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Limitations on the Right to Manifest Religion in European Private Companies: *Achbita v. G4S Secure Solutions NV* Under Article 9 of the ECHR and Article 18 of the ICCPR

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LIMITATIONS ON THE RIGHT TO MANIFEST RELIGION IN EUROPEAN PRIVATE COMPANIES: ACHBITA V. G4S SECURE SOLUTIONS NV UNDER ARTICLE 9 OF THE ECHR AND ARTICLE 18 OF THE ICCPR

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I. INTRODUCTION

For centuries, Muslim women all over the world have worn the Islamic headscarf or veil.[1] There are many types of veils that Muslim women wear. A few are the burqa, the niqab, and the hijab. The burqa is a full body garment that covers the head and the entire face with a mesh covering over the eyes.[2] The niqab is similar in that it covers the head and face, but it does not cover the eyes.[3] The hijab is a headscarf that covers the head and sometimes the neck.

There are different views concerning the Islamic veil. Some Muslims feel the veil is a requirement of the religion while others view the veil as a choice to present themselves in a modest way.[4] In

1. *See* Farinaz Zamani Ashni & Paula Gerber, *Burqa: Human Right or Human Wrong*, 39 ALTERNATIVE L.J. 231, 231 (2014) (stating that women have worn the burqa in Muslim cultures since the 9th or 10th century and the niqab started in the Byzantine Empire).

2. *Id.*

3. *Id.*

4. *See* Eur. Parliamentary Assembly Resolution 1743, 53rd Sess., Islam, Islamism and Islamophobia in Europe, ¶ 15 (2010), http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17880&lang=en (explaining that some Muslims view the headscarf

several countries around the world, mainly the Western world, many view the Islamic veil as a sign of the oppression of Muslim women.[5] Although there are some countries that require women to wear the veil, women still freely choose to wear the veil in those countries and in countries that do not have this requirement.[6]

Even though many Muslim women wear some form of the Islamic veil, many European countries are installing bans on the veil in different settings.[7] The Court of Justice of the European Union (CJEU) recently upheld the internal rule of a Belgian company that banned all religious, philosophical, and political displays of religion in the office in *Achbita v. G4S Secure Solutions NV*.[8] This decision specified that it was permissible for a private company to prevent a woman, Achbita, from wearing a hijab at work. Achbita argued that the Higher Labour Court incorrectly interpreted direct and indirect discrimination under Article 2(2) of European Union Directive 2000/78.[9] The Belgian Court of Cassation decided to send the case to the Court of Justice of the European Union (CJEU) for a preliminary ruling. The question that the Belgian court presented to the CJEU was whether Article 2(2)(a) of Directive 2000/78 prohibited a general ban on all signs of religious, philosophical, or political beliefs because it constituted direct discrimination against a

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as merely a social or cultural tradition rather than a religious obligation).

5. *Id.*

6. *See* Sital Kalantry, *The French Veil Ban: A Transnational Legal Feminist Approach*, 46 U. BALT. L. REV. 201, 220-21 (2017) (stating that in countries, such as Iran, the state requires women to wear the veil while some women wear the veil as an expression of "self-identity").

7. *See* S.A.S v. France, 2014 Eur. Ct. H.R. 341, 365 (noting that, at the time of the case, 2014, only Belgium had a ban on burqas and niqabs in public places); *The Islamic Veil Across Europe*, BBC (Jan. 31, 2017), http://www.bbc.com/news/world-europe-13038095 (specifying the various bans and laws concerning the Islamic headscarf in Europe; for example, "at least half of Germany's sixteen states went on to ban teachers from wearing headscarves," there are also bans on full-face veils in Austria, France, Belgium, the Netherlands, Italy, Spain, Turkey, the UK, and more, although a lot of these bans are not nationwide).

8. Case C-157/15, Achbita v. G4S Secure Sol. NV, (Mar. 14, 2017), http://curia.europa.eu/juris/document/document.jsf?docid=188852&pageIndex=0&doclang=EN&=1.

9. *Id.* ¶¶ 1, 17, 20; *see also* Council Directive 2000/78/EC, art. 2, 2000 O.J. (L 303) 16, 18 (EU).

female Muslim who wanted to wear an Islamic headscarf at work.[10] The CJEU ruled against Achbita and determined that the rule was not discriminatory.[11]

The CJEU considered a case with similar facts on the same day and came to the opposite conclusion, in *Bougnaoui v. Mircopole SA*, ruling in favor of the individual.[12] Bougnaoui worked at a private company that did not have an internal rule banning all visible signs of any religious, philosophical, and political beliefs.[13] Instead, the company fired Bougnaoui for insisting on wearing a hijab while interacting with company customers.[14]

Before the Grand Chamber of the CJEU decides any case, it considers an Opinion written by an Advocate General (AG).[15] Advocate General Sharpston wrote the Opinion for *Bougnaoui* and Advocate General Kokott wrote the Opinion for *Achbita*.[16] Although the facts were similar, the Grand Chamber decisions of each case closely followed the Advocate General Opinion associated with the case, which were Opinions that largely differed.

The CJEU in *Achbita* found that there was no direct discrimination, but it did not analyze the case under Article 9 of the European Convention on Human Rights (ECHR) or, on a broader

10. Case C-157/15, *Achbita v. G4S Secure Sol. NV*, ¶ 21.

11. *Id.* ¶ 44.

12. Case C-188/15, Bougnaoui v. Micropole SA, ¶ 42 (Mar. 14, 2017), http://curia.europa.eu/juris/document/document.jsf?text=&docid=188853&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=693245 (ruling that the desire of a customer to have an employee fired who was determined to wear an Islamic headscarf was not a "genuine and determining occupational requirement").

13. *Id.* ¶ 34 (explaining that an analysis of whether the employer requiring the employee to remove an Islamic headscarf when interacting with customers constitutes a "genuine and determining occupational requirement" is necessary if Ms. Bougnaoui's dismissal was not based on an internal company rule).

14. *Id.* ¶ 14.

15. Rules of Procedure of the Court of Justice, 2012 O.J. (L 265/1) 1, 31 (EU) (specifying, in Article 136, that the court may only issue a ruling after hearing the opinion of the Advocate General).

