

## Article

# How to Strengthen Protection of (Religious) Minorities and Cultural Diversity under EU Law: Some Lessons from Human Rights Protection System

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**Abstract:** The paper is split into two parts. The first part starts with the analysis of Views adopted by the UN Human Rights Committee on *Yaker and Hebbadi v. France* cases concerning the French Act prohibiting the concealment of the face in public. These Views are then compared with the judgment *S.A.S. v. France* delivered by the European Court of Human Rights on a similar case. This comparison shows that the principle of non-discrimination and, in this vein, intersectional discrimination play a critical role in assuring the effective protection of Muslim women wearing religious clothing. Analysis of *S.A.S.* is completed by highlighting the most relevant weaknesses of religious minority protection in the case-law of the European Court of Human Rights. Some references are also made to freedom of religious clothing in the workplace, underlining the critical role that can be played in this regard by the duty of reasonable accommodation. The second part identifies the most significant shortcomings characterizing the protection of religious minorities under European Union law. In conclusion, this paper tries to highlight which lessons can be learnt from the human rights system—examined in the first part—in order to strengthen minority protection in the EU.

**Keywords:** freedom of religions; freedom to wear religious clothing; cultural identity; religious symbols; European Court of Human Rights; minority protections under EU Law; minority rights



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## 1. Introduction

This contribution aims to develop the analysis of the interplay between the freedom of religion, on the one hand, and the protection of minority rights grounded in religious identity, on the other, bearing in mind the necessity of combining these approaches in order to foster the protection of members of religious communities. On that occasion, the nexus between these approaches will be studied, exploring cultural practices of minorities having a migrant background;<sup>1</sup> in particular, this paper will focus on the wearing of the Muslim headscarf and full-face veil.

This specific topic can be interesting for several reasons. Firstly, freedom to wear religious clothing is covered not only by freedom of thought, conscience and religion, but also by the right to cultural identity. Both the headscarf and full-face veil are perceived as a way to manifest not only one's religious conviction, but also one's cultural and personal identity.<sup>2</sup> Secondly, laws and regulations banning some religious clothing have a disproportionate impact on members of some religious minorities, particularly Muslim communities; as a consequence, the prohibition of religious clothing involves the principle of non-discrimination on the grounds of religion. This principle can be perceived as an individual right, but it can also play a critical role in reinforcing minority protection; as a matter of fact, it is widely recognized as one of the rights that must be guaranteed to minorities, along with the right to existence, to identity and diversity, and to participation.<sup>3</sup> Certainly, human rights bodies and Courts cannot adopt positive actions, which are among the most important legislative measures to promote minority rights; nevertheless, recognizing a discrimination suffered by a person *as member* of a (religious) minority is an important step to protect minorities against assimilation. Thirdly, religious clothing,

and in particular the Islamic headscarf and full-face veil, involves gender equality. On the one hand, the headscarf and full-face veil can be imposed to women and girls by their family and community in order to maintain women in a subjugated role. However, on the other hand, the wearing of religious symbols can be a free and autonomous choice made by women in order to express a key part of their religious and cultural identity. Against this background, a great debate has arisen around bans on wearing these religious symbols (and, in particular, the full-face veil). Indeed, these banning acts are not only perceived as a limitation of the freedom of religion. These acts can also be seen as instruments promoting gender equality of Muslim women against cultural practices imposed against their will. At the same time, they can also become a boomerang that, preventing Muslim women to go out with a veil, further limits their chances of integration.<sup>4</sup> In the light of that, when these gender-sensitive practices are at stake, it is important to adopt a gender equality approach able to detect intersectional discriminations.

This paper is split into two parts. The first part will start with the analysis of Views adopted by the UN Human Rights Committee (Committee or HRC) on *Yaker v. France*<sup>5</sup> and *Hebbadi v. France* cases<sup>6</sup>. Both cases concern the French Act No 2010-1192 prohibiting the concealment of the face in public, which was challenged by two Muslim women wearing the niqab. These are not the first occasions in which the Committee dealt with the issue of freedom to wear religious clothing; however, in the previous occasions—concerning the Muslim headscarf and Sikh turban<sup>7</sup>—the Committee, following its usual approach, had elaborated its Views, simply assessing the suitability of justifications provided by the defendant State. Instead, in *Yaker* and *Hebbadi* Views, the Committee started from this usual approach but, after ascertaining the lack of State party justifications, it went on analyzing the merits of the contested measure. In doing so, the human rights body applied the necessity test typical of the assessment made, for example, by the European Court of Human Rights (ECtHR), but, unlike this Court, it does not apply the doctrine of the margin of appreciation.<sup>8</sup> This in-depth evaluation permits to compare these Committee's Views and judgement delivered by the ECtHR in the analogous case *S.A.S. v. France*. This comparison will show that the principle of non-discrimination and, in this vein, intersectional discrimination play a critical role to assure the effective protection to Muslim women wearing religious clothing. Analysis of *S.A.S.* will be completed, pointing out the most significant shortcomings of religious minority protection in the case-law of the ECtHR. In this regard, some references will be made to freedom of religious clothing in the workplace, underlining the critical role that can be played in this regard by the duty of reasonable accommodation for religious reasons. This measure, widely recognized in the USA and Canada legal system—not analyzed in depth in this paper—can play a strategic role in allowing members of religious minorities to manifest their religious identity.<sup>9</sup>

The second part will aim to study the protection of religious minorities and cultural diversity under EU law. After providing an overview of relevant EU primary law, considerable attention will be paid to judgements delivered by the Court of Justice of the European Union (CJEU) in *Achbita*<sup>10</sup> and *Bouagnaoui*<sup>11</sup> cases, in which the Court has first dealt with the use of religious clothing at work. This analysis will consent to identify the most significant shortcoming characterizing the protection of religious minorities under EU law. Finally, the conclusions will try to highlight which lessons can be learnt from the human rights system—shortly examined in the first part—in order to strengthen the minority protection in the EU.

## **2. The “Minority-Friendly Approach” of the International Covenant on Civil and Political Rights: the Paradigmatic Views *Yaker v. France* and *Hebbadi v. France***

The International Covenant on Civil and Political Rights (ICCPR) is one of the most important binding international instruments on (religious) minority rights. Indeed, according to Article 27, persons belonging to ethnic, religious or linguistic minorities cannot be denied the right to enjoy their own culture, to practice their own religion, and to use their own language. This provision has been significantly applied by the HRC to protect

the right of linguistic minorities to use their own language, and, in particular, the right to the cultural identity of national minorities and indigenous people. Instead, less relevance has been recognized to religious minorities. This is certainly because, as specified by the General Comment No. 23 on the rights of minorities, Article 27 guarantees a right that is «distinct from, and additional to»<sup>12</sup> other rights recognized by the ICCPR. With specific regard to religious minorities, this right is additional to freedom of thought, conscience and religion, enshrined in Article 18 ICCPR. At the same time, in its General Comment No. 22 (1993) on freedom of religion, the HRC recognized a deep connection between Articles 18 and 27.<sup>13</sup> Moreover, the Committee has conceived the right not to be discriminated on the grounds of religion not only as an individual right, but rather an instrument to protect religious minorities. This attention to religious minorities significantly emerges in the General Comment No. 22 (1993) when the HRC expressed its concern about any discrimination against religion «for any reasons, including the fact that they [ . . . ] represent religious minorities that may be the subject of hostility by a predominant religious community».<sup>14</sup>

The “minority-friendly approach” characterizing the HRC quasi-jurisprudence can be significantly grasped by analyzing the two landmark Views adopted by the HRC in *Yaker v. France* and *Hebbadi v. France* cases. Both concern two Muslim women wearing the niqab who, after being stopped for an identity check, were prosecuted and convicted under the French Act No 2010-1192. Before the Committee, they claimed not only that the national Act implies a violation of their right to thought, conscience and religion (Article 18 ICCPR), but also that the banning represents an indirect discrimination in violation of the principle of non-discrimination (Article 26 ICCPR).

As for freedom of religion, the Committee examined the two objectives, which, according to France, would justify the limitation of freedom of religion, namely, the protection of public safety and public order, and the protection of rights of others. As for the first objective, the HRC, while recognizing the necessity that individuals, on certain circumstances, reveal their face, pointed out that the State has not demonstrated why the wearing of a full-face veil poses such a threat to public safety and public order to justify a blanket ban. Moreover, even assuming the existence of a threat to public order and public security, the State has not proved that the blanket ban set out by the Act is proportionate to the pursued objective. The Committee paid a great deal of attention to the proportionality test, because it stressed that the ban has «a considerable impact on the author as a Muslim woman wearing the full-face veil» (§7.8). As for the second alleged objective, namely, the protection of rights and freedoms of others, the State based its argument on the idea that the Act would be necessary to assure the minimum requirements of “living together”. According to the HRC, this notion is too vague and abstract, and the State had not clarified which fundamental rights would be infringed by the wearing of a full-face veil in a public space. Also in this regard, the Committee stressed that, even if the concept of living together would constitute a legitimate aim, the blanket ban, which significantly restricts the freedom of religion of the authors due to their choice to wear the full-face veil, is not proportionate.

