. The term 'faith' should be framed broadly, to include also non-religious beliefs in the dialogue, so that a large number of interests in society can be taken into consideration and reconciled. Such dialogue should be shaped as suggested by the EU as regards intercultural dialogue (as explored in Chapter 3) and has been called for explicitly as a major means to tackle the root causes⁴ of religious discrimination.⁵ Ideally, any such dialogue ought to be accessible to the wider public in terms of contribution and access, for instance using the facilities and support of the domestic anti-discrimination bodies. In particular, interfaith dialogue is valuable to support law aiming for

⁴ Ignorance and impressions of superiority, see, for instance, Tahzib BG, *Freedom of Religion and Belief – Ensuring Effective International Legal Protection* (The Hague: Martinus Nijhoff, 1996), at 30.

⁵ Tahzib BG, *ibid.*, at 29-30; Odio Benito E, *Study of the Current Dimensions of the Problems of Intolerance and of Discrimination on Grounds of Religion or Belief*, UN Doc E/CN.4/Sub.2/1987/25 (1986), at 167.

substantive neutrality, as the necessary neutral outcome can only be achieved by a law-maker that understands the meaning of religious practice to the individual.

IV. Contribution and Originality

This thesis set out to analyse the law dealing with religious discrimination in employment in the UK, France and Germany, and to measure the results against the chosen international and supranational law standards. Where the research focused on national law, it revealed significant differences between the three jurisdictions in relation to the law and its outcomes, as well as to the underlying attitudes that formed the law. To underline several factors that determined the differences between the jurisdictions, the thesis utilised a number of materials from other disciplines, including sources in languages other than English. Previously, such literature has made few appearances in relevant UK publications. In addition, this thesis is the first study, conceived and carried out this way, of the church-state relations, the statutory law and the case law in the UK, France and Germany. Similarly, the thesis' subsequent testing of the three legal frameworks' compatibility with international and supranational law is the first existing analysis in this constellation. Also, a contribution was made towards effective solutions for a variety of religious discrimination scenarios pertinent to the work environment, elaborated with the help of the comparison in Chapter 7. Existing literature on religious discrimination in France has focused on the law related to schooling, whereas this thesis has contributed greatly to the investigations so far undertaken in the field of French employment law. This thesis is also the first account focussing on the examination of the concept of substantive neutrality as a benchmark for religious discrimination. In sum, this thesis added an original, detailed and comprehensive comparison to fill gaps in the previously existing literature.

V. Limitations of the Research

This thesis completed its task of examining how UK, French and German law deals with instances where employees face a disadvantage for reasons of religion, as well as the potential incompatibility of the law with the frameworks of the CoE and EU. No such substantial assignment can, however, be free from limitations. Issues posed by the breadth of this thesis were answered by focussing on the practically most relevant aspects of religious discrimination at work, whilst still providing an overview of other, less pressing matters. Another, related challenge was set by the vast amount of academic work available in English and German. This necessitated a careful selection process to identify the most valuable scholarship, drawing mainly from the field of law, but also from history, politics and sociology. Conversely, the thesis had to rely on a small number, but quality commentary

related to French law. Whereas ideally a comparative analysis would appreciate even-handedly all jurisdictions involved, this thesis contains a briefer consideration of French law, as opposed to the law of the other two jurisdictions.

A closer examination of quantitative data on incidents of religious discrimination was, furthermore, not possible due to the limited number of words available, but would have contributed to a greater understanding of the topic, as well as further comparative conclusions in each chapter. Since many assessments of compatibility with international and supranational law in this thesis were hypothetical (where cases have not been filed), research into these areas will need to continue and can build on the findings presented here.

VI. Proposals for Future Research

The substantial differences found between the UK, French and German law reflect little commonality in the understanding of what law should provide to protect individuals from religious discrimination at work. This thesis already touched upon the origins of these differences, as far as this was necessary to make sense of the law. It materialised that prejudice towards religious minorities has infiltrated legal debates, in particular with regard to religious practices of women. To contravene further marginalisation of the individuals involved, I propose the collection and analysis of representative empirical data to confront on an objective basis such prejudicial arguments that have led to the justification of religious discrimination. Although, depending on the scale and depth of such a study, the timeframe could be considerable, existing research and output⁶ could be utilised as a basis to set priorities, and then remodelled to focus on religious discrimination in employment. The advantage of a far-reaching study of the pertinent prejudice is the ability to make use of the data in parliamentary debates and courts, thus ensuring the impact of such research.