16. *See* Case C-157/15, Achbita v. G4S Secure Sol. NV, Opinion of Advocate General Kokott, (May 31, 2016) [hereinafter Opinion of Advocate General Kokott]; Case C-188/15, Bougnaoui v. Micropole SA, Opinion of Advocate General Sharpston, (July 13, 2016) [hereinafter Opinion of Advocate General Sharpston].

scale, Article 18 of the International Covenant on Civil and Political Rights (ICCPR). The CJEU does not have to follow the jurisprudence of the European Court of Human Rights (ECtHR) when deciding cases, but the jurisprudence of the ECtHR is very persuasive to the CJEU, and the CJEU uses the European Convention as a guiding instrument in determining cases concerning fundamental rights.[17]

A. ARTICLE 9 OF THE EUROPEAN CONVENTION AND ARTICLE 18 OF THE ICCPR

Article 9 of the ECHR states that all people have the right to freedom of religion and to manifest that religion, but Section 2 of Article 9 states that the right to manifest religion is subject to limitations.[18] Those limitations must be "prescribed by law" and "necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."[19] Whenever there is a conflict between the interests the state must protect, there must be a balancing of the interests or rights.[20]

Article 18 of the ICCPR states that the Covenant guarantees the right to maintain and to manifest religion, but the right to manifest religion is subject to limitations.[21] Just like Article 9 of the ECHR, the right to manifest religion under the Covenant must be "prescribed by law" and "necessary to protect public safety, order, health, or

17. *See* Szilárd Gáspár-Szilágyi, *The CJEU: An Overzealous Architect of the Relationship Between the European Union Legal Order and the International One?*, 2016 REVISTA DE DREPT CONST. 44, 47 (2016) (stating that the CJEU draws "inspiration" from international human rights treaties that its Member States are signatories to and uses those documents for interpretation guidelines).

18. Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, Nov. 4, 1950, 1955 U.N.T.S. 230 [hereinafter European Convention on Human Rights].

19. *Id.*

20. Eweida v. United Kingdom, 2013-I Eur. Ct. H.R. 215, 254 (noting that it is important to fairly balance competing rights and explaining that, under both positive and negative obligations, states must find the fair balance between the interests of the individual and community, which is subject to the margin of appreciation).

21. International Covenant on Civil and Political Rights art. 18, Dec. 19, 1966, 999 U.N.T.S. 171, 178.

morals or the fundamental rights and freedoms of others."[22]

B. EUROPEAN COURT OF HUMAN RIGHTS CASE LAW

The ECtHR has established case law concerning limitations on the right to manifest religion and the proper analysis to use. I will discuss three relevant cases for analyzing limitations on the right to manifest religion and the Islamic veil. In 2005, the ECtHR decided *Şahin v. Turkey*, which concerned a ban in a public university in Turkey on Islamic headscarves and beards.[23] The ECtHR, in this case, granted Turkey a wide margin of appreciation and ruled that the ban did not violate Şahin's Article 9 right to manifest her religion under the European Convention of Human Rights (ECHR).[24]

In 2013, the ECtHR ruled on *Eweida v. United Kingdom*, in which a private company, British Airways, tried to limit the first applicant's (Nadia Eweida) ability to wear a cross around her neck.[25] Although the legitimate aim of the company and the right of the individual to manifest her religion were in conflict, the ECtHR ruled that the limitation violated Eweida's Article 9 right to manifest her religion.[26] The second applicant in *Eweida* faced a similar limitation from a public hospital that restricted the religious items employees could wear with their uniform. The ECtHR found that the hospital's restrictions on the second applicant did not violate her Article 9 right under the ECHR.[27]

Furthermore, in 2010, the ECtHR decided *S.A.S. v. France*. France enacted a ban that prohibited all people from wearing any garment that covered the face in public, which largely affected Muslim women desiring to wear the niqab and burqa.[28] The court upheld the

22. *Id.*
23. Şahin v. Turkey, App. No. 44774/98, 44 Eur. H.R. Rep. 99 (2005).
24. *See id.* ¶ 123.
25. *Eweida v. United Kingdom*, 2013-I Eur. Ct. H.R. at 255-56.
26. *Id.* at 257 (specifying that the right of the individual in this situation carried more weight than the right and aim of the company).
27. *Id.* at 259 (noting that the aim of the hospital was more important than the right of the individual).
28. Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of October 11, 2010 on Prohibiting the Concealment of the Face in the Public Space], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010.

French law, saying it did not violate the plaintiff's right to manifest her religion under Article 9 of the European Convention because the state's aim was more significant.[29]

There are flaws in some of the ECtHR's prior analyses of Article 9. Occasionally, the ECtHR's wide interpretation of the margin of appreciation and failure to apply an adequate balancing analysis place certain individuals' rights at an unjustifiable disadvantage. The court's balancing analyses in Ş*ahin* and in *S.A.S.* provide insight into the court's reasoning, but are, ultimately, less applicable to *Achbita* because the facts of the cases are dissimilar. Whereas, the proportionality analysis of the first applicant in *Eweida* is applicable as a guiding factor because it is most analogous to the facts in *Achbita*.

When deciding *Achbita*, the CJEU should have followed the opinion of AG Sharpston for the *Bougnaoui* case and applied the balancing analysis used in ECtHR jurisprudence to balance the competing rights of the company and Achbita. Without adequately balancing the rights in conflict, domestic courts cannot sufficiently interpret and apply EU Directive 2000/78. Section II of this Comment presents background information, which will begin by explaining the details of *Achbita*. Next, it will explain the justification test of Article 9 of the ECHR. It will then examine cases from the ECtHR that have analyzed Article 9 and, thus, developed the law surrounding the limitations clause in Article 9(2). Specifically, it will examine the law in the following cases: Ş*ahin v. Turkey*, *Eweida v. United Kingdom*, and *S.A.S. v. France*. Next, the Background will explain Article 18 of the ICCPR and how the United Nations (UN) Human Rights Committee (HRC) has interpreted the law. Alongside the HRC's views concerning interpretation, the Background will consider the Special Rapporteur on freedom of religion or belief's reports concerning interpretation of the right to manifest religion.

The Analysis will apply developed case-law concerning Article 9 of the ECHR to *Achbita*. Specifically, it will consider how the ECtHR applied the justification test and, more specifically, the

29. S.A.S v. France, 2014 Eur. Ct. H.R. 341, 381.

balancing approach in previous ECtHR cases and show the similarities or differences between those cases and *Achbita*. It will also analyze the ECtHR's prior use of the margin of appreciation and its proportionality and balancing analyses. This Comment will also consider reports from the UN HRC and the Special Rapporteur to determine how the UN might have decided *Achbita* under Article 18.

