Choose One: Gainful Employment or Religious Obedience – An Analysis of Samira Achbita v. G4S

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Choose One: Gainful Employment or Religious Obedience – An Analysis of Samira Achbita v. G4S

Shane Simms*

Abstract

Freedom of religious expression is a fundamental human right that pervades both international and domestic law, yet this right is not absolute. This holds particularly true when one’s religious mandates conflict with the rights of others. This Comment explores this tension in the context of the recent ruling by the European Court of Justice in Samira Achbita v. G4S. The court ruled that an employer can establish a general policy that forbids the wearing of religious symbols and attire in the workplace because it does not constitute direct discrimination. This ruling suggests that a private employer’s right to conduct business according to his or her wishes is equally important, if not more so, to the fundamental right to manifest one’s religious beliefs. Although such policies must be facially neutral to avoid the moniker of discrimination, followers of religions with clothing mandates, such as Muslim women, are affected to a greater degree than followers of religions without such mandates, atheists, and secular individuals. This Comment considers this disparity by analyzing both European Union law and international law generally, suggesting a potential conflict between the two. International law provides broad and rigid protections for the freedom of religious expression, whereas E.U. law has developed a more granular and specific approach. This latter approach may not sufficiently protect freedom of religion as envisioned under international law.

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I. INTRODUCTION

Perhaps one of the most salient characteristics of a free society is the ability of an individual to develop or adopt any set of beliefs; some of which transform into pure convictions—creeds by which people live and manifest their identities. Yet, another hallmark of a free society, especially one which also operates under a free market economy, is the individual liberty to operate a commercial business according to one’s desires. As aptly noted by Aristotle in Book II of his *Politics*: “if different people attend to different things, no mutual accusations result, and they will together contribute more, since each person keeps his mind on his own proper concerns.” From an economics standpoint, assuming the persuasive force of Aristotle’s argument, business owners can increase output and thus enhance social welfare when they can conduct business per the policies they deem appropriate.

Yet no rational individual could assume that either of these attributes of a free society should exist without limit. True, an individual can believe virtually anything, but surely society would not allow individuals to manifest beliefs via conduct that impinges upon the fundamental rights of other citizens. By that same token, no society will last long that allows business owners to set openly harmful policies with impunity. Removing a sense of benevolence from the equation, a business owner is freest when the company operates precisely to the owner’s specifications without making concessions for the rights of subordinates. This, however, is not the efficient outcome. As a result, when these two fundamental rights of free citizens come into conflict, the critical inquiry is which right gives way to the other and does the answer to that question change depending on both the circumstances and the degree of suppression that results from the compromise?

This Comment seeks to explore the balance between the right to follow the mandates of one’s religion—the pinnacle of individualized belief—and the right of an employer to control the conduct of their employees in the workplace. The resulting implications will be explored in the context of the recent ruling by the European Court of Justice (ECJ) in *Samira Achbita v. G4S Secure Solutions NV*, as well as the related Opinion of Advocate General J. Kokott (AG) upon which the ECJ relied in reaching its determination. In this case, the ECJ issued a preliminary ruling stating that an employer may institute a blanket ban on the

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wearing of religious symbols or apparel in the workplace, and that such a policy would not constitute direct discrimination, although it could potentially qualify as similarly unlawful indirect discrimination. This Comment begins with a brief overview of the relevant facts surrounding this suit.

G4S Secure Solutions NV (G4S) is a publicly traded company that provides security, guard, and reception services to various customers from the public and private sectors. On June 12, 2006, Samira Achbita was terminated from her position at G4S in Belgium for violating the G4S employee code of conduct when she announced her firm intention to wear the Islamic headscarf at work for religious reasons. In response to her termination, on April 26, 2007, Ms. Achbita brought an action for damages for wrongful dismissal against G4S before the Arbeidsrechtbank te Antwerpen (Antwerp Labour Court) in Antwerp, Belgium. The Labour Court dismissed the action brought by Ms. Achbita on the ground that no direct or indirect discrimination was present. Ms. Achbita appealed to the Arbeidshof te Antwerpen (Antwerp Higher Labour Court) which also dismissed her claims on December 23, 2011, on the grounds that, “in the light of the lack of consensus in case-law and legal literature, G4S was under no obligation to assume that its internal ban was illegal, and that Ms. Achbita’s dismissal could not therefore be regarded as manifestly unreasonable or discriminatory.” The case was further appealed to the Belgian Hof van Cassatie (Court of Cassation, Belgium) which requested a preliminary ruling from the ECJ on whether Article 2(2)(a) of Council Directive 2000/78 of 27 November 2000 (which establishes a general framework for equal treatment in employment and occupation) should be interpreted as meaning that the prohibition on wearing a headscarf by a female Muslim at the workplace does not constitute direct discrimination where the employer’s rule prohibits all employees from wearing outward signs of political, philosophical, and religious beliefs at the workplace.

On March 14, 2017, the ECJ issued its response ruling in Achbita v. G4S and determined that there is no direct discrimination present in G4S’s code of

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4 Achbita v. G4S, supra note 2.
5 Achbita v. G4S, Opinion of the AG, supra note 3, at ¶ 16.
7 Achbita v. G4S, Opinion of the AG, supra note 3, at ¶ 20 (summarizing the Belgian appellate court’s holding).
9 Achbita v. G4S, Opinion of the AG, supra note 3, at ¶ 22 (detailing the Court of Cassation’s referred legal question).
Conduct since the ban “does not introduce a difference of treatment that is directly based on religion or belief.”\footnote{Achbita v. G4S, supra note 2, at ¶ 32.} The court concluded that although Ms. Achbita’s termination does not constitute \textit{direct} discrimination as defined in Directive 2000/78, it was still possible that the company’s policy \textit{indirectly} discriminates if “an apparently neutral provision, criterion or practice would put persons having a particular religion or belief . . . at a particular disadvantage compared with other persons.”\footnote{Id. at ¶ 5.} The court further noted that, consistent with Directive 2000/78, indirect discrimination is permissible so long as the policy that results in such indirect discrimination is “objectively justified by a legitimate aim” and the means of achieving that aim are “appropriate and necessary.”\footnote{Id. at ¶ 44.}

The ECJ’s legal holding and the AG’s analysis of direct and indirect discrimination under Directive 2000/78 serve as the focus of this Comment. Directive 2000/78 is a current body of E.U. law that traces its roots and inherent authority to Article 13 of the Treaty Establishing the European Community (E.C. Treaty).\footnote{Consolidated Version of the Treaty Establishing the European Community, Dec. 29, 2006, 2006 O.J. (C 321) 37 [hereinafter E.C. Treaty].} In turn, the E.C. Treaty itself, which applies only to E.U. member states,\footnote{Id. at art. 1 (“By this Treaty, the High Contracting Parties establish among themselves a European Union, hereinafter called ‘the Union’ . . . The Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty. Its task shall be to organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples.”).} is generally consistent with other established bodies of international law concerning the freedom of religious expression. These established bodies of international law naturally apply more broadly than the E.C. Treaty by encompassing states and countries outside of the E.U. The primary bodies of relevant international law, all of which will be discussed more thoroughly later in the Comment, include Article 18 of the Universal Declaration of Human Rights,\footnote{G.A. Res. 217 III (A), Universal Declaration of Human Rights (Dec. 10, 1948).} Article 18 of the International Covenant on Civil and Political Rights,\footnote{G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 18 (Dec. 16, 1966).} the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief,\footnote{G.A. Res. 36/55, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Nov. 25, 1981).} and the
European Convention on Human Rights\textsuperscript{18} (formerly known as the Convention for the Protection of Human Rights and Fundamental Freedoms).\textsuperscript{19} The transition from broad and generalized international law, to the E.C. Treaty, and then to Directive 2000/78, is accompanied by an increasingly more granular and nuanced framework for interpreting whether religious discrimination is present in a given context. The ECJ has now arrived at an interpretation of E.U. law that may be inconsistent with broader international law predecessors and counterparts.

On the other hand, perhaps the ECJ is indeed properly interpreting E.U. law, yet E.U. law itself has become inconsistent with the established protections of religious freedom firmly embedded within international law. For example, whereas Directive 2000/78 distinguishes between “direct” and “indirect” discrimination and provides for legal exceptions in the latter,\textsuperscript{20} the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (DEAFID) contains no such distinction.\textsuperscript{21} Specifically, Article 2(1) of the DEAFID states: “[n]o one shall be subject to discrimination by any State, institution, group of persons, or person on grounds of religion or other belief.”\textsuperscript{22} Article 2(2) goes on to clarify that:

For the purposes of the present Declaration, the expression “intolerance and discrimination based on religion or belief” means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.\textsuperscript{23}

Note how the language of the DEAFID implies an outright ban on discrimination regardless of whether the policy at issue has “as its purpose,”

\begin{itemize}
  \item \textsuperscript{18} Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.
  \item \textsuperscript{19} As a point of clarity, the E.U. currently has 28 member states (see European Union, CITIZENS INFORMATION, http://perma.cc/CTE8-EPPE). Thus, the E.C. Treaty applies only to these 28 member states. The European Convention on Human Rights, on the other hand, applies to the entire Council of Europe, which contains a total of 47 countries, 28 of which are also members of the E.U. (see Member States of the European Union and the Council of Europe, EUROPE IN STRASBOURG, http://perma.cc/TL8M-H8AR). Broader still, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights are products of the United Nations and apply to all U.N. members. There are presently 193 Member States of the U.N. (see Growth in United Nations Membership, UNITED NATIONS, http://perma.cc/YNE2-2LEX).
  \item \textsuperscript{20} See Council Directive 2000/78, supra note 8, at art. 2(2)(a)–(b).
  \item \textsuperscript{21} Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, supra note 17.
  \item \textsuperscript{22} Id. at art. 2(1).
  \item \textsuperscript{23} Id. at art. 2(2) (emphasis added).
\end{itemize}
what Directive 2000/78 would categorize as “direct discrimination,”24 or “as its effect,” which Directive 2000/78 labels “indirect discrimination.”25 Similarly, Article 4 of the DEAFID requires: “[a]ll States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social, and cultural life.”26 Without subcategorizing different types of discrimination, a plausible interpretation of the DEAFID is that states have a legal duty to combat any discrimination based on religion or belief. This creates an apparent tension between how Directive 2000/78 allows for legal exceptions to certain policies that result in indirect discrimination, whereas no such exemptions can be found explicitly within the DEAFID.27 As will be illustrated later in the Comment, similar tensions exist between Directive 2000/78 and other bodies of international law.