For this analysis, the application given by the HRC to the principle of non-discrimination on the grounds of religion is much more interesting. The Committee refused the State’s argument that the ban generally covers any clothing aiming to conceal the face, regardless of its religious connotation. As underlined by the two authors of the communications, the HRC highlighted that, firstly, during the debate preceding the adoption of the Act, the ban was seen as a solution to prohibit the use of the full-face veil; secondly, it has mainly been enforced against women wearing the niqab or burqa. The Committee also remarked that, although the Act does not make a specific reference to the ban of the full-face veil, it excludes from its scope of applications most circumstances of face covering in public (i.e., for health or professional reasons, sport, artistic or traditional festivities or events) and, ultimately, limits the applicability of the ban to the full-face veil. In light of the above, the Committee held that the Act, while being formulated in neutral terms, mainly covers the full-face veil, which represents «a form of religious observance and identification for a *minority of Muslim women*» (§7.13). This formulation is really interesting

from a double point of view. Firstly, the Committee overcame an individualistic approach focused on the discrimination suffered by the *individual* victim, and it stressed the link existing between this *discrimination* and the *minority* to which she belongs. Secondly—and this certainly represents one of the more meaningful elements of these Views<sup>15</sup>—referring to the “minority of Muslim women”, the Committee introduced a gender perspective and recognized the intersectional discrimination experienced by women wearing a full-face veil; as a matter of fact, this is a discrimination based not only upon religion, but also upon gender.

The Committee continued its analysis assessing whether the differentiated treatment introduced by the French Act is based upon reasonable and objective criteria, and in particular whether it can be justified in the light of the legitimate aim to protect women who do not want to cover their faces and risk being forced to by social or family pressure. In this regard, the Committee firstly pointed out that, while this kind of pressure can exist, the wearing of the full-face veil can also be a free choice made by women, also to stake an identity claim. Secondly, recalling what it had already stressed in its Concluding Observations adopted in 2015 on the fifth periodic report submitted by France<sup>16</sup>, the HRC underlined that the disproportionate effect of the ban on the members «of specific religions and on girls» can cause a «feeling of exclusion and marginalization»<sup>17</sup> among Muslim women, confining them at home and impeding their access to public spaces. Finally, the Committee highlighted that the criminal nature of the sanctions imposed on women wearing the full-face veil is totally unproportionate.

Very meaningfully, both the gender approach and the minority perspective are further developed in the two concurring opinions alleged to the Views. As regards the protection of minorities, Ms. Brands Kehris and Cleveland underscored the fact that the State party had not clarified how to respect the rights of persons belonging to religious minorities and to protect pluralism against the dominant position of the majority.

With regard to gender equality, according to Ms. Brands Kehris and Cleveland, the thesis argued during the parliamentary debate that the wearing of the full-face veil is in itself oppressive and cannot be the result of a free and autonomous decision is questionable for two reasons. Firstly, this argument can have the effect of reinforcing a stereotyped perception of Muslim women, and increase prejudices and intolerance towards them and Muslims more generally. Secondly, recalling what was already emphasized by the Special Rapporteur on the freedom of religion<sup>18</sup>, Ms. Brands Kehris and Cleveland stressed that «the State or the majority’s view» on the oppressive nature of the practice must be «*accommodate[d]*» with the «author’s own explicit choice to wear certain clothing in public to manifest her religious belief».<sup>19</sup>

On this point, the Joint concurring opinion of Ms. Brands Kehris, Cleveland, and Kran, and of Mr. Heyns and Shany deserves to be specifically mentioned. They took the view that the wearing of the full-face veil is a discriminatory practice expressing women’s subjugated role. In the light of that, they held that Articles 2(1), 3, and 26 ICCPR and Article 5 (a) of the Convention on the Elimination of All Forms of Discrimination against Women imply France’s obligation to take all appropriate measures to eradicate this conduct. However, in the independent experts’ views, the custom of the full-face veil can be eliminated by implementing measures, such as education and awareness-raising programs, criminalization of conducts aiming to force women to wear it, and bans limited to some specific contexts (i.e., teachers in public schools, or government employees) enforced through non-criminal sanctions. In contrast to the blanket ban, these measures would be able to respect the right to privacy and religious freedom of women who freely choose to wear the veil, and, at the same time, they might promote gender equality.

### **3. The Weak Protection of (Religious) Minority Rights in the Case-Law of the European Court of Human Rights**

A comparison between the Committee’s Views and the solution taken by the ECtHR in relation to the freedom to wear religious clothing consents to stress the added value

characterizing the approach adopted by the Committee. This comparison will be made by drawing particular attention to two different aspects: on the one hand, the protection of pluralism, which is linked to minority's rights, and on the other, the promotion of gender equality, deeply connected with the principle of non-discrimination.

As already recognized elsewhere (Ferri 2017), the ECtHR has elaborated a restricted and contradictory notion of religious pluralism. Taking the example of ideological pluralism, according a strong and steady line of Court's jurisprudence, States have a positive obligation to promote the existence of a public sphere in which different ideas can be expressed and debated. Instead, the case law on positive obligations flowing from the freedom of religion is rather underdeveloped and incoherent. On the one hand, the Court has stressed the importance of religious pluralism, underlining that States must promote mutual tolerance between different religious groups but, at the same time, they must not remove the causes of tensions by eliminating pluralism.<sup>20</sup> On the other hand, in several decisions on the freedom to wear religious clothing, the Court has admitted severe restrictions on religious pluralism in public institutions and, more generally, in the public sphere.<sup>21</sup> Quite paradoxically, in these judgements, the Court has qualified in terms of positive obligations the limitations to the freedom of wearing religious clothing, which it believes are necessary to ensure the interests of different religious groups.<sup>22</sup>

This strict notion of religious pluralism is linked with the protection of (religious) minority rights under the European Convention on Human Rights (ECHR). In this regard (Medda-Windischer 2003), it is important to recall that, although the Convention does not include any specific provisions on minorities, the Court has been able to guarantee protection to them by means of rights which the Convention assures to single individuals, such as the right to family and private life (Article 8), freedom of religion (Article 9), freedom of expression (Article 10), and freedom of association (Article 11), taken alone or in conjunction with the principle of non-discrimination (Article 14). However, as underlined by some authors (Toivanen 2019, p. 68), the case-law elaborated by the Court in this regard is quite «weak». With specific regard to religious minorities, it is characterized by a «liberal and individualistic approach» (McCrea 2016). Certainly, the collective dimension of the freedom of religion—explicitly mentioned by Article 9 ECHR—has been stressed by the Court which, for example, has pointed out the necessity to protect religious communities against any State's interference, because their autonomous existence is «an issue at the very heart» of the right enshrined in Article 9 ECHR.<sup>23</sup> However, the communitarian dimension of the freedom of religion is protected by the Court because in its absence «all other aspects of the individual's freedom of religion would become vulnerable».<sup>24</sup> In other words, the collective dimension is protected insofar as it is *strictly functional* to the protection of its individual facet. Not surprisingly, this dimension has been emphasized by the Court in cases concerning the refusal of national authorities to legally recognize or register a religious community. In this regard, the ECHR perspective is very different to the ICCPR approach. The individualistic attitude of the ECtHR entails that, when the Court deals with the freedom of religion of a person belonging to a religious minority, it focuses its analysis on his/her *individual* right to freedom of religion, without paying any attention to the fact that he/she belongs to a minority. Minority membership, and the comparison between the applicant's condition and that of persons belonging to majoritarian groups, only emerges when the Court assesses a violation of the principle of non-discrimination. Nevertheless, even at this stage, the ECtHR adopts an individualistic approach. In this regard, judgement *S.A.S. v. France* is paradigmatic. This much-debated decision has been deeply analyzed, especially as regards the position taken by the Court on violation of the right to private life (Article 8 ECHR) and freedom of religion (Article 9 ECHR). However, the solution adopted by the Court with regard to the principle of non-discrimination and the comparison with the solution adopted by the HRC in the Views analyzed above are very indicative of the Court's approach towards minority rights.