This Comment will suggest that the ECtHR specify a test for when to use the margin of appreciation as well as how to determine what the scope of the margin of appreciation should be in specific cases. It will also recommend that the ECtHR, CJEU, and other courts place a greater emphasis on the need to balance the competing interests of the state, society, or private entity, and the rights of the individual. Lastly, Section V briefly states concluding remarks.

II. BACKGROUND

A. ACHBITA V. G4S SECURE SOLUTIONS, NV AND THE CJEU'S REASONING

Samira Achbita started working at G4S Secure Solutions in 2003.[30] When she started, there was an "unwritten rule" in the company that prohibited all displays of religious, political, and philosophical beliefs.[31] In 2006, Achbita informed her employers that she was going to start wearing the hijab, and the company, then, decided to enact a written rule banning all visible signs of religious, political, and philosophical beliefs.[32] Achbita refused to comply with the new written rule, and, subsequently, the company fired her.[33]

Achbita brought suit in the Belgian Labour Court against G4S because of her dismissal from work, but the court dismissed her action.[34] She subsequently filed an appeal in the Higher Labour Court, but the court denied her appeal.[35] The court held that there

30. Case C-157/15, Achbita v. G4S Secure Sol. NV, ¶ 11 (Mar. 14, 2017), http://curia.europa.eu/juris/document/document.jsf?docid=188852&pageIndex=0&doclang=EN&=1.
31. *Id.*
32. *Id.* ¶ 15.
33. *Id.*
34. *Id.* ¶ 17.
35. *Id.*

was no direct or indirect discrimination because the company's ban applied to all religious, political, and philosophical signs and was not targeted at a specific religion.[36]

Achbita then brought suit before the Court of Cassation in Belgium to challenge the Higher Labour Court's decision.[37] The Court of Cassation decided to stay the proceedings and submit a request for a preliminary hearing to the CJEU.[38] Belgium asked whether it should interpret Article 2(2)(a) of Directive 2000/78 "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?"[39]

The CJEU decided that the company in *Achbita* did not directly discriminate against Achbita, but it did not rule on whether there was indirect discrimination.[40] The CJEU found that the rule was not directly discriminatory because it was a written company rule and it applied to all beliefs.[41] However, the court decided that it could still be indirectly discriminatory and that an indirectly discriminatory law is one that provides a greater disadvantage to people with a specific religion than others of a different religion.[42] A law that indirectly discriminates can stand if it has a justifiable, legitimate aim and appropriate and necessary means for reaching that aim.[43] The court ruled that the company had a right to conduct a business and that its desire to present a neutral front to customers was a legitimate aim.[44] Whether the means to reach that aim were proportionate was up to

36. Case C-157/15, *Achbita v. G4S Secure Sol. NV*, ¶ 17.
37. *Id.* ¶¶ 20-21.
38. *Id.* ¶ 21.
39. *Id.* ¶ 22.
40. *Id.* ¶¶ 30, 43, 44 (stating that, ultimately, it would be up to the Belgian court to decide whether there was indirect discrimination after the Belgian court takes into consideration factors such as necessity, proportionality, and whether the company dismissed Achbita without considering other posts to place her in that did not involve visual contact with customers).
41. *Id.* ¶ 44.
42. Case C-157/15, *Achbita v. G4S Secure Sol. NV*, ¶¶ 30, 43, 44.
43. *Id.* ¶ 35.
44. *Id.* ¶ 37.

the state court to decide.[45]

Achbita v. G4S Secure Solutions, NV is one of two cases the CJEU decided in 2016 concerning Islamic headscarves and discrimination in private workplaces. The other case was *Bougnaoui v. Micropole SA*, which also required the CJEU to interpret articles of Council Directive 2000/78/EC.[46] The CJEU in *Bougnaoui* responded to a request for an interpretation of Article 4(1) of Council Directive 2000/78/EC.[47] Article 4(1) specifies that there is no direct discrimination when occupational activities require a difference of treatment based on a person's religion or belief, disability, age, or sexual orientation due to a "genuine and determining occupational requirement."[48] In *Achbita*, Belgium asked the court for an interpretation of Article 2(2)(a) Council Directive 2000/78/EC.[49] Article 2(2)(a) focuses on what constitutes direct discrimination. Thus, both cases required the CJEU to expound upon the proper analysis of the European Union's workplace discrimination law.

The CJEU requires that Advocate Generals provide Opinions about cases before the CJEU decides the case.[50] The Advocate Generals' Opinions are not binding on the CJEU, but the court must review Opinions, and in most cases, the CJEU follows the Opinion of the Advocate General assigned to the case.[51] *Bougnaoui* and *Achbita* concerned the same issue, which was potential discrimination in the workplace based on the desire to wear an Islamic headscarf. Despite the similarity of the issues, the Advocate General in *Achbita*, Kokott, and the Advocate General in *Bougnaoui*, Sharpston, came to two largely different results using different

45. *Id.* ¶ 43.

46. *See* Case C-188/15, Bougnaoui v. Micropole SA, ¶ 1 (Mar. 14, 2017), http://curia.europa.eu/juris/document/document.jsf?text=&docid=188853&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=693245; Case C-157/15, *Achbita v. G4S Secure Sol. NV*, ¶ 1; Council Directive 2000/78/EC, *supra* note 9, art. 2.

47. Case C-188/15, *Bougnaoui v. Micropole SA*, ¶ 1.

48. Council Directive 2000/78/EC, *supra* note 9, art. 2.

49. Case C-157/15, *Achbita v. G4S Secure Sol. NV*, ¶ 1.

50. Rules of Procedure of the Court of Justice, *supra* note 15 (specifying, in Article 136, that the court can only give its ruling after hearing the opinion of the Advocate General).