This Comment seeks to analyze this potential discrepancy by first providing a detailed discussion of the ECJ’s ruling and the AG’s legal analysis in Achbita v. G4S.28 Section II illustrates the facts surrounding Ms. Achbita’s termination, her circumstance as a devout Muslim woman, and G4S’s employment policy that bans the wearing of religious symbols and attire in the workplace. Additionally, this Section explores the effects of such a policy on individuals similarly situated to Ms. Achbita. Section III of this Comment then provides a brief history and overview of E.U. law concerning the freedom of religious expression, including Directive 2000/78 and its origin in the E.C. Treaty. This Section further analyzes the specifics of Ms. Achbita’s situation and whether the ECJ’s ruling effectively protects an individual’s right to freely express and exercise his or her religious beliefs. Section III also introduces the major bodies of international law concerning religious freedom and expression and provides a brief history and relevant summary of each. Finally, this Section analyzes the interplay between E.U. law and international law. Specifically, it discusses the idea that the ECJ ruling and E.U. law may not be effectively protecting Ms. Achbita’s freedom of religious expression as prescribed by existing international law. Section IV looks at how international law has been applied in this regard and provides additional discussion regarding the disconnect between E.U. and international law. Section IV additionally discusses potential concerns, issues, and the implications created by this dissonance.

25 Id. at art. 2(2)(b).
26 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, supra note 17, at art. 4.
27 Id.
Section V concludes by offering additional solutions for interpreting both E.U. and international law that maximize protection for the freedom of religious expression.

The primary argument is that E.U. religious discrimination law is currently ineffective in protecting the right of religious expression for followers of certain religions. Religions with certain idiosyncratic practices do not receive sufficient legal protection from religious discrimination. This is seen in the context of the ECJ upholding a facially neutral employment policy that forces a devout Muslim woman to violate a strict mandate of her religion if she wishes to retain her employment.29 By contrast, the effect of such a policy on secular individuals or those who follow religions without such strict mandates on religious apparel is essentially de minimis. For instance, unlike for Muslim women, there is no universal mandate on clothing that must be worn in public for women of many Christian faiths. In its current form, E.U. law treats these inherently unequal requirements as equals. Overall, this Comment raises specific concerns regarding the ECJ’s holding and the AG’s analysis of E.U. law and how this relates to an individual’s ability to freely practice his or her religion.30

II. MS. ACHBITA’S TERMINATION AND THE EUROPEAN COURT OF JUSTICE’S RULING

Samira Achbita was hired as a receptionist at G4S Secure Solutions NV in February of 2003.31 Ms. Achbita worked for G4S for three years until April 2006, at which point she announced that, going forward, she intended to wear a headscarf during working hours in accordance with her Islamic faith.32 Prior to this announcement, Ms. Achbita had worn the headscarf exclusively outside of working hours for more than three years.33 On June 12, 2006, on account of her firm intention to wear the Islamic headscarf in the workplace, Ms. Achbita was

30 As a point of clarification, the ECJ’s Judgment of the Court contains a recitation of the relevant law, a very brief analysis, and then states its legal ruling. This constitutes the official legal determination by the court. By contrast, the Opinion of the AG, although not itself the official holding of the ECJ, provides a detailed and thorough legal analysis of the issues raised. The Opinion of the AG was directly relied on by the ECJ in reaching its ruling, and the ECJ adopted virtually every legal conclusion reached by the AG. As such, this Comment often focuses on the legal analysis by the AG, especially when the ECJ’s legal reasoning is unclear or underdeveloped as presented in the Judgment of the Court. Any disparities between the Opinion of the AG and the ECJ’s official Judgment of the Court, or any position expounded by the AG that was not officially adopted by the ECJ, will be duly noted.
31 Achbita v. G4S, Opinion of the AG, supra note 3, at ¶ 16.
32 Achbita v. G4S, supra note 2, at ¶ 12.
dismissed from her position at G4S.\textsuperscript{34} One day later, on June 13, 2006, a new G4S employment policy took effect reading in pertinent part: “employees are prohibited, in the workplace, from wearing any visible signs of their political, philosophical or religious beliefs and/or from giving expression to any ritual arising from them.”\textsuperscript{35}

Once Ms. Achbita’s case reached the Belgium Court of Cassation, on March 9, 2015, the court stayed proceedings and sought a preliminary ruling by the ECJ on whether Article 2(2)(a) of Council Directive 2000/78 of 27 November 2000 should “be interpreted as meaning that the prohibition on wearing, as a female Muslim, a headscarf at the workplace does not constitute direct discrimination where the employer’s rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace.”\textsuperscript{36} However, the ECJ and the AG went beyond the question presented. The ECJ noted that under Directive 2000/78 discrimination is subdivided into two categories: direct discrimination and indirect discrimination.\textsuperscript{37} As will be analyzed more fully in the next Section, direct discrimination occurs under Directive 2000/78 when “one person is treated less favourably than another is, has been or would be treated in a comparable situation.”\textsuperscript{38} The ECJ determined that since G4S’s policy applies with equal force to all employees, there is a lack of evidence to support a determination of direct discrimination.\textsuperscript{39} The AG specifically took pains to note that “[t]here is nothing in the present case to indicate that [Ms. Achbita] was ‘treated less favourably.”\textsuperscript{40} In addition, the AG explained, “there is no evidence here either of discrimination perpetrated against the members of one religious community as compared with the followers of other religions, or of discrimination perpetrated against religious individuals as compared with non-religious individuals or professed atheists.”\textsuperscript{41}

However, after determining that G4S’s policy did not rise to the level of direct discrimination, the ECJ proceeded to consider whether the company policy constituted indirect discrimination within the meaning of Directive 2000/78.\textsuperscript{42}

\textsuperscript{34} Id.
\textsuperscript{35} Claire Best, Muslim Headscarf Ban Justified by Employer's Dress Code Policy, LEXOLOGY (June 10, 2016), ¶4, http://perma.cc/5QHR-RY3U.
\textsuperscript{36} Achbita v. G4S, supra note 22, at ¶ 21.
\textsuperscript{37} Id. at ¶ 24.
\textsuperscript{39} Achbita v. G4S, supra note 2, at ¶ 31–32.
\textsuperscript{40} Achbita v. G4S, Opinion of the AG, supra note 3, at ¶ 48.
\textsuperscript{41} Id.
\textsuperscript{42} Achbita v. G4S, supra note 2, at ¶ 34.
Indirect discrimination is covered in Article 2(2)(b) of Directive 2000/78, which specifies that: “indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief . . . at a particular disadvantage compared with other persons.” 43 The court further explained that even if these parameters are met, there are certain situations under which a company policy that seemingly results in indirect discrimination is nonetheless legally allowable. 44 These situations require that the “provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.” 45 If these conditions are satisfied, “a difference of treatment does not . . . amount to indirect discrimination within the meaning of Article 2(2)(b).” 46

Unfortunately, the concepts of “legitimate aim” and “appropriate and necessary” are not explicitly defined under Directive 2000/78. 47 Further, the ECJ did not explore the meaning of these concepts in its ruling, simply stating that such determinations are “for the referring court to ascertain.” 48 However, the AG looked to Article 4(1) of Directive 2000/78, which establishes basic guidelines for determining when a policy that results in a difference of treatment is acceptable. 49 Article 4(1) of Directive 2000/78 sets two conditions a policy such as G4S’s must meet: first, there must be a “genuine and determining occupational requirement”; and, second, that requirement must be a “proportionate” one which was laid down in pursuit of a “legitimate” objective. 50 Although the AG’s analysis of “genuine and determining occupational requirement” is brief, it mentions that both the operational processes involved by virtue of the employee’s role and the context in which those processes are carried out are relevant considerations. As applied to Ms. Achbita’s role as a receptionist, the AG explained that although the work of a receptionist can be performed just as well with a headscarf as without one, a company is entitled to legitimately decide on a policy of strict religious and ideological neutrality in order to achieve a specific company image. 51 This conclusion was ultimately adopted by the ECJ holding: “the desire to display, in relations with both public and private sector customers, a policy of political,

44 Achbita v. G4S, supra note 2, at ¶ 35.
46 Achbita v. G4S, supra note 2, at ¶ 35.
48 Achbita v. G4S, supra note 2, at ¶ 44.
50 Id.
51 Achbita v. G4S, Opinion of the AG, supra note 3, at ¶ 76.
philosophical or religious neutrality must be considered legitimate.”52 As such, a facially neutral dress code, as an occupational requirement, to promote an image of religious and ideological neutrality might pass muster.

The AG then turned her attention to clarifying what type of underlying intention or purpose qualifies as a “legitimate aim.” In a rather unsatisfying way, she attempts to define the bounds of a “legitimate aim” by appealing to the norms and fundamental values of the E.U.53 The AG ultimately determines that a “policy of neutrality [for G4S] is absolutely crucial” noting how the work is characterized by constant face-to-face contact with external individuals, which has a defining impact on the company’s image and affects the public’s perception of the company’s customers.54 Again, this is a conclusion ultimately adopted by the ECJ, explaining: “[a]n employer’s wish to project an image of neutrality towards customers relates to the freedom to conduct a business … and is, in principle, legitimate, notably where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer’s customers.”55

However, this conclusion is in direct tension with the AG’s comments just a few sentences earlier in the opinion where she explains that it would “obviously not” constitute a legitimate aim for a company policy that accedes to customers’ demands to be served only by employees of a particular religion.56 Curiously, the AG fails to address the critical concern that certain individuals are required by their religion to wear certain clothing. Furthermore, the headscarf is a garment that does not interfere with the occupational processes to be carried out by the employee in filling her occupational role. In essence, a policy grounded in presenting a certain company image, at least in the context of banning otherwise mandatory religious apparel, is really nothing other than the company implicitly acceding to customers’ demands to be served only by individuals who follow certain religions. A company specifically crafts an image for itself that it believes will be pleasing to customers, and a policy such as G4S’s assumes that it is displeasing to customers to see a Muslim woman wearing a religious headscarf—despite her religion requiring it. Thus, the AG seems to rely on the same example in defining both what is and what is not a “legitimate aim.”57 Arguably, defining “legitimate aim” in this manner seems to allow a company policy that, in consequence, allows customers to demand to be served

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52 Achbita v. G4S, supra note 2, at ¶ 37.
54 Id. at ¶ 94.
55 Achbita v. G4S, supra note 2, at ¶ 38.
57 Id.
by anyone except devout, practicing Muslim women. Such implications extend beyond just Muslim women, of course, but also to any follower of a religion with clothing mandates that apply to public appearances.