Both the applicant in *S.A.S.* and the communications' authors in *Yaker* and *Hebbadi* complained of indirect discrimination. Unlike the HRC, the ECtHR, recalling what was

stated in relation to the violation of Articles 8 and 9, took the view that the French ban has an objective and reasonable justification. The different solution adopted by the Court is certainly the direct consequence of the position taken as regards the alleged violation of the right to private life and freedom of religion. However, reading the paragraphs of the judgement on this point consents to seize the perspective adopted by the Court. The Court simply highlighted that Muslim women wearing the full-face veil in public «are particularly exposed to the ban»; so, the French law produces «specific *negative* effects» on their situation. It is meaningful that the ECtHR did not make any explicit reference to the «*disproportionate* impact» of the Law, which was instead recognized by the HRC. The Court's approach clearly emerges from its language. As stressed by [Henrard \(2019\)](#), it shows an «avoidance tactic» in relation to discrimination, which is further contradictory considering that the Court itself, recalling some of the third-party interventions, expressed its concerns about the spread of Islamophobia, intolerance, and stereotypes against «certain categories» (and not minorities!) of the population. Moreover, it is necessary to point out that the lack of recognition of the discriminatory nature of the ban also prevented the Court from analyzing in depth this kind of discrimination, and in particular from identifying its gender dimension and intersectional nature.

Against this background, it is not surprising that the duty of reasonable accommodation in the religious field has found very limited recognition by the ECtHR, particularly when the requested accommodation comes from workers who wish to express their religion in the workplace.<sup>25</sup> According to a steady line of jurisprudence of the Court, the resignation and dismissal of workers, who were unable to comply with working obligations due to the observance of their religious duties, are legitimate in the light of workers' freedom to undertake contractual obligations and, then, to resign. In the Court view, the worker, signing the employment contract, freely accepts to be bound by certain work obligations incompatible with some religious obligations. At the same time, the employee keeps the freedom to resign throughout the duration of the contract, and this freedom is seen as «the ultimate guarantee of his freedom of religion».<sup>26</sup>

These principles have been applied by the ECtHR to several cases of workers asking for derogation to usual working hours to perform religious duties or to wear religious clothing in the workplace. This latter issue has generally involved public employees. For example, in *Dahlab v. Switzerland*<sup>27</sup> and *Kurtulmus v. Turkey*<sup>28</sup> cases, concerning a primary school teacher and a university professor who were prohibited from wearing their headscarfs when teaching, the Court has referred to the principle of neutrality, according to which public servants must perform their duty, keeping a neutral approach towards religious beliefs and philosophical convictions. This implies that they are requested to refrain from expressing their religious identity in order to not compromise the neutrality of the public service they provide.

A critical turning point in the European case-law on freedom of religion in the workplace is represented by judgement *Eweida and Others v. the United Kingdom*<sup>29</sup>. On that occasion, the Court ruled on four different cases. Nadia Eweida, a British Airways employee, and Shirley Chaplin, a nurse employed at a state hospital, complained about their employers' uniform policies, which prevented them from visibly wearing a cross around their necks. Lillian Ladele, a registrar of births, deaths and marriages, and Gary McFarlane, a couple's therapist, alleged that they were dismissed because of their refusal to carry out their function with homosexual couples, which they considered contrary to their religious beliefs. Although the Court found a violation of the freedom of religion only in *Eweida* case, this decision is very meaningful for two different reasons. Firstly, the ECtHR stated that the freedom to resign and change job cannot be considered automatically as a sufficient guarantee of the freedom of religion; instead, the ability to change jobs must be weighed in the overall balance concerning the assessment of the restriction's proportionality. Secondly, recalling its case-law on positive obligations, the Court underlined that, when the alleged violation is the result of a private company's conduct, as in the *Eweida* and *McFarlane* cases, the issues at hand must be evaluated in the light of the State's positive obligations «to

secure» freedom of religion (para. 84). In other words, States have the obligation to take measures to protect freedom of religion, even in the sphere of private relations between individuals; this implies that national authorities must ensure a fair balance between the competing interests of the worker and of his/her employer.

As already mentioned, the gender approach adopted by the ECtHR is very lacking. In the Court's case-law, it is possible to detect a significant evolution as regards the interplay between gender equality and Muslim religious symbols. In the *Dahlab* case, the Court took the view that the wearing of a headscarf can have some proselytizing effects on pupils, because it can be perceived as being imposed on women by a religious obligation incompatible with gender equality. The «paternalism» of this position, already questioned by Judge Tulkens in her dissenting opinion to *Leyla Sahin* judgment<sup>30</sup>, was definitely left by the Court in *S.A.S.* On that occasion, the Grand Chamber rejected the Government's argument that the full-face ban is necessary to assure the principle of gender equality, stating that «a State Party cannot invoke gender equality in order to ban a practice that is defended by women—such as the applicant—in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms»<sup>31</sup>. Although the overcoming of its previous paternalistic stance must certainly be welcomed, as underlined above, on that occasion, the Grand Chamber totally put aside the principle of gender equality. Indeed, it did not give any consideration to the fact that a burqa ban implies intersectional discrimination based not only upon religion, but also upon gender.

#### 4. The Protection of Cultural Diversity and (Religious) Minority under EU Law

Several authors have stressed the dichotomy characterizing the minority protection under EU law. EU external policy pays a great deal of attention to cultural diversity. In this regard, it is important to recall partnership agreements between the EU and third countries, which usually include meaningful cultural clauses aiming to promote cultural cooperation, intercultural dialogue, and cultural heritage. From another side, the Copenhagen criteria that must be met by candidate member countries make reference, among others, to respect for and the protection of minorities<sup>32</sup>; the monitoring reports adopted by the European Commission throughout the accession process reserve special attention to minority protection. Instead, promotion of cultural diversity at internal level leaves much to be desired.

The first European acts recognizing the necessity to protect cultures and languages of minorities date back to the 1980s with the adoption of some meaningful Resolutions of the European Parliament.<sup>33</sup> This attention has been formalized with the Treaty of Maastricht, which attributed to the Community the competence to «contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity». Beginning with this provision—which is now Article 167 TFEU—there is a clear focus placed by the Community (now the Union) on cultures of *Member States*, and the necessity to respect the diversity characterizing them. According to Article 167(2), the Union's action must aim to encourage cooperation between Member States, support, and supplement their action as regards, among others, «conservation and safeguarding of cultural heritage of European significance». As now specified by Article 6(c) TFEU, this must be qualified as a simple supporting, sustaining and coordinating competence.

It is important to remark that Article 167, at paragraph 4, includes a meaningful «cultural impact assessment clause» (Toggenburg 2000, p. 7)<sup>34</sup>: «The Union shall take cultural aspects into account in its action under other provisions of the Treaties, *in particular* in order to respect and to promote the diversity of its cultures». This entails the existence of some «implicit cultural powers of the EU» (Psychogiopoulou 2013, p. 170). The promotion and respect of cultural diversity can be pursued not only within EU cultural policy: as the taking into account of cultural aspects must be also integrated in all EU actions having a cultural dimension, the promotion and respect of cultural diversity can be indirectly realized within EU policies other than cultural ones. This background is really interesting, as it implies

that the EU should also take into account the cultural dimension of integration measures for third-country nationals, in relation to which it can exercise a supporting competence (Article 79(4) TFEU). Moreover, in this regard, the EU should encourage the promotion and respect of cultural diversity; indeed, the expression “in particular” employed by Article 167(4), does not exclude the possibility to also promote cultures of third-country nationals (Adinolfi 2008).

In a similar vein, Article 167(4) TFEU implies some implicit EU powers in the field of minority protection. However, as underlined by a prominent author, this risks placing minority protection in a subordinate position where it forms «the object of European legislation whose central aim is non-cultural» (De Witte 2004, p. 115). The same cannot be said for cultural diversity; indeed, intersecting nature of culture makes it more feasible to pursue cultural diversity as an indirect measure inserted within another (non-cultural) policy.

Article 167 TFEU is coherent with Articles 2 and 3 TEU. Article 2 qualifies the respect for rights of persons belonging to minorities as one of the values on which the Union is founded; Article 3 includes, among the aims of the EU, the respect of «its rich cultural and linguistic diversity» and the safeguarding and enhancement of «Europe’s cultural heritage». The formulation of this provision is really expressive of the EU approach toward cultural diversity. Firstly, the reference to the respect of the EU’s cultural diversity gives a «limiting» connotation to this provision. This trait was particularly evident in the previous version of the provision, which referred to cultural diversity of *Member States*; due to this reference, the provision was seen as a «limit to the integration process» (Adinolfi 2008). However, this limiting function seems to persist now, as well; indeed, although the reference to the diversity of Member States is no longer included in the new version of Article 3, it is still present in Article 167(1) TFEU as a limit to the EU’s action aiming to contribute to the flowering of their cultures of the Member States.