51. *Id.*

analyses.[52] For *Achbita*, Kokott decided that there was no direct discrimination because the restriction did not target a specific religious group.[53] However, Kokott found that indirect discrimination may exist if the company could not justify the ban in some way.[54] Additionally, Kokott recognized the company's justification of neutrality as appropriate and necessary.[55]

Contrastingly, Sharpston determined that there was direct discrimination because there was nothing to suggest that Ms. Bougnaoui was incapable of doing her job.[56] The company only dismissed her because of her decision to manifest her religion by wearing a hijab.[57] More importantly, Sharpston recognized that even though the EU Directive on discrimination is silent on the right to manifest one's religion, the Directive extends to and covers the right to manifest one's religion.[58] Sharpston also goes into great detail when considering the ECtHR's case law on the right to manifest religion.[59]

Kokott and Sharpston agree that "religion" under Directive 2000/78 includes the right to manifest religion.[60] Sharpston recognized that, because the Directive also protected the right to manifest religion, the CJEU needed to apply a separate balancing analysis, but Kokott found that there was no need for a separate

52. Schona Jolly QC, *Achbita & Bougnaoui: A Strange Kind of Equality*, CLOISTERS (Mar. 15, 2017), http://www.cloisters.com/blogs/achbita-bougnaoui-a-strange-kind-of-equality; Opinion of Advocate General Kokott, *supra* note 16, ¶ 141 (stating that the a general ban on all visible signs of religious, political, and philosophical beliefs, which prevented a female employee from wearing an Islamic headscarf at work, is not directly discriminatory because it is not based on stereotypes or prejudice against one or more particular religion); Opinion of Advocate General Sharpston, *supra* note 16, ¶ 135 (declaring that a company rule that prohibits employees who come into contact with customers from wearing religious signs or apparel involves direct discrimination and neither Article 4(1) nor permissible derogations specified in the Directive apply).

53. Opinion of Advocate General Kokott, *supra* note 16, ¶¶ 48-49, 141.

54. *Id.* ¶ 57.

55. *Id.* ¶¶ 93-94.

56. Opinion of Advocate General Sharpston, *supra* note 16, ¶ 102.

57. Case C-188/15, *Bougnaoui v. Micropole SA*, ¶ 14.

58. Opinion of Advocate General Sharpston, *supra* note 16, ¶¶ 85-87.

59. *Id.* ¶¶ 45-57.

60. *See id.* ¶¶ 85-87; Opinion of Advocate General Kokott, *supra* note 16, ¶ 35.

analysis.[61] Sharpston reviewed the ECtHR's jurisprudence on Article 9 and noted that the proportionality requirements under EU legislation mirror those of the ECHR.[62] After balancing the competing interests, Sharpston concluded that "the business interest in generating maximum profit should then in [her] view give way to the right of the individual employee to manifest his religious convictions."[63]

The CJEU could have taken into consideration the Opinions of the Advocate Generals and the ECtHR's interpretations of the right to manifest religion as persuasive materials to the court.[64] The Charter of Fundamental Rights of the European Union binds the CJEU and specifies that the right to religion and the right to manifest it in Article 10 of the Charter has the same meaning and scope as the right to religion under Article 9 of the European Convention.[65] Therefore, the CJEU in *Achbita* should have given weight to Advocate General Sharpston's Opinion because EU Directive 2000/78 extends to the right to manifest religion as stated in Article 9 of the ECHR and Article 10 of the Charter, which calls for a separate balancing analysis and not just the basic discrimination analysis.[66] Had the CJEU done this, it would have found that the company's right did not outweigh Achbita's right to manifest her religion.

In *Achbita*, the CJEU did consider some elements of the Article 9 justification test to analyze whether there was indirect discrimination. The court determined that the company had a legitimate aim in trying to promote a neutral image to customers

61. *See* Opinion of Advocate General Sharpston, *supra* note 16, ¶ 73; Opinion of Advocate General Kokott, *supra* note 16, ¶ 54.

62. *See* Opinion of Advocate General Sharpston, *supra* note 16, ¶ 63 (stating, ultimately, that EU law more intensely protects the right to manifest religion).

63. *Id.* ¶ 133.

64. *See* Gáspár-Szilágyi, *supra* note 17, at 44, 47.

65. *See* Case C-157/15, Achbita v. G4S Secure Sol. NV, ¶ 27 (Mar. 14, 2017), http://curia.europa.eu/juris/document/document.jsf?docid=188852&pageIndex=0&doclang=EN&=1; Explanations Relating to the Charter of Fundamental Rights, 2007 O.J. (C 303/17) 17, 21 (concerning Article 10 of the EU Charter of Fundamental Rights, "the right guaranteed in paragraph 1 corresponds to the right guaranteed in Article 9 of the ECHR and, in accordance with Article 52(3) of the Charter, has the same meaning and scope. Limitations must therefore respect Article 9(2).").

66. Opinion of Advocate General Sharpston, *supra* note 16, ¶¶ 73, 87.

because it had the "freedom to conduct a business."[67] It states that proportionality and balancing, in terms of whether the company used appropriate and necessary means, were important factors to analyze, but it leaves that analysis to the state.[68]

B. ARTICLE 9 OF THE ECHR AND THE RELEVANT CASES

1. The Article 9 Justification Test, the Margin of Appreciation, and Proportionality Standards

Article 9 of the ECHR states that people have the right to manifest their religion, but a limitation on the right is permissible if it is "prescribed by law" and "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," which are legitimate aims.[69] There are several debates concerning what constitutes a justifiable limitation on the right to manifest religion.[70] However, the ECtHR has elaborated on the test to help determine when a law is justifiable.[71] The first part of the justification test in Article 9 is that the limiting regulation must be "prescribed by law."[72] Thus, the law must be rooted in the domestic law of the state.[73]

The second part of the test in the limitations clause is that the law

67. *Id.* ¶ 38.

68. *Id.* ¶ 42.

69. European Convention on Human Rights, *supra* note 18, at 230.

70. *See, e.g.*, M. Todd Parker, *The Freedom to Manifest Religious Belief: An Analysis of the Necessity Clauses of the ICCPR and the ECHR*, 17 DUKE J. COMP. & INT'L L. 91, 91 (2006) (referring to Freedom of Religion as "controversial" and "open to significant debate").

71. *See generally* Şahin v. Turkey, App. No. 44774/98, 44 Eur. H.R. Rep. 99, ¶ 71 (2005) (finding a ban on religious headscarves justified); Erica Howard, *Protecting Freedom to Manifest One's Religion or Belief: Strasbourg or Luxembourg?*, 32 NETH. Q. HUM. RTS. 159, 163 (2014) (remarking on the court's comments from previous French cases).