Ultimately, the AG proposed a proportionality test that analyzed whether the means to achieve a given legitimate aim are appropriate and necessary. The AG set a rather low bar for what amounts to an “appropriate” measure, essentially asking whether the means result in, or seek to achieve, the desired ends.\(^58\) For G4S, a desired company policy of image neutrality would certainly be achieved by a blanket ban on the wearing of religious apparel. As such, the AG spent little time discussing this factor. However, a question of greater importance is whether the particular means relied on are “necessary” in order to achieve the company’s legitimate aim. Key to this factor, the AG noted, is whether the same legitimate aim can be achieved by “means more lenient than a ban” on the wearing of religious apparel.\(^59\) Although the AG provides limited examples that would constitute less restrictive alternatives, such as providing a company uniform that comes with an optional headscarf or assigning employees who desire to wear certain religious apparel to back-office positions, the AG noted that such solutions are not satisfactory because they would cut against her previous analysis of a “legitimate aim.”\(^60\) Namely, these considered alternatives do not allow a company to uphold its stated aim of religious and ideological neutrality. As such, assuming the company’s policy meets the requirements for being a legitimate aim, a facially neutral ban on the wearing of religious apparel in the workplace satisfies the requirements for being both appropriate and necessary. In sum, the foundation of the proportionality test analyzes whether the means utilized to achieve a given legitimate aim are the least burdensome available. If the means result in, or seek to achieve, the desired ends then such means are appropriate. If the means are the least burdensome available that will achieve the desired end, then they are necessary. If the means are both appropriate and necessary, then they are proportional within the meaning of Article 4(1) of Directive 2000/78.\(^61\) Recall that, under Directive 2000/78, a policy that is indirectly discriminatory is nonetheless legally allowable so long as that policy “is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”\(^62\)

\(^58\) Id. at ¶ 103.
\(^59\) Id. at ¶ 104.
\(^60\) Id. at ¶ 107.
\(^62\) Id. at art. 2(2)(b)(i).
Yet the AG then inserted an additional factor into the proportionality test that the court labeled “proportionality *sensu stricto,*” which balances whether the disadvantages suffered by the adversely affected employee(s) are disproportionate to the objective, or legitimate aim, pursued by the company’s policy. As applied to Ms. Achbita, “this means that a fair balance must be struck between the conflicting interests of employees such as Ms Achbita, on the one hand, and undertakings of employers such as G4S, on the other.” The AG identified various factors to consider when balancing the interests of the employee with that of the employer including: how visible and conspicuous the elements—such as religious symbols or apparel—in question are in relation to the overall appearance of the employee; whether the employee operates in a prominent role or a position of authority and/or the degree to which that employee interfaces with the company’s clients; whether the policy merely asks for restraint on religious expression as opposed to the forced adoption of a particular religious belief or form of expression; whether differences of treatment on other grounds are also presented by the implementation of the particular policy, such as a policy that results in disparate impact on not only those of certain religious backgrounds but also sex, color, or ethnic background for example; and finally, the broader context surrounding any conflict between an employee and the employer in connection with the wearing of visible religious symbols in the workplace. Although the AG did not specifically explain the meaning of the “broader context” factor, presumably this factor is meant to gauge whether the employee has a genuine interest in wearing the religious apparel or whether the employee merely attempts to exercise such an interest for the sake of causing grief or difficulty for the employer.

The AG also briefly mentioned that the national identity of the E.U. Member State should be considered in the proportionality calculus. She asserted that in Member States where secularism has constitutional status and therefore plays an instrumental role in social cohesion, the wearing of visible religious symbols may legitimately be subject to stricter restrictions than in other Member States that do not carry such sociopolitical positions. The AG, however, did not explain the reasoning or value behind such a relativistic position. It seems an odd proposition that E.U. law should apply differently to different E.U. Member States. To the contrary, an argument could be made for the cohesive value, intrinsic fairness, and efficiency of a proportionality standard that applies equally.

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63 See *sensu stricto,* MERRIAM-WEBSTER DICTIONARY (2018), http://perma.cc/DL7E-52PV (defined as “in a narrow or strict sense”).
64 Achbita v. G4S, Opinion of the AG, supra note 3, at ¶112.
65 Id. at ¶117–22.
66 Id. at ¶125.
across all Member States bound by the same E.U. law. Nevertheless, the AG arrived at the position that the national identity of the Member State involved is a relevant factor to consider.

Unfortunately, the ECJ said little concerning weighing the interests of the employer and employee in this context, and it is unclear to what extent it adopted the AG’s “proportionality” regime. In its official ruling the ECJ simply notes that: “the means of achieving [a legitimate] aim [must be] appropriate and necessary.” 67 Concerning what is “appropriate,” the ECJ explained that “it must be held that the fact that workers are prohibited from visibly wearing signs of political, philosophical or religious beliefs is appropriate for the purpose of ensuring that a policy of neutrality is properly applied, provided that that policy is genuinely pursued in a consistent and systematic manner.” 68 As to whether the policy is necessary, the court held that “it must be determined whether the prohibition is limited to what is strictly necessary.” 69 Interestingly, the ECJ’s reasoning at this point diverged from the AG’s. Whereas the AG considered alternatives to a blanket ban, such as relocating employees seeking to wear religious apparel to back-office positions, as inconsistent with the notion of a “legitimate aim,” the ECJ by contrast specifically suggests that only a ban covering customer-facing employees might be strictly necessary. 70 The ECJ further explained that the referring court would have to consider whether “it would have been possible for G4S, faced with [Ms. Achbita’s] refusal, to offer her a post not involving any visual contact with those customers, instead of dismissing her.” 71 In addition, “[i]t is for the referring court . . . to take into account the interests involved in the case and to limit the restrictions on the freedoms concerned to what is strictly necessary.” 72

In the end, the ECJ did not arrive at a firm conclusion as to whether G4S’s employee policy banning the wearing of religious symbols in the workplace fails the test for indirect discrimination. Even the AG provided merely a soft conclusion in her opinion, stating: “there is much to support the argument that a ban such as that at issue here does not unduly prejudice the legitimate interests of the employees concerned and must therefore be regarded as proportionate.” 73

Recall that the ECJ determined that G4S’s policy was not directly discriminatory, and that Ms. Achbita’s suit would prevail only if she could establish that the

67 Achbita v. G4S, supra note 2, at ¶ 44.
68 Id. at ¶ 40.
69 Id. at ¶ 42 (emphasis added).
70 Id.
71 Id. at ¶ 43.
72 Id.
73 Achbita v. G4S, Opinion of the AG, supra note 3, at ¶ 126.
policy was indirectly discriminatory. Further, any discriminatory effects resulting from that policy could not be outweighed by a legitimate company aim and whereby the means of achieving that aim were appropriate and necessary. The Court had determined that religious and ideological neutrality is a legitimate aim, that an outright ban might, or might not, be appropriate for achieving this legitimate aim, and that the question of necessity must be analyzed through the lens of what is strictly necessary.\footnote{Achbita v. G4S, supra note 2, at ¶ 42.} The AG resolved that these issues would have to be decided by the referring court, which must “strike a fair balance between the conflicting interests, taking into account all the relevant circumstances of the case.”\footnote{Achbita v. G4S, Opinion of the AG, supra note 3, at ¶ 127.} Thus, whether G4S’s policy implementing a blanket ban on the wearing of religious apparel was strictly necessary, as well as some degree of a balancing of interests, serve as the linchpins to the entire issue, at least as it relates to Ms. Achbita’s situation.

Although a handful of both the AG’s and ECJ’s premises may be debatable, there is no denying that both provided a fair and reasoned interpretation of Directive 2000/78 and how it should apply. Yet the concern is whether such a detailed level of scrutiny in applying Directive 2000/78 comports with other established E.U. law, as well as broader international law concerning the freedom of religious expression. The next Section begins this analysis by taking a deeper look at Directive 2000/78, which finds its authority in Article 13 of the E.C. Treaty.

III. LEGAL DYNAMICS AND THE FREEDOM OF RELIGIOUS EXPRESSION

A. European Union Law

The original Treaty Establishing the European Community was signed into effect on March 25, 1957.\footnote{E.C. Treaty, supra note 13.} The original treaty, however, did not contain any special provisions for the protection of religious expression. In 1997, the Treaty of Amsterdam\footnote{Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1. The Treaty of Amsterdam had the additional effect of renumbering various articles of the amended EC Treaty. Thus, Article 13 is the equivalent of Article 6(a) post-renumbering.} amended the EC Treaty by adding Article 13 which 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.\textsuperscript{78}

Based on the inherent authority provided by Article 13, in 2000 the E.U. adopted Directive 2000/78, the so-called “Framework Directive,” which has the purpose of establishing a general framework for equal treatment in employment and occupation.\textsuperscript{79} The Framework Directive “prohibits both direct and indirect discrimination, harassment and an instruction to discriminate.”\textsuperscript{80}

Article 1 establishes the general purpose of Directive 2000/78.\textsuperscript{81} Here, Article 1 provides that Directive 2000/78 seeks to “lay down a general framework for combating discrimination on the grounds of religion or belief . . . as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.”\textsuperscript{82} Article 2(1) defines the “principle of equal treatment” in terms of “no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.”\textsuperscript{83} These dual concepts of “direct” and “indirect” discrimination serve as the basis for the Framework Directive which the ECJ relied on in testing whether discrimination was present in the G4S employee policy. Direct discrimination is handled entirely under Article 2(2)(a) of Directive 2000/78 which establishes: “direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1.”\textsuperscript{84} As such, the ECJ’s analysis for direct discrimination as applied to Ms. Achbita’s circumstances perfectly aligns with the clear language of Article 2(2)(a).\textsuperscript{85} The G4S employee policy applied equally to all individuals regardless of religious belief or affiliation. In general, a policy that applies equally to all employees cannot treat one person less favorably than another.