As underlined by some authors (Shoraka 2010; Van Bossuyt 2010), the Treaty of Lisbon has strengthened the protection of minority and cultural diversity, not only because of the introduction of Article 2 TFEU, but also thanks to the entry into force of the EU Charter of Fundamental Rights (EU Charter).<sup>35</sup> Similar to Article 3(3) TEU, the Preamble of the Charter states that the Union promotes common values on which it is founded, «while respecting the diversity of the cultures and traditions of the peoples of Europe». Moreover, the Charter enshrines two meaningful provisions with regard to cultural diversity and the protection of minorities, namely, Article 21, which prohibits discrimination based also upon membership of a national minority, and Article 22 on cultural diversity.

#### *4.1. Article 22 of the EU Charter of Fundamental Rights on Cultural, Religious and Linguistic Diversity*

Article 22 is the outcome of a long discussion on minority protection under EU Law (European Union Network of Independent Experts on Fundamental Rights 2006; Craufurd-Smith 2014). Indeed, the drafting process of the Charter saw two opposite stances: on the one hand, the necessity to strengthen the minority protection under EU law, especially in the perspective of accession of new Member States in which this is a very sensitive issue; on the other hand, the strong opposition of some Member States worried about the emergence of separatist movements. The compromising result is Article 22, which, although recognizing cultural, religious and linguistic diversity, does not explicitly refer to minorities or to their rights.

Needless to say, reference made to cultural (linguistic, and religious) diversity by the Charter is really meaningful; however, a careful analysis of the provision consents to grasp its real weakness. Several doubts exist about the real scope of application and meaning of the provision: Which diversity must be respected by the EU? Diversity *between* Member States or also diversity *within* Member States, and if this latter is the case, what does it mean? Does the duty to respect regional diversity imply the recognition of minority rights? And finally, which is the notion of minority—if anything—implicitly referred to by

Article 22: national minorities historically existing in Europe or also minorities having a migrant background?

Explanations relating to the Charter put some light on these questions. As specified by them, Article 22 is based on Article 167(1) and (4) TFEU, and on former Article 6 TEU<sup>36</sup>. This latter provision referred, among others, to the Union's obligation to respect the national identities of its Member States. Reference made to this principle, now enshrined in Article 4(2) TEU, might confer a state-centered perspective and a «defensive» approach to Article 22: the Union must respect diversity existing *between* Member States in order to protect them against excessive harmonization produced by the interpretation process (Toggenburg 2000, p. 16). A deep link between Article 4 and cultural (and linguistic) diversity is beyond question. Indeed, on some occasions, the CJEU referred both to Article 22 Charter and Article 4(2) TEU to state that European Union law does not preclude a policy aiming to protect and promote a language of a Member State that is both the national language and its first official language.<sup>37</sup> Nevertheless, as Article 22 is also based upon Article 167(1) TFEU, it must be interpreted as implying an obligation to respect not only national, but also regional diversity. Though this entails a recognition of diversity *within* Member States, it is hard to accept the thesis—which is suggestively argued by Arzoz—that Article 22 is a minority protection clause, guaranteeing the right of minority members to «an enforceable right to non-interference by the EU with their minority characteristics» (Arzoz 2008, p. 163).<sup>38</sup> Certainly, as he stressed, the EU Charter is a bill of rights, and so the thesis that Article 22 has the only aim to protect national or regional entities or the diversity in itself is of little bearing. At the same time, the provision's formulation is too general and open-ended to be translated into individual rights of persons belonging to minorities<sup>39</sup> or even collective minority rights.

It must be recalled that, as emerges from its Article 51(1), the Charter includes not only rights, but also principles that must be «observed» both by EU institutions and Member States only when they are implementing EU law.<sup>40</sup> Not being clearly defined by the Charter, distinction between rights and principles is really doubtful.<sup>41</sup> Several scholars have elaborated criteria to clear the distinction. Starting from the Explanation to the Charter, according to which «Principles may be implemented through legislative or executive acts», scholars consider deciding the clear and precise formulation of the provision. Some authors have underlined that when the provision clearly identifies the holder of a claim or an obligation towards an individual, it is a right; instead, when it simply stipulates that EU institutions or Member States (when are implementing EU law) must pursue an objective or protect a value, it is a principle (Guðmundsdóttir 2015; Krommendijk 2015; Lazzerini 2018; Vezzani 2019).

Although the application of these criteria can leave some uncertainty, it seems clear that Article 22 must be qualified as a principle, despite the lack of an explicit qualification by the Explanation to the Charter.<sup>42</sup> The case-law of the CJEU on Article 22 is very poor, and the Court has never taken a position as regards the nature of this provision. A few more references to it can instead be found in Opinions of AGs<sup>43</sup>, who on some occasions have qualified Article 22 as a principle.

As regards the content of this principle, due to the simple reference made by Article 22 to respect—and not to promote—cultural diversity, nothing more than «a negative obligation of non-interference [ . . . ] to avoid jeopardizing cultural diversity» can be identified (Psychogiopoulou 2013, p. 169). In other words, Article 22 cannot entail any obligation to take positive measures to promote cultural diversity.

Finally, it is necessary to consider which notion of cultural diversity this provision refers to and, in particular, if it only includes minorities traditionally existing in Europe or minorities having a migrant background, as well. The Article's formulation does not consent to exclude its application to these latter minorities. As highlighted above, the specific reference made by Article 167(4)—on which Article 22 is based—to European cultures does not exclude the respect and promotion of cultures originating from other contexts.<sup>44</sup> In this regard, it is also relevant that Advocate General (AG) Sharpston in her

Opinion in case *Unal* underlined that EU diversity is also based upon cultures of third-country nationals, and she qualified as «*unduly simplistic*» an interpretation of EU law that does not take into due account the cultural diversity of third-country nationals.<sup>45</sup>

#### 4.2. A Brief Outline on Principle of Non-Discrimination under EU Law

It is necessary to make a brief outline on the principle of non-discrimination under EU law. Article 19 TFEU (previous Article 13 Treaty of European Community) sets out the EU's competence to «take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation». This provision was introduced by the Treaty of Amsterdam, paving the way to strengthen the prohibition of non-discrimination; indeed, as underlined by [Henrard \(2010b\)](#), although the European Court of Justice had already recognized the principle of equal treatment as a general principle of the European Community Law, until the Treaty of Amsterdam, the scope of application of this principle was strictly defined by the Treaty of European Community (TEC). As a matter of fact, this only prohibited discrimination on the grounds of gender and nationality against citizens of other European Community Member States. In other words, the principle of non-discrimination was not conceived as a fundamental right, «but in so far as it contributed (directly) to the goal of the common market» ([Henrard 2010b](#), p. 38). This perspective was significantly overcome with the inclusion of Article 13 TEC. However, as underlined by [van den Berghe](#), although some of the grounds of discrimination included in this provision can be invoked to reinforce the protection of minorities, Article 13 TEC (now Article 19 TFEU) does not provide for «a *specific* legal basis» for their protection ([Van den Berghe 2003](#), p. 171).

The implementation of Article 13 TEC was assured with the adoption of Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin<sup>46</sup> and Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.<sup>47</sup> For this paper, it is particularly interesting to consider the protection assured to religious minorities with a migrant background by these Directives. As clarified by the Preamble of both Directives, they also apply to third-country nationals, although neither of them covers differences of treatment based on nationality. Certainly, some of the grounds of discrimination prohibited by the Directives, and in particular racial and ethnic origin, can be relevant to protect minorities having a migrant background. However—and with specific regard to religious minorities—the two Directives are affected by some important shortcomings with regard to their scope of application and the non-recognition of the duty of reasonable accommodation for religious reasons.

Firstly, the relevance of religion as a ground of discrimination is limited to employment area; indeed, it is mentioned as a relevant ground of discrimination only by the employment equality Directive, which is characterized by a narrower scope of application than the racial equality Directive. Secondly, measures of reasonable accommodation are only set out in favor of persons with disabilities by the employment equality Directive. In this regard, it also needs to be remarked that the proposal aiming to widen the scope of application of the principle of equal treatment irrespective of religion or belief, disability, age or sexual orientation beyond the field of employment, does not include an extension of the duty of reasonable accommodation.<sup>48</sup>

Actually, a duty of reasonable accommodation in the religious field was recognized by the Court of Justice in *Viven Prais* decision dating back to 1976. The case concerned the date fixed for the written test in a competition which coincided with a Jewish feast. As during this day, Jewish followers are not permitted to travel and write, this coincidence prevented one of the candidates from undergoing the test. On that occasion, the Court stated that when the appointing authority is timely informed that a date for a test prevents a person of a particular religion from undergoing the test, it has the obligation to «take *reasonable steps* to avoid» this coincidence.<sup>49</sup> This judgement proves that logic underlying duty of reasonable accommodation is «present between the lines of European

law» (Bribosia et al. 2010, p. 158). Additionally, as envisaged by Henrard (2010a), this logic might be significantly developed by the Court to assure effective protection to religious minorities with a migrant background. Despite these good premises, the judgements delivered in March 2017 by the CJEU on *Achbita* and *Bouagnaoui* cases disappointed any expectation.