72. European Convention on Human Rights, *supra* note 18, at 230.

73. *See Şahin v. Turkey*, 44 Eur. H.R. Rep. ¶¶ 84, 88 (noting that anything that forms written law, including laws ranked lower than statutes, can "prescribe" the limitation or restricting law); Howard, *supra* note 71, at 163 (stating that the law must be accessible to those who must abide by it, and the law must be sufficiently precise to allow those people to foresee any consequences of their actions).

must be "necessary in a democratic society."[74] This means that the restricting law must coincide with an important social need.[75] In analyzing this factor, the ECtHR has recognized that pluralism is an important concept, which means that individuals in a society may have different beliefs and values, but everyone should respect and tolerate the beliefs of others.[76] Thus, when the Convention or its Protocols protect a person's rights and freedoms but these rights conflict with the rights and freedoms of another, there must be a balance between the two fundamental rights.[77] Balancing of rights plays an important role in the proportionality test, which emphasizes that the aim of the state must be proportionate to the restriction or means of limiting the right to manifest one's religion.[78]

When the ECtHR tries to analyze proportionality and balance the rights in conflict, it oftentimes defers to the state by using the margin of appreciation doctrine instead of fully balancing the competing rights. The margin of appreciation doctrine gives deference to the laws of a state on certain issues.[79] The ECtHR has consistently stated that it is not for the ECtHR to comment on the appropriateness of the laws and regulations of a state.[80] However, the court is meant to ensure that the methods used by the state are justified and proportionate and, thus, in line with the laws of the European Convention.[81]

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74. European Convention on Human Rights, *supra* note 18, at 230.

75. *See* Howard, *supra* note 71, at 163-64 (stating that "necessary in a democratic society" means that the limitation must relate to an important social need, "be proportionate to the legitimate aim," and "justified by relevant and sufficient reasons").

76. Parker, *supra* note 70, at 96; *see* Claudia Morini, *Secularism and Freedom of Religion: The Approach of the European Court of Human Rights*, 43 ISR. L. REV. 611, 615 (2010) (stating the ECtHR demonstrates that the "principle of pluralism is fundamental when considering the justifiability of a restriction on religious freedom"); *cf. Şahin v. Turkey*, 44 Eur. H.R. Rep. ¶ 1067 (recognizing that sometimes restrictions on the right to manifest religion are necessary to provide a respectful environment of tolerance for all religions).

77. *See Şahin v. Turkey*, 44 Eur. H.R. Rep. ¶ 108 (commenting that "pluralism, tolerance[,] and broadmindedness" are the foundation of a "democratic society").

78. Howard, *supra* note 71, at 164.

79. *Id.*; Parker, *supra* note 70, at 99.

80. *Şahin v. Turkey*, 44 Eur. H.R. Rep. ¶ 94.

81. *See id.*; Eweida v. United Kingdom, 2013-I Eur. Ct. H.R. 215, 254; *see also* Morini, *supra* note 76, at 616 (stating that the "level of discretion given to the

The ECtHR gives discretion to states in certain situations because it assumes that states will better evaluate the needs and conditions of locals, and the court wants to permit states to retain some sovereignty.[82] The doctrine, however, can sometimes be a great disadvantage for individuals arguing to protect their rights because, instead of applying a balancing analysis, the state automatically receives deference.[83] The scope of the margin of appreciation varies in ECtHR caselaw.[84] When the margin is wide, the state does not have a high standard to meet, but when the margin is narrow, the court has set a high standard for the state.[85] A possible downside of the margin of appreciation doctrine is that there is no clear test, or method, for using it or for determining its scope.[86]

The last element of the justification test requires that one of the legitimate aims in the ECHR justify the restricting law.[87] Those legitimate aims are public safety, public order, health or morals, or the rights and freedoms of others.[88] The ECtHR has provided case-law to further clarify how to interpret Article 9 of the ECHR and

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national authorities depends on the content of the right at issue").

82. Morini, *supra* note 76, at 616; *see* Jan Kratochvíl, *The Inflation of the Margin of Appreciation by the European Court of Human Rights*, 29 NETH. Q. HUM. RTS. 324, 326 (2011) (stating that this is known as the "better position rationale").

83. *See* Kratochvíl, *supra* note 82, at 326-27 (stating that there is no clear explanation for why the ECtHR automatically considers deference to the state when analyzing proportionality).

84. *See id.* at 330 (noting that sometimes the margin is wide and sometimes it is narrow).

85. *See id.* (stating, also, that sometimes the width of the margin does not provide an accurate assessment of how strict the court is to the state); *id.* at 325 (stating that "no simple formula can describe" how the margin of appreciation works and it has a "casuistic, uneven, and largely unpredictable nature" because it is unclear when courts should use the margin of appreciation doctrine and what its limits and boundaries are; thus, "the consequences of invoking it are far from predictable or precise").

86. *See* Kratochvíl, *supra* note 82, at 325; *see also* Howard, *supra* note 71, at 164 (stating that the ECtHR tends to give a wider margin of appreciation in cases that deal with restrictions on the freedom to manifest one's religion than it does in cases that concern other articles like, Article 8, which is the right to respect for private and family life; Article 10, which is freedom of expression; and Article 11, which is the freedom of assembly and association).

87. European Convention on Human Rights, *supra* note 18, at 230.

88. *Id.*

analyze the various elements of the justification test.

2. Şahin v. Turkey

The ECtHR decided *Şahin v. Turkey* in 2005.[89] A circular, or regulation, that denied people wearing beards and Islamic headscarves the ability to attend lectures, courses, and tutorials prevented Leyla Şahin from wearing an Islamic headscarf at her university.[90] In 1998, Ms. Şahin argued to the European Commission on Human Rights that the circular violated her right to manifest her religion under Article 9 of the ECHR.[91] The Grand Chamber of the ECtHR affirmed the lower court by finding that there was no violation of Article 9 because the right to manifest one's religion was subject to limitations.[92]

The court went through the various elements of the justification test laid out in Article 9(2) to explain the validity of the school's circular banning beards and Islamic headscarves. It found that the circular was "prescribed by law" and said that it was necessary to protect democratic society in Turkey.[93] The circular was "prescribed by law" because the Vice-Chancellor of the school enacted the circular based on a regulatory provision.[94] The court gave the state deference in deciding what constituted a sufficient "law" for the Vice-Chancellor to base his circular on.[95] The court also gave a large margin of appreciation to the state when considering the conflicting rights.[96] It found that secularism and equality were legitimate aims,

89. Şahin v. Turkey, App. No. 44774/98, 44 Eur. H.R. Rep. 99 (2005).