Although not raised by the court, one particular concern would include a scenario whereby an employer implements a facially neutral employee policy specifically to respond to the conduct or circumstances of a specific individual.

\textsuperscript{78} Id. at art. 13.
\textsuperscript{82} Id.
\textsuperscript{83} Id. at art. 2(1).
\textsuperscript{84} Id. at art. 2(2)(a).
\textsuperscript{85} Id.
that the employer views as problematic. For example, an employer may institute a policy that bans the wearing of religious apparel in the workplace with the sole intention of discouraging Muslim women from working at or applying to the company. Despite the policy being facially neutral, the intent in enacting such a policy would be an implicit form of targeted discrimination. In fact, there is strong evidence in Ms. Achbita’s case that that is precisely what G4S aimed to do with its policy banning the wearing of religious apparel in the workplace. Ms. Achbita was fired on June 12, 2006. It wasn’t until the next day that G4S officially established its employee policy on the books.\textsuperscript{86} It seems that Ms. Achbita was the first employee to be disciplined by G4S for wearing religious attire in the workplace. Yet note that the problematic conduct in the eyes of the employer was that Ms. Achbita was a Muslim woman who sought to adhere more strictly to the tenets of her religion. G4S’s policy, although seemingly neutral, can certainly be framed as the company’s attempt to prevent devout Muslim women from exercising their religious beliefs in the workplace. An alternative explanation is that G4S felt for the first time the need to enshrine an already existing, but perhaps unwritten, company policy in response to the tension with Ms. Achbita’s religious practices. Still, despite speculation concerning G4S’s motive in enacting the policy, the point is that if a facially neutral policy is merely pretextual, a policy such as G4S’s could be directly targeting and adversely affecting specific persons under the guise of equal treatment.

The plain text of Article 2(2)(a) of Directive 2000/78 seems well-equipped to handle hypothetical situations such as those above. Although the court did not specifically address situations where a facially neutral policy was merely a pretext meant to covertly accomplish targeted discrimination, Article 2(2)(a)’s method of defining direct discrimination in terms of unequal treatment suggests a means for combatting such techniques. In theory, one could compile enough circumstantial evidence to show that a specific policy was created and enforced with the intent to adversely affect one particular person or group of persons. If one could show that a facially neutral employee policy was implemented solely to harm one individual, this would presumably establish that the targeted person is being treated less favorably than another. In other words, if an individual could show that a neutral policy was implemented with the intent of harming certain individuals, then that policy would violate the principle of equal treatment within the meaning of Directive 2000/78. Unfortunately, the ECJ did not explore this possibility.

The other test intrinsic to Directive 2000/78’s Framework Directive is whether the employee policy indirectly discriminates against a specific person or

\textsuperscript{86} See AMNESTY INTERNATIONAL, supra note 6.
group. Article 2(2)(b) establishes that “indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief ... at a particular disadvantage compared with other persons.” Unlike Article 2(2)(a) for direct discrimination, however, Article 2(2)(b) is accompanied by the important caveat that it does not constitute indirect discrimination if “[t]he provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.” Unfortunately, Article (2)(2)(b) lacks any real guidance for determining whether a policy constitutes indirect discrimination. It is unclear precisely what is a legitimate aim or what is meant by means that are appropriate and necessary. These concepts were not defined under Directive 2000/78 and thus resulted in the ECJ being tasked with formulating a methodology for balancing the interests of the employee in religious expression in the workplace and the interests of the company.

The ECJ has previously grappled with the concept of indirect discrimination in the context of a facially neutral policy. For example, in Ursula Voß v. Land Berlin,90 a gender pay discrepancy case, the Advocate General stated: “[t]here is also indirect discrimination where, for example, a regulation is adopted which, although formulated in a neutral way, in fact adversely affects a far larger proportion of women than men, except if it is justified by objective reasons which are wholly unrelated to any discrimination based on sex.”91 Similarly, in Kirsammer-Hack v. Sidal,92 another gender discrimination case, the court explained: “[t]he Court has consistently held that national rules discriminate indirectly against women where, although worded in neutral terms, they are more disadvantageous to women than men, unless that difference in treatment is justified by objective factors unrelated to any discrimination on grounds of sex.”93 Although these case examples concern gender discrimination, the ECJ implemented a similar construct in analyzing whether a facially neutral employment policy indirectly discriminates on the basis of religion. Per the court:

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88 Id. at art. 2(2)(b)(i).
89 Id.
90 Judgment of the Court (First Chamber) of 6 December 2007, Ursula Voß v. Land Berlin, C-300/06, EU:C:2007:757.
93 Id.
an internal rule of a private undertaking may constitute indirect discrimination within the meaning of Article 2(2)(b) ... if it is established that the apparently neutral obligation it imposes results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage, unless it is objectively justified by a legitimate aim, such as the pursuit by the employer, in its relations with its customers, of a policy of political, philosophical and religious neutrality.\textsuperscript{94}

Thus, an employer’s legitimate desire to present an image of ideological neutrality to its customers serves as an objective factor that is both unrelated to the resulting discrimination based on religion and legally justifies that particular employment policy.

At this point it seems clear that the AG and the ECJ effectively applied Directive 2000/78, formulated an appropriate balancing test, and established a reliable framework on which future cases can rely for guidance. Yet despite this being the right outcome based on the effective application of Directive 2000/78, it is less clear whether this is a proper outcome as envisioned by Article 13 of the E.C. Treaty. There is an unsettling disconnect between Article 13’s broad language, which grants the authority to take appropriate action to combat discrimination, and the focused scrutiny supplied by Directive 2000/78 coupled with the ECJ’s balancing of relevant interests. Taken at face value, “appropriate action to combat discrimination” evinces a purpose to stamp out discrimination should it manifest.\textsuperscript{95} This interpretation suggests that, under Article 13, the simple test is whether the company policy discriminates on the basis of religion. If so, there is legal authorization to combat such a policy.

This gap between the language of Article 13, which seeks to outright combat discrimination, and the application of Directive 2000/78, which leads to an outcome where a policy that results in discrimination against Muslim women can be justified and acceptable, is unsatisfactory. For one, no one can sensibly deny that G4S’s facially neutral policy places a greater burden on those following religions that have clothing mandates than it does on those whose religions do not require specific clothing to be worn in a public setting. Muslim women with strict clothing mandates are affected to a far greater degree by such a policy than many Christian women, for example, who are not required by any religious mandate to wear specific garb or attire in public. For context, the following is a passage from the Qur’an detailing the clothing mandates for women who follow Islam:

\begin{quote}
And tell the believing women to reduce [some] of their vision and guard their private parts and not expose their adornment except that which necessarily appears thereof and to wrap [a portion of] their headcovers
\end{quote}

\textsuperscript{94} Achbita v. G4S, supra note 2, at ¶ 44.

\textsuperscript{95} E.C. Treaty, supra note 13, at art. 13.
over their chests and not expose their adornment except to their husbands, their fathers, their husbands' fathers, their sons, their husbands' sons, their brothers, their brothers' sons, their sisters' sons, their women, that which their right hands possess, or those male attendants having no physical desire, or children who are not yet aware of the private aspects of women. And let them not stamp their feet to make known what they conceal of their adornment. And turn to Allah in repentance, all of you, O believers, that you might succeed.96

The Qur’an, as commonly interpreted, teaches Muslim women that they should wear headcovers and limit visible exposure of their physical features. Should an individual wish to strictly follow this religious mandate, they, like Ms. Achbita, would be ineligible to work at G4S due to employee policy barring the wearing of religious symbols and attire. Note that such an individual becomes ineligible for employment at G4S in this regard solely by virtue of her religion. Therefore, even if such a policy does not qualify as legal discrimination under Directive 2000/78, it certainly satisfies the dictionary definition of discrimination.97 In essence, the functional effect of G4S’s employee policy, despite being facially neutral, is this: secular individuals, atheists, and any who follow a religion that does not mandate clothing requirements that apply in the workplace may work here. Individuals, such as devout Muslim women, who follow a religion that does contain such clothing mandates, may not. In this regard, Muslim women similarly situated to Ms. Achbita are afforded fewer opportunities by being ineligible to work at any company with an employee policy similar to that at G4S. The alternative would be to abandon strict adherence to one’s religion if doing so would once again make one eligible for employment. The broad and simple language of Article 13 of the E.C. Treaty to “combat discrimination” suggests that such literal discrimination falls within the category of ills the E.C. Treaty seeks to encompass.

Nevertheless, even if one accepts an interpretation of Article 13 that would result in a different ruling by the ECJ had it not been guided by the strict requirements of Directive 2000/78, the language of Article 13 is permissive rather obligatory: “the Council . . . may take appropriate action to combat discrimination.”98 As a result, there is no direct conflict between Directive 2000/78 and Article 13 of the EC Treaty. Directive 2000/78 is simply a body of law whose existence is authorized by Article 13. Instead, the tension between the two seems to lie in the potential scope of conduct that qualifies as legal discrimination.

96 An-Nur, 24:31 (Qur’an).
97 See discrimination, MERRIAM-WEBSTER DICTIONARY (2018), http://perma.cc/DLC5-MS88 (defined as “prejudiced or prejudicial outlook, action, or treatment”); See also prejudicial, MERRIAM-WEBSTER DICTIONARY (2018), http://perma.cc/4E99-2Q5A (defined as “tending to injure or impair: detrimental”).
discrimination. Although perhaps subtle in the narrow context of E.U.-specific law, international law defines the scope of religious discrimination in a fashion that arguably creates even greater dissonance with the approach for determining discrimination under Directive 2000/78.

B. Broader International Law

Protecting the freedom of religious expression is a staple among the various bodies of international law. In many ways, these various international codes and treaties have firmly established the freedom to practice one’s religion as a fundamental human right. Here the Comment introduces and briefly summarizes the major bodies of law that not only overlap with E.U. law and Directive 2000/78, but also relate directly to Ms. Achbita’s circumstance and the G4S employee policy barring religious apparel in the workplace.