#### 4.3. *The Freedom to Wear Religious Clothing before the Court of Justice: Achbita and Bouagnaoui Cases*

In March 2017, the Grand Chamber of the CJEU delivered its first judgements on the use of religious clothing at work. One case concerns Ms. Achbita, a Muslim woman who, after working as a receptionist at G4S for three years, informed her manager about her intention to wear a headscarf during working hours. The management replied informing Ms. Achbita that the company wanted to keep a neutral image, and so it would not have accepted the wearing of a headscarf, as well as any other political, philosophical, and religious symbol. This rule of conduct, which until then was an unwritten rule, was formalized in the workplace regulation of G4S; as a consequence, Ms. Achbita was dismissed due to her refusal to remove the headscarf. The preliminary ruling was raised by the Belgian Court of Cassation, which asked whether the prohibition of wearing a headscarf in the workplace, which arises from an internal rule of the employer prohibiting all employees from wearing visible signs of political, philosophical and religious beliefs during working hours, constitutes direct discrimination according to Article 2(2)(a) of Directive 2000/78.

The Court excluded the existence of direct discrimination. Indeed, it stressed that the internal rule adopted by the undertaking covers any manifestation of political, philosophical and religious beliefs, and so it treats them in the same and undifferentiated way. Although the referring question asked only for the presence of direct discrimination, the Court continued its analysis considering that the referring court could decide to qualify G4S's internal regulation as an indirect discrimination ex Article 2(2)(b). Though this evaluation is ultimately up to the national referring court, the CJEU provided it with necessary guidance to assess whether the prospective indirect discrimination can be justified because it pursues a legitimate aim and the means of achieving this aim are appropriate and necessary (Article 2(2)(b)(i)).

With regard to the legitimate nature of the aim, the Court stated that, when an employer pursues its desire to display a neutral image with its customs, this employer's wish can be qualified as legitimate, because it «relates» to the freedom of conduct of a business, guaranteed by Article 16 Charter. The condition of appropriateness of the measure is met on condition that the policy of neutrality is carried out in a consistent and undifferentiated manner—the evaluation of which is for the referring court. Finally, the Court held that G4S's internal rule is strictly necessary, providing that it only applies to workers being in contact with customers, and if it can be ascertained—which is for the referring court—that, after worker's refusal to take off her headscarf, it was not possible, taking into account the inherent constraints to which the company would have been subject and without imposing it an additional burden, to offer Ms. Achbita an alternative job not entailing any contact with customers, instead of dismissing her.

The *Bouagnaoui* case concerns a design engineer who, since her recruitment to Micropole, wore the Islamic headscarf. Despite a customer, for whom she worked, complaining about her headscarf and asking her not to wear it in the future, she refused to give up wearing the veil. After her refusal, Micropole decided to dismiss her. The preliminary ruling, raised by the French Court of Cassation, was about Article 4(1) Directive 2000/78, according to which «Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate». The referring Court asked whether,

according to this article, “a genuine and determining occupational requirement” can be the decision of an undertaking to satisfy the wish of a customer that its services are no longer provided by a worker wearing the Islamic headscarf.

The Court underlined that, according to its well-established case-law, “a genuine and determining occupational requirement” cannot be represented by the ground on which the difference of treatment is based; it must be «a characteristic *related* to that ground». With specific regard to cases in which a characteristic related to religion can constitute a genuine and determining occupational requirement, the Court adopted a very restrictive approach, stressing that religion can constitute a genuine and determining occupational requirement only in «very limited circumstances». This approach is the consequence of a broad notion of religion adopted by the Court in the light of the case-law of the ECtHR. Moreover, the notion of “genuine and determining occupational requirement” can only cover a requirement that is «objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out»; as a consequence, it cannot include «subjective considerations», such as the employer’s wish to satisfy a particular desire of a customer.<sup>50</sup>

#### 4.3.1. The Lack of References to Fundamental Right to Freedom of Religion

A great astonishment produced by the reading of *Bougnaoui* and, in particular, *Achbita* stems from the lack of any reference to freedom of religion of two involved women. The right to freedom of religion is enshrined in Article 10 Charter. Certainly, neither two preliminary questions made reference to this provision; however, Directive 2000/78/EC, like any other act of secondary law, must be interpreted by the Court taking into account the Charter.

Both in *Bougnaoui* and *Achbita*, the Court started its reasoning for analyzing the notion of religion, as this is not specified by the Directive. The CJEU adopted a broad definition of religion including both *forum internum* and *forum externum*; it came to this notion making reference to Article 9 ECHR and to constitutional traditions common to the Member States—explicitly recalled by the Preamble of the Directive, and to Article 10 Charter.<sup>51</sup> Against this background, the Court properly referred to freedom of religion in order to define the notion of religion employed by the Directive and its scope of application. However, after that, it did not pay any more attention to this fundamental right. Needless to say, limitations on religious clothing in the workplace seriously involve workers’ freedom of religion; and this clearly also emerges from the ECtHR’s judgement *Eweida*, recalled by the Court in *Achbita*.

The non-recognition of the freedom of religion emerges in *Achbita* in relation to a couple of elements.

Firstly, the CJEU does not recognize that it has an important role in the proportionality test. More generally, the test carried out in *Achbita* appears totally incomplete (and very questionable). According to a steady line of jurisprudence, the principle of proportionality implies that the adopted measure must meet three criteria: (a) it must be *appropriate* to pursue the legitimate objective(s) defined by the legislation, (b) it cannot go beyond what is strictly necessary in order to achieve this/those objective(s), and (c) it must be *proportionate stricto sensu*.<sup>52</sup> This latter condition implies that disadvantages caused by the measure must not be disproportionate to the aims achieved; in other words, the Court is requested to strike a balance between the competing interests at stake. Unlike the first two limbs of the proportionality test, the last one is completely missing in *Achbita*. In this judgement, the Court of Justice recalled the ECtHR’s judgement in *Eweida*. The reference is appropriate; indeed, this is the only decision of the Strasbourg Court concerning limitations imposed by private employers on workers’ freedom to wear religious clothing.<sup>53</sup> Nevertheless, the CJEU drew from the ECtHR’s jurisprudence in a very selective way. Indeed, on the one hand, the CJEU found a support in *Eweida* in order to affirm that the employer’s interest to project a specific image of its corporation must be qualified as a legitimate aim—and this was not exactly the ECtHR’s stance in *Eweida*. However, on the other hand, the CJEU forgot the balance between the competing interests at stake, which the ECtHR rigorously searched

for in *Eweida*. Indeed, on this occasion, the ECtHR overcame the freedom to resign doctrine stating that the ability to change jobs must be weighed in the overall balance concerning the assessment of the dismissal's proportionality. This statement led the Court to make a strong and rigorous evaluation of proportionality weighing, on one side of the scale, the applicant's desire to manifest her religious belief and, on the other, the corporation's interests to defend a neutral corporate image. This was the most meaningful part of *Eweida's* reasoning, and it is completely overlooked in *Achbita*.

The lenient nature of the proportionality test is certainly influenced by the notion of religion and conviction proposed by AG Kokott. Unlike the Court, she applied all limbs of proportionality test, considering the proportionality *stricto sensu*, as well. Nevertheless, in this latter regard, she proposed a very questionable notion of religion. While recognizing that religion is an important part of personal identity, she affirmed that religion is not comparable to other characteristics, such as sex, skin colour, ethnic origin, sexual orientation, age or a person's disability. These latter are «unalterable facts» that cannot be left «at the door» before going at work; instead, religion is an aspect on which a worker «can choose to exert an influence», moderating its exercise during working hours (§116). This conception of religion is not coherent with a steady line of ECtHR's jurisprudence, according to which beliefs and convictions, falling within the scope of application of Article 9 ECHR, are views attaining «a certain level of cogency, seriousness, cohesion and importance»<sup>54</sup>. Kokott's stance was implicitly criticized by Sharpston, who decisively denied a distinction between religion, and other individual features. In Sharpston's opinion, individuals can conceive some elements of their religion as non-compulsory, and, as a consequence, they can give up them or accept a negotiation; however, generally, religious requirements are not able to be confined to some specific moments of the day, and discarded in others. AG Sharpston supported her view by recalling what the Grand Chamber of the CJEU stated in the *Y and Z* judgement.<sup>55</sup> Although the case concerned the identification of acts that can constitute persecution according to the Qualification Directive<sup>56</sup>, this decision is paradigmatic of the notion of religion adopted by the Court. On that occasion, it clarified that the Directive is based upon a «broad» notion of religion, and acts constituting a severe violation of the freedom of religion, relevant for the Directive, include serious acts interfering with the freedom to practice one's religion in private, but also to manifest it publicly.