More generally, I also propose further interdisciplinary research in the field of religious discrimination. In the light of the close and complex interaction of law, politics and sociology in the field of religious discrimination, it would also be fruitful to elaborate on these relationships. For example, findings from these disciplines could be coordinated to develop fairer and more elaborate integration policies, frameworks for interfaith dialogue, and legislation capable of overcoming discrimination. Therefore, a more thorough investigation

⁶ For instance, internationally the vast, comprehensive results and evaluation from Esposito JL and Mogahed D, *Who Speaks for Islam? What a Billion Muslims really Think* (New York: Gallup Press, 2007), and, at national level, the Allensbach Studie "Zuwanderer in Deutschland", http://www.bertelsmann-stiftung.de/cps/rde/xchg/SID-2C05A5D3-BC8DB2E1/bst/hs.xsl/nachrichten_96355.htm (accessed 15 March 2014); Wiese K, *Lehrerinnen mit Kopftuch – Zur Zulässigkeit eines Religiösen und Geschlechtsspezifischen Symbols im Staatsdienst* (Berlin: Duncker & Humblot, 2008).

of politics and sociology research is suggested, ideally in a joint effort with experts from these fields. The advantage of such a venture would be the relative ease of access to quality scholarship from all three subject areas and the potential to find comprehensive and viable solutions for theoretical and practical problems.

Both proposed avenues for research could, at the same time, be effectively used to underscore the need for dialogue, improving law and policy, as well as for drafting codes of practice for employers. Thus, benefits of the research for the individuals and work environments involved can be expanded, leading on to transformation within society as a whole.

VII. Final Remarks

This thesis strived to highlight the legal context within which religious discrimination at work occurs in the UK, France and Germany. For this purpose, it critically evaluated the law governing these incidents in light of their (lack of) compliance with the chosen international and supranational law frameworks. Soon after starting this investigation, it became clear that this topic entails much more than a pure legal comparison, but instead required the consideration of a wide range of factors. These factors helped to explain vast disparities between different national laws and mirrored underlying, clearly diverging attitudes, basically regarding the ways in which individuals deal with perceived or actual 'otherness'. A contrasting picture emerged between the UK and French position, whereby in the UK 'otherness' as such does not constitute a legal problem, whilst in France the law targets minority religious manifestations. One could even go as far as to say that French law on religious discrimination resembles law in totalitarian states, defined as aiming for "homogeneity or, alternatively, subordination, repression, and/or persecution of the other" and cultivating "a sense of group-defined superiority and domination, exploit[ing] a sense of xenophobia".⁷ In such a model, this thesis would place Germany, due to its more isolated cases of minority oppression, somewhere between the UK and France.

At a practical level, nonetheless, the UK, France and Germany are and will be similarly endowed with a diverse population, so law needs to tune in better with this *status quo*. Accordingly, I agree with Talbi when he says that "[w]e have to accept each other as we are. Diversity is the law of our time."⁸ Increased proximity requires inclusiveness to secure

⁷ Vyver JD van der, "Limitations of Freedom of Religion or Belief: International Law Perspectives", (2005) 19(2) *Emory International Law Review* 499, at 536.

⁸ Talbi M, "Religious Liberty: A Muslim Perspective", in L Swidler (ed), *Religious Liberty and Human Rights in Nations and Religions* (Philadelphia/New York, 1986), at 176.

peaceful coexistence in a multi-faith, multicultural society, and law relating to religious discrimination at work can play a vital role in this quest. To support and thus produce inclusive law, we have to become confident enough in our own beliefs, so we can respect and appreciate those of others. Education focused on critical thought is, therefore, the fundamental, long-term solution, and substantively neutral interpretations of church-state relations can be a strong element in making law supportive of this transformation.

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