However, a preliminary note must be made at this juncture. The bodies of international law to be discussed apply to state actors. However, there is some debate in the scholarly arena as to whether, and to what extent, private citizens can rely on the provisions of international treaties. For example, in the context of U.S. law, Chief Justice Marshall invented the concept of a “self-executing” treaty in 1829 when he asserted such a treaty “is carried into execution . . . whenever it operates of itself.”99 This idea would be in contrast to that of a “non-self-executing” treaty, namely a treaty that that “the legislature must execute.”100 This distinction turns on the notion that “some treaties do not operate of themselves but require domestic legislation to carry them ‘into execution.’”101 In the U.S., historically, “courts generally applied a strong presumption that private litigants could use treaties to press their claims in court.”102 However, this presumption was turned on its head in Medellín v. Texas when the Court adopted a “background presumption” against finding that treaties confer private rights or private rights of action, even when they are self-executing.103 As a result, it is unclear to what extent a U.S. citizen can enforce the fundamental rights found under international law without state assistance.

This similar complication arises in the context of E.U. law. The E.U. has a basic obligation to comply with international law.104 However, the E.U. has

100 Id.
traditionally rooted its human rights obligations within its own legal order.\textsuperscript{105} Under this approach, “the EU is merely under an obligation not to violate human rights when it acts (i.e. a negative obligation to respect human rights).”\textsuperscript{106} The conflict thus occurs in that “Member States remain bound by their obligations under UN human rights treaties and cannot release themselves from these obligations simply by delegating powers relevant to their implementation to the EU.”\textsuperscript{107} Once again, there is a tension between the fundamental human rights established by international law and the availability to exercise those rights should the E.U. fail to proactively ensure such rights.

However, a detailed discussion of “self-executing” versus “non-self-executing treaties” is beyond the scope of this Comment. At a minimum, it is accepted that G4S, as a private employer, is not bound by the provisions of the following international law treaties. Additionally, this Comment does not openly suggest that Ms. Achbita has a private right of action against either her employer or the E.U. The stance this Comment takes is that the E.U., should it fail to enact legislation to ensure the preservation of freedom of religious expression for its Member States’ citizenry, is the party in violation of international law. This bold assertion is not mere conjecture. As stated by the U.N.:

International human rights law lays down obligations which States are bound to respect. By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfil human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.\textsuperscript{108}

As G4S is a private, nongovernmental employer, international law does not directly apply to its conduct. Therefore, G4S’s employee policy does not itself violate international law. Instead, this Comment takes the stance that a state has a positive duty to enforce the provisions of the following international treaties and resolutions to enshrine the fundamental rights established under these bodies of international law. The freedom of religious expression is the relevant fundamental right at issue. However, an analysis of whether E.U. law sufficiently protects this fundamental right for a private citizen such as Ms. Achbita cannot


\textsuperscript{106} Id.


be viewed in isolation. As noted by the AG, G4S has its own private interests and a “policy of [ideological] neutrality does not exceed the bounds of the discretion it enjoys in the pursuit of its business.” As such, any analysis as to whether the E.U. is properly adhering to its international law obligations necessarily entails keeping both Ms. Achbita’s and G4S’s interests at the forefront of one’s thoughts. A second consideration is whether both private interests can fairly be seen as “fundamental human rights.”

This Section of the Comment introduces the relevant bodies of international law that apply beyond simply the member states of the E.U. The purpose is to explore whether E.U. law and the approach taken by the AG and the ECJ is consistent with the legal norms and dictates of the broader international community.


The Universal Declaration of Human Rights (UDHR) was proclaimed by the United Nations General Assembly in Paris on December 10, 1948 as “a common standard of achievements for all peoples and all nations.” The UDHR contains multiple provisions establishing various fundamental rights and freedoms including the rights to life, liberty, security, adequate standards of living, and privacy. For this Comment’s purposes, Article 18 similarly establishes the freedom of religious expression as a fundamental human right. Article 18 states: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

Of important note is the plain language of Article 18 focusing on “freedom . . . in community. . . and in public . . . to manifest his religion or belief in . . . practice, worship, and observance.” Article 18 thus doesn’t only establish the freedom to adhere to a particular religion or belief, but specifically preserves the freedom to manifest that belief in practice in both private and public contexts. It is unclear by the text of Article 18 whether such a right was intended to be exercised on occasion, such as occasional worship in the public square, or whether it applies with equal force to religious practices that are constant. For example, Ms. Achbita’s position is that her religion dictates that she should wear

110 Universal Declaration of Human Rights, supra note 15.
111 Id.
112 Id., at art. 18.
113 Id.
the Islamic headscarf at all times that she is in public.\textsuperscript{114} One interpretation of Article 18 is that this type of religious practice that constitutes a form of constant religious observance is a fundamental human right. Yet this interpretation does not fit with Directive 2000/78’s concept of balancing interests between employer and employee. Whereas Article 18 states that Ms. Achbita is entitled to wear the Islamic headscarf in public as a fundamental right, Directive 2000/78 by contrast essentially states, “yes she can, but not at work when the employer’s interest in religious neutrality is both a legitimate aim and the means to achieve that aim are appropriate and necessary.” In this way, Directive 2000/78 abridges a freedom of religious expression for individuals such as Ms. Achbita for which Article 18 expressly provides.

An alternative interpretation of Article 18 is that freedom of religious expression is not necessarily a universal freedom divorced from time, place, and manner restrictions. So long as an individual is not ultimately barred from practicing his or her religion at some times and in some places, then Article 18, under this interpretation, would not be violated by a policy banning religious apparel in the workplace. Ms. Achbita certainly has the right to be a Muslim woman, to practice her religion, and to wear a headscarf in numerous other contexts, both public and private, except for in the workplace per the ECJ’s ruling. Furthermore, as the ECJ explained, this abridgement of freedom of religious expression isn’t arbitrary, but rather an issue of two competing interests butting up against one another. The employer has an interest in creating a religiously and ideologically neutral image which conflicts with the employee’s interest in manifesting her religious beliefs in the workplace. It would be odd to think that Article 18 was meant to allow all religious practices, at all times, and in all places to fall within its scope. Such an interpretation would clearly be untenable, especially in situations where competing interests are at play.

However, a loose or malleable interpretation of Article 18 threatens to remove any force the UDHR might have in terms of protecting religious expression as a fundamental freedom. At a minimum, “[i]nvoking customary human rights law is in itself not dispositive, though it may lend weight to an existing right and affect the balancing process in a domestic legal issue which deals with human rights.”\textsuperscript{115} As Adrienne Anderson notes, “[d]espite challenges to the UDHR’s universal relevance and enforceability...it is commonly perceived as the underpinning of international human rights and credited as the inspiration of more than two hundred international human rights

\textsuperscript{114} See Achbita v. G4S, Opinion of the AG, supra note 3.

\textsuperscript{115} Li-Ann Thio, Reading Rights Rightly: The UDHR and Its Creeping Influence on the Development of Singapore Public Law, 2008 SING. J. LEGAL STUD. 264, 284.
instruments.”\footnote{Adrienne Anderson, On Dignity and Whether the Universal Declaration of Human Rights Remains a Place of Refuge after 60 Years, 25 Am. U. Int'l L. Rev. 115, 118 (2009).} This fact alone suggests that although the UDHR is not a treaty (it is a U.N. resolution), and thus does not directly create legal obligations for countries,\footnote{See What is the Universal Declaration of Human Rights?, Australian Human Rights Commission, http://perma.cc/T7XZ-CG9C.} substantial weight should be given to the value it places on fundamental freedoms, such as religious expression. As Anderson further notes, “[t]he UDHR is held in such regard for its contribution to the international human rights regime that the UDHR and human rights have become almost synonymous concepts.”\footnote{Anderson, supra note 116, at 119.} Anderson goes on to quote Professor Jack Donnelly, who states: “For the purposes of international action, ‘human rights’ means roughly ‘what is in the Universal Declaration of Human Rights.’”\footnote{Id. (quoting Jack Donnelly, Universal Human Rights in Theory and Practice, 22 (2d ed. 2003)).}

The functional effect of allowing exceptions to the general rule of religious freedom, especially for the many individuals who spend a great deal of their lives in a work environment, would be to relegate freedom of religious expression to a subordinate position in the spectrum of human interests. Religious expression becomes ultimately a “do it on your own time” engagement. This is all the more concerning considering that wearing the Islamic headscarf for many devout traditional Muslim women is not optional—they are supposed to wear the headscarf \textit{any} time they are in \textit{any} public place. Thus, without a strict interpretation of Article 18, religions with these constant or universal requirements are not protected relative to religions that do not have such requirements. Essentially, Article 18 would allow a Catholic individual to adhere to the tenets of her religion but would not allow a Muslim individual to adhere to the tenets of her religion, simply because the Muslim individual must follow public clothing mandates whereas the Catholic individual does not. Further consider the ongoing commitments of many other religions, such as Jewish individuals who require Kosher food, or Hindu individuals who abstain from eating beef. Under this interpretation of Article 18, many widespread religious practices would have little protection under the UDHR. This position, understandably, would be unworkable if a particular religious practice created undue burden, expense, or openly violated the rights of others, but this case involves a particularly innocuous practice: the public wearing of a scarf on one’s head. As even the ECJ noted, “the work of a receptionist can . . . be performed just as well with a headscarf as without one.”\footnote{Achbita v. G4S, Opinion of the AG, supra note 3, at ¶ 75.} Directive 2000/78 apparently
abridges, at least in some contexts, a freedom of religious expression guaranteed by Article 18 of the UDHR.

2. Article 18 of the International Covenant on Civil and Political Rights.

The International Covenant on Civil and Political Rights\(^\text{121}\) (ICCPR) is an international human rights treaty adopted by the U.N. in 1966.\(^\text{122}\) In many respects, the ICCPR practically mirrors the protections afforded by Article 18 of the UDHR. Article 18(1) of the ICCPR states:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.\(^\text{123}\)

Article 18 of the ICCPR, however, adds two additional lenses not found in the UDHR by which to analyze freedom of religious expression. Article 18(2) provides that: “\(\text{i}\)no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”\(^\text{124}\) A narrow reading of this provision would suggest that it applies only to coercive conduct that prevents an individual from adopting their own desired religion. A more relaxed interpretation suggests that this provision bars coercive conduct that would dissuade an individual from adopting a particular belief or religious practice, such as an adherence to clothing mandates. Commentators Katarzyna Ważyńska-Finck and François Finck have explained that the Human Rights Committee has found that Article 18 of the ICCPR “should be construed as covering also the right to change one’s beliefs.”\(^\text{125}\) This interpretation suggests a fluid, dynamic process by which an individual is at liberty to change or modify his or her beliefs as desired. Ważyńska-Finck and Finck further argue that “Article 18 guarantees everyone’s right ‘to have or to adopt a religion or belief of his choice’, thus clearly stating the importance to respect the individual’s freedom of choice in this matter.”\(^\text{126}\) This line of argumentation implies that Article 18(2) extends beyond the narrow reading of simply barring the forcing of a religion on another individual, but to also give deference to the individual’s choice of whether to modify his or her belief(s) in either piecemeal or wholesale fashion.