90. *See id.* ¶¶ 17, 100 (stating that the regulation prevented Şahin from taking multiple exams because she was wearing an Islamic headscarf).

91. *Id.* ¶ 3.

92. *Id.* ¶¶ 9, 13, 123.

93. *See id.* ¶¶ 114, 120.

94. *See id.* ¶¶ 85, 120 (explaining, additionally, that the two highest courts in Turkey established case-law on the right to wear the Islamic headscarf in educational institutions).

95. *See Şahin v. Turkey*, 44 Eur. H.R. Rep. ¶ 87-88 (finding that the "law" meant any provision that the state courts have interpreted as binding).

96. *See* Howard, *supra* note 71, at 166 (noting that there was a large margin of appreciation due to the various laws the state had enacted concerning wearing religious symbols in educational institutions); Morini, *supra* note 76, at 623 (stating that the courts recognition of the margin of appreciation principle forced it to neglect the right to analyze the compatibility of the margin of appreciation

and that the law was proportionate to the legitimate aims.[97]

The ECtHR in *Şahin* did not attempt to balance the right of the individual to manifest her religion and the right of the state to protect secularism and equality.[98] The ECtHR recognizes secularism and equality in this case as legitimate aims, and it implicitly gives more weight to secularism and equality than to the individual's right to manifest her religion without stating a sufficient justification for doing so.[99] Instead of balancing the rights to decide which one should rightfully receive more weight, the ECtHR applied a wide version of the margin of appreciation doctrine and ruled in Turkey's favor.[100]

Secularism was a foundational principle for the Republic of Turkey.[101] The State enacted several reforms that tried to remove any form of religion, mainly Islam, from the State and its Constitution to promote secularism.[102] In accepting the Chamber's decision, the Grand Chamber of the ECtHR assumes that allowing some women to wear the veil negatively affects others, that all women feel oppressed when wearing the Islamic headscarf, and that

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principle with the rights that the Convention protects).

97. *See Şahin v. Turkey*, 44 Eur. H.R. Rep. ¶¶ 112-13 (explaining that secularism is important to Turkey because Turkey's courts view secularism as the "grantor of democratic values" and "the meeting point of liberty and equality"); Howard, *supra* note 71, at 165.

98. *See Şahin v. Turkey*, 44 Eur. H.R. Rep. ¶¶ 108, 110 (limiting the court's role to ensuring that the state's actions are "justified in principle and proportionate" after stating that balancing the fundamental rights of individuals is the "foundation of a 'democratic society'").

99. *See* Morini, *supra* note 76, at 623 (noting that the court did not analyze the proportionality of the ban on all headscarves and beards to maintain secularism and noting that the simple reference to secularism was sufficient for the court to rule).

100. *See Şahin v. Turkey*, 44 Eur. H.R. Rep. ¶ 110 (stating that the ECtHR restricts its role to ensuring that state's actions are "justified in principle and proportionate").

101. *Id.* ¶ 30.

102. *See id.* (noting the various revolutionary reforms that Turkey conducted: repealing the constitutional provision that allowed Islam to be the State's religion; abolishing the caliphate; and giving constitutional status to the idea of secularism); *cf. id.* ¶¶ 32-33 (stating that Turkey believed that women should be free from all religious constraints and this encouraged it to enact these bans to promote secularism and help women who may have felt oppressed when wearing religious attire).

all women need protection from having to wear it.[103] Although Turkey has for years tried to suppress religion, specifically Islam, the State is beginning to remove many of its bans on religious attire.[104]

Moreover, in considering the justification test, the ECtHR considered proportionality in terms of the relationship between the legitimate aim and the means used to achieve it and ruled that the school's ban was proportionate to the legitimate aim.[105] It justified the proportionality of the law by noting that there were bans on other forms of religious attire as well.[106] Additionally, the court noted that the Muslim students were still able to manifest their religion in "habitual forms of Muslim observance."[107]

3. Eweida v. United Kingdom

a. First Applicant

The ECtHR decided *Eweida* in 2013.[108] British Airways had a strict uniform policy that it required all its employees to adhere to when in contact with the public.[109] It required anyone desiring to wear a religious item to seek approval before wearing it.[110] Eweida wore a concealed cross around her neck until 2004 when the company changed its dress code, thereby exposing the necklace.[111] Her manager asked her to remove her cross, and when she refused to

103. *See id.* ¶ 115 (stating that the circular was necessary to help protect the rights of women by creating gender equality, which was a legitimate aim).

104. *See* Sebnem Arsu & Dan Bilefsky, *Turkey Lifts Longtime Ban on Head Scarves in State Offices*, N.Y. TIMES (Oct. 8, 2013), http://www.nytimes.com/2013/10/09/world/europe/turkey-lifts-ban-on-head-scarves-in-state-offices.html (stating that Turkey is possibly removing many of the bans it placed on religious attire to help the religious majority, which the secular elites oppressed for many years).

105. *Şahin v. Turkey*, 44 Eur. H.R. Rep. ¶ 122.

106. *See id.* ¶¶ 118-19 (pointing out the restricting law's consistency with Turkish legislation and case-law).

107. *Id.* ¶ 118.

108. Eweida v. United Kingdom, 2013-I Eur. Ct. H.R. 215.

109. *Id.* at 225.

110. *Id.* at 225-26 (noting that, in the past, the company has approved an exception for a male Sikh to wear a turban and for a female Muslim to wear a hijab).