Secondly, in *Achbita*, the Court denied the existence of a direct discrimination. The possibility to qualify as direct discrimination a rule laid down in the workplace regulations prohibiting employees from wearing religious signs or apparel has been much debated by third intervenes and AGs before the Court, and among scholars after the judgement. The Court, following the Opinion of AG Kokott, took the view that the ban imposed by G4S's regulation applies to all visible signs of religious beliefs, and so it does not constitute discrimination between religions; moreover, as it also prohibits the wearing of visible signs of political or philosophical beliefs, it does not perpetrate any discriminations between religions and non-religious convictions.

This position shows some shortcomings. As underlined by scholars ([Ouald Chaib and David 2017](#); [Brems 2017](#); [Spaventa 2017](#)), the Court and AG Kokott wrongly made the necessary comparison to identify the presence of a direct discrimination. The circumstance that the ban indistinctly covers all religious beliefs and philosophical convictions does not exclude discrimination. Indeed, the comparison must be done between workers wishing wear a symbol expressing their—religious or not religious—conviction, on the one hand, and workers not having this desire, on the other.<sup>57</sup> In this respect, it needs to be remarked that AG Kokott recognized the existence of this difference, but in her view, this does not represent a less favorable treatment directly linked to religion, because not every interference with freedom of religion or belief constitutes an act of discrimination. This stance is highly questionable, as it does not take into due account the right to freedom of religion and belief, recognized by Article 10 Charter. In this regard, it is really meaningful that AG Sharpston, in her Opinion in the *Bouagnaoui* case, concluded for the existence of a direct discrimination underlining the different positions between Ms. Bouagnaoui

and any other design engineer employed by Micropole who had not chosen to wear a symbol to manifest his/her religious conviction or non-religious belief. The AG reached this conclusion by highlighting that, although not explicitly mentioned, the Directive also prohibits difference of treatment on the grounds of the *manifestation* of religion, and this is the case of Ms. Bougnaoui—whose dismissal was not on the grounds of her religion, but the consequence of the manifestation of her religion. This interpretation is elaborated by the AG making reference to the fact that, according to Article 9 ECHR and Article 10 Charter, the right to manifest one's religion is «an intrinsic part» of the freedom of religion (§87). Additionally, in a footnote, she recalled that AG Bot, in his Opinion in *Y and Z* cases, stressed that if a person is required to conceal, amend or forego the public manifestation of his/her belief, they would be being deprived of a fundamental right assured by Article 10 Charter.

#### 4.3.2. The (Mistaken) Application of Duty to Reasonable Accommodation for Religious Reasons

As already recalled, in *Achbita*, the Court took the view that G4S's internal rule was strictly necessary on the condition that it only applied to workers being in contact with customers, and if it can be ascertained that, after the worker's refusal to take off her headscarf, it was not possible, taking into account the inherent constraints to which G4S would have been subject and without imposing it an additional burden, to offer Ms. Achbita a job not entailing any contact with customers. The circumstance that the legitimacy of the employer's internal rule supposes to have ascertained the impossibility to find an alternative solution to Ms. Achbita's dismissal, giving her a job not implying any contact with customers, is certainly meaningful. As a matter of fact, the Court implicitly referred to a prospective accommodation, while—as it will be stressed below—it gave a wrong and questionable application to this duty.

As already recalled, Directive 2000/78 sets out a duty of reasonable accommodation only with regard to disabled persons. According to Article 5, «employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a *disproportionate burden on the employer*». In the wake of the notion of reasonable accommodation developed in the United States and Canada, the employer's duty of reasonable accommodation is excluded when it imposes a disproportionate burden on the employer.

Although Directive 2000/78 does not provide for a duty of accommodation for religious reasons, its recognition in this field by the CJEU cannot be excluded, as proved by the already recalled *Vivien Prais* decision. So, it is not surprising that both AGs and the Court considered the employer's duty to accommodate Ms. Achbita's desire to wear her headscarf. In this respect, the views of the two AGs were totally diverging. AG Kokott stressed that, according to Directive 2000/78, an employer cannot be requested to implement reasonable accommodation for religious reasons. She admitted that individual solutions can be sought in the light of specific circumstances, but in her opinion these solutions cannot imply a «significant organizational burden»<sup>58</sup> for the employer. The position of AG Sharpston is completely different. According to her, the employee does not have an absolute right to define the conditions under which he/she works; at the same time, the employer cannot immediately force the employee to choose between job and religion. On the contrary, and in line with the evolution of ECtHR's jurisprudence, it is necessary to reach «a solution that accommodates both the employee's right to manifest his religious belief and the employer's right to conduct his business»<sup>59</sup>. The AG went on considering the extreme case in which any solution cannot be found; she affirmed that, in this situation, the employee's right to manifest his/her religion must have priority over the employer's interest to maximize profit.

As already recalled, the Court referred to the necessity to search a solution combining Ms. Achbita's freedom of religion and her employer's interest; however, the prospective

accommodation proposed by the Court is highly questionable for a couple of reasons. Firstly, the Court subordinated the admissibility of an accommodation to the condition that the employer is not «required to take on an additional burden». This strict clause is not in line with the conditions set out by Article 5 Directive 2000/78 in relation to disabled persons. Indeed, according to this provision, the admissibility of the accommodation is not excluded by the existence of an «additional burden» taken on by the employer; it is only a «disproportionate» burden that makes the accommodation unreasonable and so not owed. It must be stressed that the solution taken by the Court is even in contrast with the position of AG Kokott who, although recognizing a limited room for reasonable accommodation in the religious field, subordinated its admissibility to the absence of «significant organizational burden»<sup>60</sup> for the employer. Secondly, as denounced by scholars, the solution proposed by the Court to accommodate Ms. Achbita's freedom of religion and her employer's interest is to offer to her a job not implying any contact with costumers. This perspective would entail «“hiding the employee” [and] is not a human rights solution» (Ouald Chaib and David 2017).

#### 4.3.3. The Non-Recognition of Intersectional Discrimination

EU law does not explicitly recognize the notion of intersectional discrimination. However, both Directives 2000/43/EC and 2000/78/EC refer in their Preambles to «multiple discrimination» women are victims. As argued by some scholars, in the light of these references and of the wide range of prohibited grounds of discrimination covered by EU law, it would be possible to promote an «integrated approach» (Schiek 2005) to EU equality law aiming to recognize intersectional discrimination. This chance has not (yet) been grasped by the Court of Justice (Schiek 2018), and *Achbita* and *Bouagnaoui* are paradigmatic in this sense.

It is surprising and clearly questionable that the Court dealt with the issue of wearing Muslim symbols without paying any attention to stereotypes and prejudices against Muslims—and in particular Muslim women—existing in Europe. As stressed by Howard (2017), this is even more surprising due to the spread of these stereotypes in EU Member States where the preliminary questions were raised.

The Court's silence is particularly evident considering that both AGs made reference, although in an implicit and unpersuasive way, to intersectional discriminations and gender equality. The view expressed by AG Kokott is clearly questionable. Applying the proportionality test, and in particular balancing the different interests involved, she pointed out the necessity to take into account the presence of differences of treatment on other grounds.<sup>61</sup> In spite of that, she came to deny that G4S's company rule entails a particular disadvantage for employees of a particular ethnic background or particular sex; moreover, she denied that measures such as the regulation adopted by G4S make the economic and social integration of Muslim women more difficult. Despite this highly questionable outcome, the reference made by the AG, which, on the other hand, makes the Court's silence even more deafening in this respect, must be certainly welcomed.