\(^{121}\) International Covenant on Civil and Political Rights, supra note 16.


\(^{123}\) International Covenant on Civil and Political Rights, supra note 16, at art. 18(1).

\(^{124}\) \textit{Id.} at art. 18(2).


\(^{126}\) \textit{Id.} at 43.
Logically, this would apply to a decision to follow a particular religious practice as equally as it would to adopting an entire religion. In addition, Devin Carpenter notes that “[d]uring the drafting of Article 18, there was significant disagreement about the scope of the phrase “religion or belief,” but the evidence suggests that it was understood to cover non-religious belief and its manifestation.” This further indicates that a particular religious practice, and its manifestation, fall within the scope of Article 18(2). Furthermore, the U.N. Human Rights Committee has itself explained:

Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms “belief” and “religion” are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community.

This provision of the ICCPR warrants particular consideration as applied to the ECJ’s ruling and G4S’s employee policy. When a particular employment policy conflicts with a religious mandate, an individual is faced with a choice between adhering to his or her religious beliefs and maintaining employment. Neither Directive 2000/78 nor the ECJ addresses whether G4S’s policy could be seen as coercive in this manner. In one respect, G4S’s policy could be said to coerce Muslim women into violating their religious beliefs in order to secure employment. The pushback, of course, is that G4S is not the only employer and such women are free to explore employment opportunities elsewhere. Yet, consider the impact on Muslim women if the vast majority of employers adopted a policy similar to that of G4S. If Directive 2000/78 allows for this state of affairs to exist, it seems we have arrived at state-sanctioned coercion whereby followers of religions that mandate certain garb in public must abandon their religious beliefs to gain employment.

Ultimately, the ECJ does not pursue this line of thought. Perhaps the court felt such considerations were beyond the scope of the immediate case, or perhaps any concept of coercion was seen as merely an incidental effect of G4S’s employee policy and that Ms. Achbita had ample opportunity to seek alternative employment. In any event, the ICCPR’s bar against coercion per

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Article 18(2) is both a relevant and pressing concern for analyzing policies that impact religious belief and expression.

The second distinctive feature of the ICCPR is that it narrows the scope of freedom of religious expression relative to the unbounded provision of Article 18 under the UDHR. Article 18(3) states: “Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” Article 18(3), in essence, addresses many of the previous concerns for interpreting the breadth of Article 18 of the UDHR. As previously noted, it would be illogical to assume every conceivable religious practice is allowable, especially when certain practices could cause substantial harm to others or conflict with other persons’ rights. Yet unlike the proportionality approach advanced by the ECJ relying on Directive 2000/78, which carefully balances the interests of employer and employee, Article 18(3) seemingly sets a higher bar for abridging freedom of religious expression. The only justifiable limitations on the freedom of religion or belief per Article 18(3) are those “necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” In addition, “General Comment No. 22 of Article 18(3) insists that the limitation or restriction on the manifestation of religion should not be undertaken for discriminatory purposes or be applied in a discriminatory manner.” Although the precise scope of “fundamental rights and freedoms of others” is not clear, the UN Human Rights Committee has clarified that:

In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26. Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18.

Although the ECJ’s proportionality test included a “necessary and appropriate” measure that sounds similar to Article 18(3) here, recall that this test applies merely to the means needed to achieve a legitimate aim that had already been established by the employer. “Legitimate aim” under Directive 2000/78 thus appears to be a much lower threshold than the “fundamental

129 International Covenant on Civil and Political Rights, supra note 16, at art. 18(3).
130 Id.
132 CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), supra note 128, at ¶ 8.
rights” language of Article 18(3). Further recall that the AG defined “legitimate aim” by appealing to both the norms and “fundamental values” of the E.U. There is arguably a key distinction between “fundamental values” and “fundamental rights and freedoms of others.” Namely, just because something is fundamentally valued, for example, a high-paying career, it does not mean that one has an entitlement to that thing. That which is fundamentally valued often requires effort to achieve; that which is a fundamental right is intrinsic and self-fulfilling. The contrast is even starker when comparing norms to “fundamental rights.” Throughout history, atrocities such as slavery and genital mutilation have been social norms in many countries and cultures, yet clearly such norms do not translate well into an objective valuation of fundamental human rights.

This analysis leads to the conclusion that Article 18(3) of the ICCPR sets a strict condition that the freedom of religious expression can be abridged only in extreme circumstances such as those “necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”

Although one could argue an employer’s desire to present an ideologically neutral image is a fundamental right alongside the freedom of religious expression, recall the U.N. Human Rights Committee has clarified that, in formulating any limitations on the freedom of religious expression, “States parties should proceed from the need to protect the rights guaranteed under the Covenant.” Freedom of religious expression is a right explicitly guaranteed under the Covenant. The ability of an employer to manufacture a specific public image for their place of business, by contrast, has no explicit support under the ICCPR provisions. Thus, some distance below sits the threshold for “legitimate aim” under Directive 2000/78, which allows for freedom of religious expression to be abridged even without a showing of such necessity or the encroachment upon a fundamental right. In fact, all that must be shown per Directive 2000/78 to open the door for the suppression of religious expression is a “legitimate aim.”

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135 See The Foundation of International Human Rights Law, UNITED NATIONS, http://perma.cc/2LZ2-5KLZ (“[The UDHR] represents the universal recognition that basic rights and fundamental freedoms are inherent to all human beings, inalienable and equally applicable to everyone, and that every one of us is born free and equal in dignity and rights.”) (emphasis added).

136 International Covenant on Civil and Political Rights, supra note 16, at art. 18(3).

137 CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), supra note 128, at ¶ 8.

138 International Covenant on Civil and Political Rights, supra note 16, at art. 18(1).
3. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (DEAFID) was passed by the U.N. General Assembly on November 25, 1981. Similar to the ICCPR, the DEAFID sets a foundation for the observance of human rights and fundamental freedoms but sets a specific focus on the freedom of religious belief and expression. Article 2(1) of the DEAFID states that: “[n]o one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or belief.” In addition, Article 2(2) further defines actions that qualify as “intolerance and discrimination based on religion or belief” as follows:

For the purposes of the present Declaration, the expression “intolerance and discrimination based on religion or belief” means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.

Of critical importance in comparing this body of international law to E.U. law is the way in which discrimination on the grounds of religion or belief is defined. Directive 2000/78 differentiates between “direct” and “indirect” discrimination and treats each type differently under separate provisions; the DEAFID groups both restrictions that are “purposeful” and those that “[have] as [their] effect” impairment on religious exercise into a single category of “discrimination.” This approach which treats both direct and indirect discrimination as simply “discrimination,” that is prohibited outright, appears to be at odds with Directive 2000/78’s differential treatment of direct and indirect discrimination. Presumably, without such differential treatment, G4S’s policy would either “purposefully” restrict or “have as its effect” a restriction on Muslim women’s ability to exercise their religious beliefs. Either way, the policy would be discriminatory against individuals such as Ms. Achbita and not allowed under international law. This presents yet another instance of E.U. law being seemingly inconsistent with international law.

139 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, supra note 17.
140 Id.
141 Id. at art. 2(1).
142 Id. at art. 2(2).
143 Id.
An additional analytical point, however, is that Article 2(2) specifically defines discrimination as occurring when a restriction prevents "enjoyment or exercise of human rights and fundamental freedoms on an equal basis."\(^{144}\) One could argue that G4S’s policy does not violate Article 2 of the DEAFID because the policy applies equally to all persons and every set of religious beliefs. This produces an equal basis and is thus non-discriminatory.

The response argument is that, by its very nature, applying a uniform policy to a range of unequal religious beliefs produces inequitable results. A policy such as G4S’s thus favors, directly or indirectly, certain religions over others. As a result of the company policy, a Muslim woman is not equally allowed to practice her religious beliefs to the same degree of freedom as a follower of a religion that has no public clothing requirements. It becomes a "square peg, round hole" type of scenario when a multitude of different religions with vastly different defining characteristics and religious mandates are expected to conform to a standardized policy. This produces an unequal basis for exercise of religious belief because certain religions are more heavily burdened than others. In effect, individuals such as Ms. Achbita are discriminated against because G4S’s policy impairs the enjoyment or exercise of their particular set of religious beliefs to a greater extent than it does for followers of many other religions.


The European Convention on Human Rights\(^{145}\) (ECHR) is the first Council of Europe’s convention.\(^ {146}\) It was adopted in 1950 and entered into force in 1953.\(^ {147}\) Like many of the bodies of international law previously discussed, the ECHR aims at protecting the right to life, freedom, and security; freedom of expression, property, and peaceful enjoyment of possessions; and also bans certain institutions such as the death penalty and slavery.\(^ {148}\) Of course the ECHR also protects the freedom of thought, conscience and religion. Article 9(1) establishes that: "[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance."\(^ {149}\)

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\(^{144}\) Id. (emphasis added).

\(^{145}\) European Convention on Human Rights, supra note 18.


\(^{147}\) Id.

\(^{148}\) Id.

\(^{149}\) Convention for the Protection of Human Rights and Fundamental Freedoms, supra note 18, at art. 9(1).
Unsurprisingly, the language of Article 9(1) is virtually identical to the language of Article 18 of the UDHR and Article 18 of the ICCPR.

Also similar to the ICCPR, the ECHR sets limits on the extent to which such freedoms can be exercised. Article 9(2) states:

Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary 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.\(^{150}\)

Note how similar this is to the language of the ICCPR at Article 18(3) which allows restrictions on religious expression that are “necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”\(^{151}\) Due to the similarity in language between the ECHR, the UDHR, and the ICCPR, there is nothing new to say here other than that the ECHR represents yet another body of international law that, while cohesive with other established bodies of international law, seems to be in tension with E.U. law, namely Directive 2000/78, and its approach to determining the bounds of religious expression.