111. *Id.* at 226.

do so, he sent her home without pay.[112] The company, later, offered her a position without customer contact, but she rejected the offer.[113] Eweida argued that there had been indirect discrimination and that the company had violated her right to manifest her religion under Article 9 of the ECHR.[114]

The ECtHR went through the elements of the justification test to determine whether the company had violated the first applicant's right to manifest her religion under Article 9. When analyzing whether the ban was "prescribed by law," the ECtHR merely considered whether the state had adhered to its positive obligation in Article 1 of the ECHR to protect the individual's fundamental rights because a company issued the ban and not the state.[115] It found that the lack of specific protection in British law did not mean that the state had not sufficiently protected the individual's right to manifest religion.[116]

The ECtHR also gave sufficient consideration to the proportionality element of the justification test. It gave sufficient weight to the right to manifest religion for the first applicant by finding that the company's rights did not outweigh the right of the individual to manifest her religion.[117] The ECtHR determined that the company had a legitimate aim in trying to present a specific image to its customers and to promote its brand.[118] However, even though the company had a legitimate aim, the ECtHR found that the state court had not sufficiently balanced the company's desire with the right of the individual to manifest her religion.[119] The state courts

112. *Id.*
113. *Id.*
114. *Eweida v. United Kingdom*, 2013-I Eur. Ct. H.R. at 226-27.
115. *Id.* at 256.
116. *Id.*
117. *Id.* at 257.
118. *Id.* at 256-57.
119. *Id.* at 257 (noting that the right to manifest one's religion is a fundamental right and that a "healthy democratic society needs to tolerate and sustain pluralism and diversity"); *Eweida v. United Kingdom*, 2013-I Eur. Ct. H.R. at 254 (explaining that under both positive and negative obligations, states must find the fair balance between the interests of the individual and community, which is subject to the margin of appreciation); *see also* Howard, *supra* note 71, at 168 (stating that there was not a fair balance because the court gave too much weight to the company's interest).

had given too much weight to the aim and desires of the company because there was no evidence showing that the religious items worn by the employees actually affected the image of the company.[120] The company had previously approved religious items such as Islamic headscarves and turbans without problem.[121]

Overall, the court ruled that there was a violation of Eweida's Article 9 right to manifest her religion even though a company created the rule and not a state.[122] Furthermore, the court specified that when balancing rights, courts should only consider whether a person voluntarily accepted a position that limited her right to manifest her religion as a factor among many, despite this issue being a determining factor in previous ECtHR cases.[123]

b. Second Applicant

The second applicant in *Eweida* was Shirley Chaplin.[124] The facts for the second applicant are comparable to the first applicant's situation in that they both wore uniforms and wanted to wear a cross as a manifestation of their religion, but the court did not find that there was a violation of the second applicant's Article 9 right.[125] The ECtHR ruled that the desire of the hospital to protect the health and safety of the hospital ward was a legitimate aim.[126] It then balanced

120. *Eweida v. United Kingdom*, 2013-I Eur. Ct. H.R. at 257.

121. *Id.*; *see also* Frank Cranmer, *Accommodating Religion in the Workplace – or Maybe Not: A Note on Chaplin, Eweida, Ladela and McFarlane*, 170 LAW & JUST. – CHRISTIAN L. REV. 67, 70 (2013); Jolly, *supra* note 52.

122. *Eweida v. United Kingdom*, 2013-I Eur. Ct. H.R. at 256-57.

123. *Id.* at 227-28, 253-54 (examining the rule established in *R (Begum) v. Headteacher and Governors of Denbigh High School* that any person who voluntarily accepted a position that did not accommodate her religious beliefs while having other ways to freely observe her religion had not suffered a violation of the right to manifest that religion and explaining that courts should merely consider this as a factor in determining balance when analyzing proportionality).

124. *Id.* at 223.

125. *Id.* at 254, 257-59 (stating that the first applicant wanted to wear a cross on a chain around her neck with her British Airways uniform and the second applicant, Ms. Chaplin, wanted to wear a cross on a chain around her neck with her hospital uniform, but the ECtHR found that the hospital's restrictions did not violate the second applicant's right to manifest her religion under Article 9 of the ECHR).

126. *Id.* at 259.

the conflicting rights by weighing the right of the individual, Ms. Chaplin, with the legitimate aim of the hospital to protect the health and safety of the ward.[127] It found that, while the plaintiff's right deserved great weight, the aim of the hospital was more important in this case.[128] In doing so, it understandably provided a wide margin of appreciation for the hospital when explaining that hospital managers knew more about clinical safety than the court.[129]

3. S.A.S. v. France

In 2010, France passed a law that prevented people from wearing anything that would conceal their faces in public places, and a Muslim woman challenged the law in 2014 in *S.A.S. v. France*.[130] This law had a profound impact on, particularly, Muslim women who desired to wear the burqa and the niqab.[131] The plaintiff argued that the law violated her Article 9 rights because it did not pursue any legitimate aims.[132] The French government argued that its legitimate aims were public safety, equality, and the protection of the freedoms of others by maintaining respect for "the minimum set of values of an open democratic society."[133] The court held that the ban did not violate the plaintiff's Article 9 rights because the state's desire to protect the freedom of others by maintaining society's ability to "live together" was a legitimate aim.[134]

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127. *Id.*

128. *Eweida v. United Kingdom*, 2013-I Eur. Ct. H.R. at 259; Cranmer, *supra* note 121, at 72; *see also* Howard, *supra* note 71, at 168 (noting that the need to protect the health and safety of a hospital ward was more important than the need of the company in the first applicant's case).

129. *Eweida v. United Kingdom*, 2013-I Eur. Ct. H.R. at 259; *see also* Cranmer, *supra* note 121, at 72 (stating that the hospital was following specific guidelines to create a specific uniform for employees).

130. Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of October 11, 2010 on Prohibiting the Concealment of the Face in the Public Space], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], October 12, 2010; *see also* S.A.S v. France, 2014-III Eur. Ct. H.R. 341, 354.

131. Kalantry, *supra* note 6, at 226 (stating that the court rejected the idea that the French ban would further exclude and alienate those who desire to wear the burqa and the niqab).

132. *S.A.S v. France*, 2014-III Eur. Ct. H.R. at 355.

133. *Id.* at 358-59.

134. *Id.* at 371.

The ECtHR attempted to go through the Article 9 justification test in analyzing this issue. It quickly explained that the limitation was "prescribed by law" because it stemmed from sections 1, 2, and 3 of the French law enacted in 2010, which outlawed covering one's face in public.[135]

The ECtHR determined that the French government had a legitimate aim in protecting the freedoms of others by protecting society's ability to "live together."[136] The ECtHR rejected the government's argument that there was a need to protect equality because the state, in the name of equality, was trying to ban a practice that some women defend.[137] It accepted that public safety was a legitimate aim, but it decided that France's ban was not "necessary in a democratic society" to protect public safety.[138] The French government's desire to protect the "minimum requirements of life in society," which included "living together" was a legitimate aim because the court agreed that the "face plays an important role in social interaction."[139] Although the court adopted the idea of "living together" into the legitimate aim in Article 9 of protecting the freedoms and rights of others, "living together" is abstract and not specified in the Convention.[140] However, the majority opinion did not acknowledge that. After deciding that there was a legitimate aim, the ECtHR tried to determine whether the ban was "necessary in a democratic society" to promote one of the aims in Article 9 of the ECHR.[141] In doing so, the ECtHR recognized the need to ensure

135. *Id.* at 368.