The non-recognition of the disproportionate effect of G4S's regulation prevented the Court from recognizing a direct discrimination. In this regard, it must be recalled that, as stated in *CHEZ Razpredelenie Bulgaria* by the CJEU, the fact that a measure is based upon stereotypes and prejudices can be indicative of direct discrimination (on that occasion, on the grounds of gender and ethnic origin). In the light of that, AG Kokott herself recognized that her conclusion in *Achbita* would have been different if the ban was proved to be based on religious stereotypes and prejudices, but she excluded this was the case. Nevertheless, this view cannot be shared; indeed, as also emerges in the Opinion of AG Sharpston, the existence of prejudices underlying banning regulation is beyond question.<sup>62</sup>

## 5. Concluding Remarks

The first part of the paper consented to learn some lessons. The effective protection of cultural and religious practices of minorities must be based on three elements: firstly,

protection of the right to freedom of religion and—when recognized—of cultural identity; secondly, reinforcement of the principle of non-discrimination conceived not only as an individual right, but also as a means of protecting members of minorities, and, in this vein, recognition of the duty of reasonable accommodation for religious reasons; and finally—when cultural and religious practices also involve a gender dimension—the identification of intersectional discriminations. These lessons can be very useful in strengthening the protection of religious minorities and cultural diversity under EU law, on which the second part of this paper focused. Based on this analysis, it is possible to say that the protection of minorities and cultural diversity under EU law shows several shortcomings. As shown by the above analysis, the EU provisions on cultural diversity and heritage are focused on cultural diversity *between* Member States, and not within Member States. This focus expresses the idea that each State does have its own cultural and national identity, which must be respected by the EU (Article 4 TEU) and cannot be jeopardized by the European integration process.

In the light of that, it is not surprising that EU law does not recognize any right to minority groups. This entails that the protection of (religious) minorities is exclusively based upon the principle of non-discrimination. However, this principle continued to be perceived as an instrument aiming to assure equality between individuals, and not also as a means promoting integration of persons belonging to minorities. This lack of protection clearly emerges from the Resolution adopted by the European Parliament in 2018 on minimum standards for minorities in the EU.<sup>63</sup> On that occasion, the European Parliament stressed that policies based upon the principle of non-discrimination are not enough and must be completed with the effective enjoyment of minority rights (such as the right to identity, language use and education, cultural and citizenship rights). Emphasizing the need to strengthen the EU system of minority protection, the Parliament called on the Commission to «to draw up a common framework of EU minimum standards for the protection of minorities»<sup>64</sup>, also including a legislative proposal for a directive on minimum standards for minority protection in the EU.

Needless to say, this Resolution is a meaningful step forward and reveals a new awareness of the need to improve minority protection at EU level. At the same time, the analysis of the Resolution shows another meaningful shortcoming characterizing the weak protection of minorities under EU law: this system is only focused on minorities having a European background. The Resolution is clear in making only reference to *minorities composed of EU citizens*. This focus is not so much surprising because, as already stressed, EU Treaties only refer to European cultural heritage and the cultural diversity of Member States.

Besides these many shadows, the EU law offers few lights, as well. Indeed, as remarked above, both Article 167(4) TFEU and Article 22 Charter could be more broadly interpreted in order to recognize the protection of minorities and cultures having a migrant background. However, this is a *de iure condito* perspective that, although very promising, at the moment, is far from being realized.

With specific regard to the freedom to wear religious clothing, which was the lens for analysis in this paper, the *Achbita* judgment corroborated the lessons learned in the first part and showed that minority protection cannot only be relied on for the principle of non-discrimination, especially if this principle is applied in an individualistic perspective. An effective protection of religious minorities needs the reinforcement of the freedom of religion (put aside in *Achbita*), recognition of the duty of reasonable accommodation for religious reasons, and the integration of the gender equality dimension.

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## Notes

- 1 As for the notion of minority and the distinction between “old” and “new” minorities, see (Medda-Windischer 2010a, 2010b, 2017a, 2017b; Eide 2010).
- 2 In this regard, the famous decision *S.A.S. v. France* delivered by the European Court of Human Rights on the French Law prohibiting the concealment of one’s face in public places is paradigmatic. The applicant, a Muslim woman who was wearing the burqa and niqab, alleged not only a violation of the freedom of religion (Article 9 of the European Convention of Human Rights), but also of her right to private life (Article 8 ECHR); in this latter regard, the Court significantly recognized that the full-face veil «is the expression of a cultural identity»; ECtHR (Grand Chamber), *S.A.S. v. France*, App. No. 43835/11, 1 July 2014, para. 120. In this regard, see also, among others, (Aluffi Beck-Peccoz 2012; Luther 2006), in which the author stresses that the veil is able «to communicate meanings and values, to represent an individual and communitarian identity (the translation is mine).
- 3 As for protection of minorities see, among others, (Capotorti 1979; Pentassuglia 2004; La Rosa 2006; Henrard 2010a).
- 4 In this regard, cf. (Ferrari 2012; Aluffi Beck-Peccoz 2012; Mancini 2012; Howard 2014; Parolari 2015).
- 5 HRC, *Yaker v. France*, Communication No. 2747/2016, UN Doc. CCPR/C/123/D/2807/2016, 17 July 2018.
- 6 HRC, *Hebbadi v. France*, Communication No. 2807/2016, UN Doc. CCPR/C/123/D/2807/2016, 17 October 2018; with the exception of some slight differences, the two Views are identical.
- 7 HRC, *Hudoyberganova v. Uzbekistan*, Communication No. 931/2000, U.N. Doc. A/60/40, 5 November 2004; *Ranjit Singh v. France*, Communication No. 1876/2009, UN Doc. CCPR/C/102/D/1876/2009, 27 September 2011.
- 8 For an in-depth comparison between the evaluation made by the ECtHR and the HRC, see (McGoldrick 2016).
- 9 As regards the duty of reasonable accommodation, cf., inter alia, (Woehrling 1998; Bosset 2005; Dicosola 2006; Loprieno and Gambino 2008; Bribosia et al. 2009, 2010).
- 10 CJEU (Grand Chamber), *G4S Secure Solutions*, Case C-157/15, 14 March 2017, known as *Achbita* case
- 11 CJEU (Grand Chamber), *Bouagnaoui and ADDH*, Case C-188/15, 14 March 2017.
- 12 HRC, *General Comment No. 23: The rights of minorities* (Art. 27), UN Doc. CCPR/C/21/Rev.1/Add.5, 1994, para. 1.
- 13 HRC, *General Comment No. 22: The right to freedom of thought, conscience and religion* (Art. 18), UN Doc. CCPR/C/21/Rev.1/Add.4, 1994, para. 9: «information as to respect for the rights of religious minorities under article 27 is necessary for the Committee to assess the extent to which the freedom of thought, conscience, religion and belief has been implemented by States parties».
- 14 *Ibid.*, para. 2.
- 15 In this regard, see (Berry 2019); according to the author «The recognition that the burqa ban constituted intersectional discrimination is an important development in this field where violations are primarily viewed through the prism of religious freedom».
- 16 HRC, *Concluding Observations on the fifth periodic report of France*, UN Doc. CCPR/C/FRA/CO/5, 2015, para. 22; in the light of that, the Committee recommended the State to review the Act No 2010-1192 according to its obligations stemming from the freedom of conscience and religion, and principle of equality.
- 17 HRC, *Yaker v. France*, cit., para. 7.15; HRC, *Hebbadi v. France*, cit., para. 7.15.
- 18 General Assembly, *Interim report of the Special Rapporteur on freedom of religion or belief*, UN Doc. A/68/290, 7 august 2013, para. 74 (d): «Policies designed to empower individuals exposed to gender-related discrimination could not claim credibility unless they paid careful attention to the self-understandings, interests and assessments voiced by the concerned persons themselves, including women from religious minorities. That principle should always be observed, in particular before setting legislative or jurisdictional limits to a right to freedom, for example the right to wear religious garments».
- 19 HRC, *Yaker v. France*, cit., Joint opinion of Committee members Ilze Brands Kehris and Sarah Cleveland (concurring), para. 3; HRC, *Hebbadi v. France*, cit., Joint opinion of Committee members Ilze Brands Kehris and Sarah Cleveland (concurring), para. 3.
- 20 ECtHR, *Serif v. Greece*, App. No. 38178/97, 14 December 1999, para. 53.
- 21 ECtHR (Grand Chamber) *Leyla Sahin v. Turkey*, App. No. 44774/98, 10 November 2005; ECtHR (Grand Chamber), *S.A.S. v. France*, cit.; ECtHR, *Ebrahimian v. France*, App. No. 64846/11, 26 November 2015.
- 22 ECtHR (Grand Chamber), *S.A.S. v. France*, cit., para. 126: «In democratic societies, in which several religions coexist within one and the same population, it may be necessary to place limitations on freedom to manifest one’s religion or beliefs in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected (see Kokkinakis, cited above, § 33). This follows both from paragraph 2 of Article 9 and from the State’s positive obligations under Article 1 of the Convention to secure to everyone within its jurisdiction the rights and freedoms defined therein (see Leyla Şahin, cited above, § 106)».
- 23 ECtHR (Grand Chamber), *Hasan and Chaush v. Bulgaria*, App. no. 30985/96, 26 October 2000, para. 62.
- 24 *Ibid.*: «the autonomous existence of religious communities [ . . . ] directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual’s freedom of religion would become vulnerable» (emphasis added).