At this point, it is necessary to briefly reiterate a point concerning the scope of certain international law such as the ECHR. A reader familiar with the ECHR might remark that the it is applicable only to the Member States. In this regard, a private action must be brought against a state party when the individual’s rights under the ECHR have been violated. Therefore, since a company like G4S is a private employer, the terms of the ECHR do not apply directly to G4S. Furthermore, since Ms. Achbita brought a private action against her private employer, the ECHR seems inapplicable. While it is true that Ms. Achbita could not rely on the law of the ECHR against her private employer, it is important to note that Article 1 of the ECHR imposes an affirmative duty on Member States (referred to as “High Contracting Parties”) to ensure the rights and freedoms established in the ECHR for their citizens. Specifically, Article 1 states: “[o]bligation to respect Human Rights – The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”\(^ {152}\) Section I contains the remaining Articles within the ECHR, including Article 9. In this regard, Ms. Achbita could theoretically bring a secondary suit against Belgium for failing to ensure her freedom of religious expression should Belgium fail to respond with state action to bar employee policies such as G4S’s (assuming of course Ms. Achbita could establish that G4S’s policy is indeed violative of her rights under Article 9 of the

\(^{150}\) Id. at art. 9(2).

\(^{151}\) International Covenant on Civil and Political Rights, supra note 16, at art. 18(3).

\(^{152}\) European Convention on Human Rights, supra note 18, at art. 1.
ECHR). Although a hypothetical secondary suit against Belgium is somewhat beyond the scope of this paper, the main value in analyzing the ECHR similar to other bodies of international law concerning religious expression is in determining where the legal lines of permissible religious expression are to be drawn, how truly “fundamental” is a right of religious expression in a legal sense, and how Directive 2000/78 seems to be the outlier in terms of creating the necessary distinctions.

IV. APPLICATION OF INTERNATIONAL LAW AND ANALYSIS

The discussion so far has focused on the specific language of various bodies of both European and international law concerning the freedom of religious expression. Historic applications of these bodies of law have yielded similar results. For instance, concerning the ECHR, Jill Marshall points out that:

In all the cases, the Convention institutions have found that in a democratic society, the relevant member state is entitled to ban adult women from wearing the Islamic headscarf on the basis that such bans have been prescribed by law, have a legitimate aim, that is, protecting the rights and freedoms of others, and are necessary in a democratic society.153

A particular case Marshall focuses on is Sahin v. Turkey, where Ms. Sahin brought a suit against the Republic of Turkey after she faced disciplinary action while attending Istanbul University.154 Ms. Sahin had refused to comply with a newly instituted university policy that banned students from attending lectures if the student wore the Islamic headscarf or otherwise covered his or her head.155 Among other claims, Ms. Sahin alleged her rights had been violated under Articles 8, 9, and 14 of the ECHR.156 Importantly, “[Ms. Sahin] comes from a traditional family of practising Muslims and considers it her religious duty to wear the Islamic headscarf.”157 The court concluded that although there had been interference with Ms. Sahin’s rights under Article 9, such interference was justified under Article 9(2) because the state’s principles of secularism and equality must necessarily be upheld in order to protect the democratic system in

155 Id. at ¶ 16.
156 Id. at ¶ 3. Article 8 of the ECHR deals with the right to respect for private and family life; Article 14 prohibits discrimination in the form of unequal application of the provisions of the ECHR 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.
157 Id. at ¶ 14.
Turkey.\textsuperscript{158} Per the court: “An attitude which fails to respect that principle [of secularism] will not necessarily be accepted as being covered by the freedom to manifest one’s religion and will not enjoy the protection of Article 9 of the Convention.”\textsuperscript{159} Similarly, in \textit{Karaduman v. Turkey}, the court upheld a university policy whereby graduating students were required to supply an identity photograph containing no head coverings or headwraps in order to receive their degree certificate.\textsuperscript{160} The applicant was a student who had recently completed her university studies at the department of pharmacology in Ankara.\textsuperscript{161} She submitted her identity photograph in which she was wearing the Islamic headscarf.\textsuperscript{162} The university administration refused to grant the student her certificate unless she submitted a photograph that complied with the university’s policy of no head coverings in the identity photograph.\textsuperscript{163} The court upheld this policy noting that “by choosing to pursue her higher education in a secular university a student submits to those university rules, which may make the freedom of students to manifest their religion subject to restrictions as to place and manner intended to ensure harmonious coexistence between students of different beliefs.”\textsuperscript{164} Furthermore, “[w]here secular universities have laid down dress regulations for students, they may ensure that certain fundamentalist religious movements do not disturb public order in higher education or impinge on the beliefs of others.”\textsuperscript{165}

In \textit{Dahlab v. Switzerland}, the European Court of Human Rights upheld a school policy forbidding educators to wear a headscarf in the performance of professional duties.\textsuperscript{166} The applicant, Ms. Dahlab, was a Swiss national and primary school teacher who converted to Islam and began regularly wearing the Islamic headscarf while teaching.\textsuperscript{167} After being informed that she could no

\textsuperscript{158} \textit{Id.} at ¶ 114. Recall that under Article 9(2) of the ECHR “[f]reedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary 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.” \textit{Convention for the Protection of Human Rights and Fundamental Freedoms, supra note 18, at art. 9(2).}

\textsuperscript{159} \textit{Sahin v. Turkey, supra note 154, at ¶ 114.}


\textsuperscript{161} \textit{Id.} at 102.

\textsuperscript{162} \textit{Id.} at 103.

\textsuperscript{163} \textit{Id.}

\textsuperscript{164} \textit{Id.} at 108.

\textsuperscript{165} \textit{Id.}

\textsuperscript{166} \textit{Dahlab v. Switzerland, 2001-V Eur. Ct. H.R. 447.}

\textsuperscript{167} \textit{Id.} at 451.
longer wear the Islamic headscarf at work, Ms. Dahlab initiated the suit alleging that the school policy violated her right to religious expression under Article 9 of the ECHR. In a well-formed opinion, the court perfectly summarized the core of the issue that this Comment raises: “[P]rohibiting the appellant from wearing a headscarf forces her to make a difficult choice between disregarding what she considers to be an important precept laid down by her religion and running the risk of no longer being able to teach in State schools.” The Court determined, however, that the measure prohibiting Ms. Dahlab from wearing a headscarf while teaching was “justified in principle and proportionate to the stated aim of protecting the rights and freedoms of others, public order and public safety. . . . [and] was ‘necessary in a democratic society.’” The court specifically noted how Ms. Dahlab taught very young children and that, as a powerful religious symbol, “it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect.” Therefore, the court found that it is especially important that educators discharge their duties while remaining denominationally neutral.

The running theme thus far suggests that individuals indeed have a legitimate legal interest in wearing religious clothing and symbols in the workplace, but that this individualized interest is outweighed by state interests of secularism, image neutrality, and maintaining public order. As the aforementioned cases involved state actors to which the ECHR directly applies, the case for legally requiring private employers, to whom the ECHR does not directly apply, to allow religious symbols and attire to be worn in the workplace becomes a markedly weaker case. If states have an overriding legal interest in image neutrality and associated spheres over religious expression, it is difficult to ascertain how a private employer, such as G4S, would not be able to assert a similar overriding legal interest in image neutrality. Courts have already adopted the position that religious expression can be limited by an interest in image neutrality, because such a limitation qualifies under Article 9(2) of the ECHR as “necessary in a democratic society. . . .”

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168 Id. at 452.
169 Id. at 456.
170 Id. at 463.
171 Id.
172 Dahlab v. Switzerland, supra note 166.
173 See generally Sahin v. Turkey, supra note 154.
174 See generally Dahlab v. Switzerland, supra note 166.
175 See generally Karaduman v. Turkey, supra note 160.
176 European Convention on Human Rights, supra note 18, at art. 9(2).
Yet a case could be made that an interest in image neutrality by a private employer fails to rise to the same level of significance of such a policy at the state level. The simple case would be to compare a policy barring religious apparel in the workplace to the same policy in a school setting, such as was at issue in Dahlab v. Switzerland.\textsuperscript{177} The critical interest in a school setting involves the unwarranted imposition of religious beliefs from a position of authority on impressionable young children. No such critical interest is present in the context of a private employer doing business with the general public. As a result, the justifications for allowing a private employer to implement such a policy are far less apparent.

The harder case would be to consider whether there is a substantial enough difference between a university setting and a private employer setting to encourage a different analytical outcome. There certainly is an apparent danger in creating the appearance that a state sponsors or favors a particular religious set. Without a baseline of ideological neutrality, state institutions could appear to promote a specific religion(s) and this could affect individuals’ willingness to demonstrate non-sponsored religious beliefs. This, in turn, could create a chilling effect that would stifle the free exchange of ideas and thus result in decreased societal wellbeing.

In the university setting, present in Sahin v. Turkey\textsuperscript{178} and Karaduman v. Turkey,\textsuperscript{179} it is readily apparent how preserving the free exchange of ideas in a welcoming, non-hostile environment is a genuine legitimate interest. It also cannot be denied that religious dress carries a powerful symbolic effect. For example, familiar clothing practices in Europe include “[t]he Jewish kippa . . . the Hassidic way of clothing . . . Sikh men [who] always wear the turban in public and at meal times and [] [S]ikh women wear the shalwar kammez, which is a long tunic and matching trousers,” and of course the Islamic head coverings frequently worn by Muslim women.\textsuperscript{180} It is common for religious persons to be publicly identified through clothing which identifies the wearer as the follower of a particular faith.\textsuperscript{181} Therefore, the state interest in preserving an image of ideological neutrality at state universities and other state institutions is understandably important. Without this visage of neutrality, concerns over state favoritism would surely arise. A critical mass of individuals wearing similar religious attire can give the impression that those individuals represent what the university accepts as “the appropriate” religious background that students are

\textsuperscript{177} Dahlab v. Switzerland, \textit{supra} note 166.

\textsuperscript{178} Sahin v. Turkey, \textit{supra} note 154.

\textsuperscript{179} Karaduman v. Turkey, \textit{supra} note 160.


\textsuperscript{181} \textit{Id.} at 373.
expected to have. This could result in the previously mentioned chilling effect on openly displaying alternative religious beliefs and practices. Although the concerns from *Dahlab v. Switzerland*\(^{182}\) regarding impressionable young children are not present in the state university context, the argument for ideological neutrality becomes even stronger when applied directly to faculty and other government employees. The ills of perceived favoritism are arguably enhanced exponentially if the state appears to be favoring one religious group or another through its hiring decisions.