- 25 As regards duty of reasonable accommodation in the case-law of the ECtHR see ([Bribosia et al. 2010](#); [Medda-Windischer 2017b](#); [Ferri 2015](#)).
- 26 European Commission of Human Rights, *Konttinen v. Finland*, App. No. 24949/94, 3 December 1996; *Stedman v. United Kingdom*, App. No. 29107/95, 9 April 1997; *Knudsen v. Norway*, App. No. 11045/84, 8 March 1985; *Kosteski v. Former Yugoslav Republic of Macedonia*, App. No. 55170/00, 13 April 2006.
- 27 ECtHR (dec.), *Dahlab v. Switzerland*, App. No. 42393/98, 15 February 2001.
- 28 ECtHR (dec.), *Kurtulmus v. Turkey*, App. No. 65500/01, 24 January 2006.
- 29 ECtHR, *Eweida and Others v. the United Kingdom*, App. No. 48420/10, 59842/10, 51671/10, and 36516/10, 15 January 2013.
- 30 ECtHR (Grand Chamber), *Leyla Sahin v. Turkey*, cit., Dissenting Opinion of Judge Tulkens, para. 12.
- 31 ECtHR (Grand Chamber), *S.A.S. v. France*, cit., para. 119.
- 32 The conditions for EU membership are defined by Article 49 TEU; these conditions were specified by the Copenhagen European Council in 1993 (Copenhagen criteria); respect for and protection of minorities are included among the political criteria, along with the guarantees of democracy, the rule of law, and human rights.
- 33 European Parliament, Resolution of 16 October 1981 on a Community charter of regional languages and cultures and a Charter of rights of ethnic minorities, OJ C 287, 9.11.1981, p. 106; Resolution of 11 February 1983 on measures in favour of minority languages and cultures, OJ C 68, 14.3.1983, p. 103; Resolution of 30 October 1987 on the languages and cultures of regional and ethnic minorities in the European Community, OJ C 318, 30.11.1987, p. 160.
- 34 The author refers to the previous version of this provision, namely Article 151 of the Treaty of European Community.
- 35 Article 6(1) TEU: «The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties».
- 36 The former Article 6 stated: «1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law. 3. The Union shall respect the national identities of its Member States. 4. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies».
- 37 CJEU, *Runevič-Vardyn and Wardyn*, C- 391/09, 12 May 2011; and *Las*, C-202/11, 16 April 2013. See also Opinion of Advocate General Poiares Maduro delivered on 16 December 2004 in Case C-160/03, *Spain/Eurojust*, para. 24: «Respect for linguistic diversity is one of the essential aspects of the protection granted to the national identities of the Member States, as is apparent from Article 6(3) EU and Article 149 EC».
- 38 In this sense, see also ([European Union Network of Independent Experts on Fundamental Rights 2003](#)).
- 39 See, inter alia, ([Wallace and Shaw 2002](#); [De Witte 2004](#); [Toggenburg 2004](#)).
- 40 Article 51(1) Charter: «The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. *They shall therefore respect the rights, observe the principles* and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties». This distinction is specified by Article 52(5): «The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality»; see also the relative Explanations.
- 41 Neither the Explanations are clear; they simply exemplify some provisions laying down principles, namely Articles 25, 26, and 37.
- 42 Explanations on Article 52(5).
- 43 Cf. Opinion of Advocate General Niilo Jääskinen delivered on 12 July 2012 in Case C-202/11, *Las*, para. 57.
- 44 This broad interpretation of Article 22 is stated, among others, by Craufurd-Smith 2014.
- 45 Opinion of Advocate General Sharpston delivered on 21 July 2011 in Case C-187/10, *Ünal*, paras. 73–74: «It may be a relatively straightforward step for the authorities of a host Member State to form the view that, where a national of a third country does not abide by rules of that State or simply fails to apprehend consequences of a particular line of conduct which may seem obvious to nationals of that State, that person is seeking to abuse those rules and, from there, to conclude that such non-compliance is evidence of fraudulent conduct or something rather like it. It seems to me that such a conclusion should be reached with great caution. A third-country national may find those rules hard to understand and difficult, or even impossible, to access – particularly if he does not speak the language of the host Member State fluently. Unless he is financially well off, he is unlikely to be able to afford the lawyers’ fees which he would need to pay in order to have every rule that is relevant to his situation explained to him. To argue, for example, as the Netherlands Government does in its observations, that, because the national rules are available, inter alia, on the internet, a third-country national, such as Mr Ünal, must automatically be presumed to have understood the rules, their implications and the presumptions that would arise under them as a result of one or other course

of action, seems to me to be unduly simplistic. Such an argument risks assuming that all cultures and lifestyles are instantly assimilated into those of the host Member State when, self-evidently, they are not. It may also have dangerous consequences as regards the freedoms and rights of the person concerned».

46 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, pp. 22–26.

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

48 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {SEC(2008) 2180} {SEC(2008) 2181}/\*COM/2008/0426 final.

49 Court of Justice of the European Communities, *Vivien Prais v Council of the European Communities*, Case C-130-75, 27 October 1976, para. 19.

50 CJEU (Grand Chamber), *Bouagnaoui and ADDH*, cit., para. 40.

51 In this regard, it deserves to be recalled Article 52(3) Charter, according to which when a right secured by the Charter corresponds to a right enshrined in the ECHR, the former must be interpreted according to the meaning and scope of the latter. Additionally, as specified by the Explanations to the Charter, Article 10 Charter corresponds to Article 9 ECHR.

52 See, among other, CJEU (Grand Chamber), *Digital Rights Ireland*, joined Cases C 293/12 and C 594/12, para. 46; CJEU (Grand Chamber), *Nelson and Others*, joined Cases C-581/10 and C-629/10, paras. 76 ss.; *British American Tobacco (Investments) and Imperial Tobacco*, Case C 491/01, para. 122; CJEU (Grand Chamber), *CHEZ Razpredelenie Bulgaria*, Case C-83/14, 16 July 2015, para. 123

53 In this regard, Article 52(3) Charter must be recalled; as specified by the Explanations on Article 52, principle of parallel interpretation does not only concern provisions of the ECHR, but also the interpretation elaborated by the ECtHR

54 ECtHR, *Campbell and Cosans v. the United Kingdom*, App. No. 7511/76 and 7743/76, 25 February 1982, para. 36.

55 CJEU (Grand Chamber), *Y and Z*, Joined Cases C-71/11 and C-99/11, 5 September 2012.

56 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304, 30.9.2004, pp. 12–23. It was repealed by Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337, 20.12.2011, pp. 9–26.

57 In a very suggestive way, Brems stressed that «it is astonishing that, in the eyes of the European Court, direct discrimination on grounds of religion or belief exists only when a measure targets a single religion or a selection of religions, but not when a measure targets all religions and beliefs» (Brems 2017).

58 Opinion of AG Kokott in Case C-157/15, *Achbita*, para. 110.

59 Opinion of AG Sharpston in Case C-188/15, *Bouagnaoui*, para. 128.

60 Opinion of AG Kokott in Case C-157/15, *Achbita*, para. 110.

61 Opinion of AG Kokott in Case C-157/15, *Achbita*, para. 121: «[I]t is important to take into account, when striking a balance between the interests involved, whether differences of treatment on other grounds are also present. The fact, for example, that a ban imposed by the employer puts not only employees of a particular religion but also employees of a particular sex, colour or ethnic background at a particular disadvantage (Article 2(2)(b) of Directive 2000/78) might indicate that that ban is disproportionate». AG Sharpston referred to issue of gender equality, as well. However, she simply recalled that the wearing of Islamic headscarf can be seen both as a symbol of oppression, and as a means to express one's religious belief. Recalling the view taken by the ECtHR in *S.A.S.*, she invites the Court not to take stance in this regard, and to qualify it «as an expression of cultural and religious freedom» (Opinion of AG Sharpston, cit., para. 75)

62 Opinion of AG Sharpston in Case C-188/15 *Bouagnaoui*, para. 133. In this sense, [Bribosia and Rorive \(2016\)](#); [Ouald Ouald Chaib \(2016\)](#).

63 European Parliament, Resolution of 13 November 2018 on minimum standards for minorities in the EU (2018/2036(INI)); for a comment on the Resolution, see, among others, [Carta \(2019\)](#).

64 *Ibid.*, para. 78.

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