The ECJ determined that G4S had a legitimate aim in establishing a specific company image that involved ideological neutrality.\(^ {183}\) However, unlike the justification for ideological neutrality in the university context, it is unclear why G4S’s desire for a specific company image is a right that warrants a limitation on religious expression—this limitation hardly seems “necessary in a democratic society”\(^ {184}\) unless the employer’s right to establish a specific company image is a more valuable right than that of religious expression. Presumably, G4S could operate just as efficiently and without causing a breakdown of society by adopting a specific company image of diverse inclusion as opposed to an image of ideological neutrality. A Muslim woman, on the other hand, has no effective alternative except to not work at G4S. As such, G4S’s legitimate aim is an interest that is seemingly outweighed by the competing interest.

Furthermore, recall that Article 18(3) of the ICCPR states that: “Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”\(^ {185}\) As one scholar argues, “[p]ublic safety, order, health, morals or the fundamental rights and freedoms of others’ are matters in which the public as a whole has a stake . . .”\(^ {186}\) If one adopts such criteria, an employer’s private interest in the image of his or her company would not give rise to a situation that warrants limiting an individual’s right to religious expression. On the other hand, society as a whole does hold an interest in the ideological neutrality of its state-sponsored institutions, such as schools and universities, for the reasons previously argued. This kind of framework would give rise to a justifiable difference of treatment when weighing the competing interests, dependent on the context. As such, a private employer’s policy that bans the wearing of religious attire in the

\(^{182}\) *Dahlab v. Switzerland*, supra note 166, at 456.

\(^{183}\) *Achbita v. G4S*, supra note 2, at ¶ 44.

\(^{184}\) *European Convention on Human Rights*, supra note 18, at art. 9(2).

\(^{185}\) *International Covenant on Civil and Political Rights*, supra note 16, at art. 18(3).

workplace should be an interest treated with less deference than an interest society as a whole has a stake in, such as ideological neutrality of state institutions. Therefore, the argument that a private employer’s interest in running a business in a specific fashion is a “fundamental right” becomes a weaker stance. Since freedom of religious expression is inarguably a fundamental human right under international law, the right which is truly fundamental should win out over any lesser, non-fundamental rights.

The key point to remember is that any limitation on religious expression must be necessary per international law. Revisiting application of the ECHR, as Joan Squele explains, “the limitation or interference must be prescribed by law, [i.e.,] have a basis in law and be necessary in a democratic society.”

Further, courts have held that “there must be a ‘pressing social need’ for the interference” in order for the limitation to be “necessary.” However, this idea of a “pressing social need” seems to be at odds with how the ECJ defined “legitimate aim.” As part of its holding in Samira Achbita v. G4S, the ECJ states:

[An] internal rule of a private undertaking may constitute indirect discrimination . . . if it is established that the apparently neutral obligation it imposes results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage, unless it is objectively justified by a legitimate aim, such as the pursuit by the employer, in its relations with its customers, of a policy of political, philosophical and religious neutrality, and the means of achieving that aim are appropriate and necessary . . .

Although this is the only example of a “legitimate aim” the court gives, the simple desire of a company to present an image of religious neutrality arguably does not rise to the level of a pressing social need. This is especially true considering one can achieve the same effect as an image of religious neutrality by either posting disclaimers around the place of business, or by simply hiring individuals of various faiths and allowing all to display religious symbols or wear their faith’s corresponding religious attire. Once again, the ECJ’s conceptualization of “legitimate aim” tugs against the international law concept of a “necessary” limitation. Opponents of the ECJ’s ruling have openly disagreed with the “assessment

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187 See, for example, International Covenant on Civil and Political Rights, supra note 16, at art. 18(3) (“Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”).


189 Id. at 45 (quoting Handyside v. The United Kingdom, App. No. 5493/72, 1 Eur. Comm’n H.R. Dec & Rep. 737 (1976)).

190 Achbita v. G4S, supra note 2, at ¶ 44.
that the aim pursued by the ban imposed by G4S was legitimate, necessary and proportionate.”

V. CONCLUSION

This concluding section offers some final analyses and suggests potential solutions to the disparity between broader international law and E.U. law. A primary concern is how Directive 2000/78 divides discrimination into two categories: direct discrimination and indirect discrimination. This granular approach may lead to instances where an employer can discriminate against an individual by advancing a legitimate aim that otherwise would not be legally possible. If, instead, the policy was gauged simply by a metric of whether it results in undue discrimination, regardless whether the policy has “as its purpose or as its effect” the discriminatory result, this would provide stronger protections for religious expression. Of course, this approach would require a radical departure from the current state of E.U. law, with nothing short of a rewrite of Directive 2000/78.

A. Reinterpreting “Direct” Discrimination

A simpler approach would be to interpret “direct” discrimination to include policies that, ex ante, will clearly lead to a disparate impact on members of various religions. G4S implemented their employee policy with full knowledge that the policy would place little burden upon followers of religions without clothing mandates, atheists, and secular individuals. At the same time, G4S was aware of the heavy burden this policy places on Muslim women and others who follow religions with clothing mandates. Because G4S knew of the policy’s disparate effect before it was implemented, such a policy could logically be deemed a form of direct discrimination. At the very least G4S was cognizant of the discriminatory effect their policy would have on individuals such as Ms. Achbita. This solution would strengthen protections for religious expression since an employer cannot be excused for direct discrimination under Directive 2000/78 as doing so would violate the principle of equal treatment.

191 AMNESTY INTERNATIONAL, supra note 6.
193 See, for example, Achbita v. G4S, supra note 2.
194 See Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, supra note 17, at art. 2(2).
Although this is perhaps the simplest solution to the issue, it is likely the most untenable. The challenge would not only be in determining whether it is or can be known *ex ante* that a policy is discriminatory, but also in reaching legal determinations concerning those policies that align with existing law for when a state interest overrides discriminatory impact. This solution also ignores the relevant interest of the business owner in establishing an ideological-neutral image, which the ECJ has determined constitutes a legitimate aim. Furthermore, this approach would also substantially blur the lines between direct and indirect discrimination making categorization of any given policy vastly more difficult.

B. A Stronger Focus on Necessary Limitations and Fundamental Rights

A second solution would be to interpret both “legitimate aim” and acceptable “limitations” on the freedom of religious expression strictly in line with Article 18 of the ICCPR. Article 18 of the ICCPR requires any limitation on the freedom of religious expression to be both (1) prescribed by law and (2) necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. Such an approach could be simply applied to policies such as G4S’s. There is a strong case that G4S’s employment policy will disparately impact Muslim women, such as Ms. Achbita, and thus constitutes indirect discrimination. Under a simple analysis, a court would likely determine that such a policy is not necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. As such, it is not a “legitimate aim” for an employer to adopt. Following this approach, G4S’s policy is indirectly discriminatory and does not raise a substantial overriding interest that warrants the limitation on freedom of religious expression. Thus, such a policy cannot stand.

Of course this second approach assumes that an employer’s right to run his or her business in the fashion they desire is not itself a fundamental right. It further assumes that courts are willing to adopt a more proactive approach to fulfilling affirmative duties under international law by maximizing protections for religious expression rather than relying solely on their current domestic counterparts. However, a benefit to this approach is that it would be the most workable solution as it would

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198 *Id.* at art. 18(3).
continue to allow for the distinction between direct and indirect discrimination as it exists in E.U. case law and under the Framework Directive of Directive 2000/78.\textsuperscript{199}

C. Lawful, Individually-Exercisable Exemptions

A final approach to the issue is recognizing that disparate treatment of those with certain beliefs, even by a seemingly neutral employment provision, constitutes general discrimination. Therefore, a broad interpretation of international and E.U. law inherently requires exemptions for individuals thus affected. As Amy Dunne notes:

Religious exemptions in pluralist democracies . . . are indispensable to the preservation of religious plurality. Tolerance, particularly when plurality means that society will comprise of persons unable to comply with certain laws for religious reasons, is expressed through the granting of exemptions from laws which would force a practitioner to violate their mandated beliefs. Providing for plurality of belief but denying practitioners the ability to fulfil the mandates of their beliefs would constitute an empty tolerance.\textsuperscript{200}

The primary benefit of protecting freedom of religious expression through exemptions is how malleable this approach could be. For example, rather than advocate that a problematic policy as a whole must fail because it is discriminatory, such a policy can stand but additionally allow for affirmative exemptions for interested individuals belonging to religious groups who are adversely affected. This approach would be workable whether such exemptions are newly established affirmative exemptions or a position is adopted that such exemptions are implied already under existing international law. Under this regime, if an employer’s policy produces a disparate impact, the policy as a whole can remain yet the particular individual whose religious beliefs conflict with the general policy can automatically qualify for a legal exemption. Such automatic legal protection does have the potential to be abused, but the relevant legal regime could further allow for employers to terminate the abusing employee with impunity upon a showing of bad faith.

Under an alternative approach, it is not necessary to introduce changes to current law in the form of an array of affirmative exemptions. Current international law can be interpreted as inherently requiring such exemptions by its \textit{de facto} ban on discrimination. This interpretation views exemptions as pre-existing under current international law, even if not previously utilized to date, rather than as entirely new solutions to the present problem. Such a solution,


although admittedly a bold proposal, would be simple and would be particularly well-suited to protect the beliefs and religious practices of members of a minority religion. The primary downside of such an approach, however, is that the solution could burden employers by making their policies that are designed to generate an image of religious neutrality entirely ineffective in the presence of one outwardly religious employee.

Whatever direction the ECJ takes moving forward, it is undeniable that individuals like Ms. Achbita are placed in a terrible predicament when faced with employee policies that directly conflict with one’s religious mandates. Should such policies become the rule rather than the exception, employment itself will become difficult, if not ultimately unattainable, for many pious individuals. These considerations bolster the baseline statement that freedom of religious expression is a fundamental human right. As enshrined in the dictates of international law, such a fundamental human right should only be limited when absolutely necessary. Ms. Achbita’s wearing of a headscarf in the workplace harmed no one. Should Ms. Achbita find future, non-discriminating employment and is thereafter allowed to wear the hijab in her new workplace, our society will surely continue to function.