136. *Id.* at 371.

137. *Id.* at 370 (recognizing that the government assumed that all women wearing the burqa and niqab had no choice in the matter).

138. *S.A.S v. France*, 2014-III Eur. Ct. H.R. at 377 (stating that there was no evidence showing that there was a "general" threat to public safety).

139. *Id.* at 371 (recognizing the aim of "living together" as a part of protecting the rights and freedoms of others, which is an accepted legitimate aim that in the European Convention on Human Rights).

140. *Id.* at 383 (Nussberger, J., dissenting) (critiquing the majority's attempt to adopt "living together" as a legitimate aim because any limitation on the right to manifest one's religion must be exactly, or specifically, one of the justifications specified in the Convention).

141. *Id.* at 372-73, 377-78 (stating that the state should receive a wide margin of appreciation when deciding whether a limitation on the right to manifest religion is "necessary").

pluralism in a state, but it also stated that a concealed face hindered communication between individuals and affected people's ability to live together.[142]

The court gave France a wide margin of appreciation to determine if the ban was proportionate, and it limited the courts role to simply determining whether the limitations established by states are "justified in principle and proportionate."[143] Many critique this case because they believe the ECtHR failed to adequately balance the right of the state to protect the freedoms and rights of others and the individual's right to manifest her religion.[144] The majority does not balance the rights, and it gives a wide margin of appreciation to France, suggesting that the need to "live together" is more important than an individual's right to manifest her religion.[145] The dissenters in *S.A.S.* argue that the interests of France in this case should not outweigh the right of the individual.[146] The dissenters point out that there was no evidence showing that the act of concealing one's face with specific attire is any different from concealing one's face using dark sunglasses, hats, or excessive hairstyles.[147]

C. ARTICLE 18 OF THE ICCPR AND ITS INTERPRETATION

1. Article 18

Article 18 of the ICCPR follows the same logic as Article 9 of the ECHR.[148] Article 18 states that the right to manifest one's religion is subject to limitations, but those limitations must be "prescribed by law," and "necessary to protect public safety, order, health, or morals

142. *Id.*
143. *Id.* at 373-74.
144. *S.A.S v. France*, 2014-III Eur. Ct. H.R. at 383 (Nussberger, J., dissenting) (stating that the abstract aim of "living together" should not have outweighed the plaintiff's right to manifest her religion by wearing a burqa or niqab in public).
145. *See id.* (noting that the court should give the domestic policy-maker's role more weight in matters of general policy and stating, "nevertheless, we cannot share the opinion of the majority as, in our view, it sacrifices concrete individual rights guaranteed by the Convention to abstract principles").
146. *Id.* at 386 (Nussberger, J., dissenting).
147. *Id.*
148. International Covenant on Civil and Political Rights, *supra* note 21, at 178.

or the fundamental rights and freedoms of others."[149]

2. General Comment No. 22

The United Nations Human Rights Committee created General Comment No. 22 to help interpret Article 18 of the ICCPR.[150] It specifies that when determining whether a limitation is acceptable, one should prioritize protecting the rights that the Covenant guarantees.[151] The limitation should not "vitiate" the rights guaranteed under the Covenant.[152] Most importantly, the Comment notes that courts should "strictly interpret" the limitations clause in Article 18.[153] Furthermore, the limitation must be "prescribed by law" and proportionate to the aim it is trying to reach.[154]

3. Special Rapporteur's Reports to the UN HRC

Multiple Special Rapporteurs on freedom of religion or belief have commented on the interpretations of Article 18 of the ICCPR. The Special Rapporteur has recently noted that "any and all limitations must be the exception, not the rule."[155] The Special Rapporteur recognized that many States apply restrictions on the right to manifest religion without providing a sufficient justification.[156] Moreover, when States attempt to justify the limitations, they ultimately produce regulations that do not adhere to the strict requirements specified in the ICCPR.[157] In 2006, Special Rapporteur Amor provided a possible solution to the many restrictions on the

149. *Id.*

150. UN Human Rights Committee (HRC), CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), (July 30, 1993) [hereinafter General Comment No. 22].

151. *Id.* ¶ 8.

152. *Id.*

153. *Id.* (noting that any potential limitation is only acceptable if it is in the Covenant).

154. *Id.*

155. *See* Ahmed Shaheed (Special Rapporteur on Freedom of Religion or Belief), *Report of the Special Rapporteur on Freedom of Religion and Belief*, U.N. Doc. A/HRC/34/50 ¶¶ 30, 44 (Jan. 17, 2017) (noting that states are continuously applying restrictions on the right to manifest religion, and they are beginning to apply "restrictions as the rule and not as the exception").

156. *Id.* ¶ 43.

157. *Id.*

right to manifest religion.[158] He argued that States should not try to politically regulate dress and that communities should adopt more "flexible and tolerant attitudes."[159]

III. ANALYSIS

In *Achbita*, the CJEU should have considered the balancing analysis used by the ECtHR for Article 9 of the ECHR because the EU Directive on discrimination also protected the right to manifest religion.[160] Advocate General Sharpston's Opinion on the Bougnaoui case, which dealt with the same issue, gave considerable thought to the prior case law and balancing analysis of the ECtHR. If the CJEU would have balanced the conflicting rights and considered ECtHR jurisprudence on balancing rights when doing so, it would have found that the aim of the company did not outweigh Achbita's right to manifest her religion.

A. ARTICLE 9 OF THE ECHR AND *ACHBITA*

1. The Right to Conduct a Business is a Legitimate Aim

Despite not applying a balancing analysis or the Article 9 justification test, the CJEU analyzed whether the company had a legitimate aim because it was a factor in deciding whether there was indirect discrimination.[161] Many criticize the CJEU's recognition of "neutrality" as a legitimate aim there is no clear definition of what a "neutral" image means.[162] Additionally, the only permissible

158. *See generally* Asma Jahangir (Special Rapporteur on Freedom of Religion or Belief), *Civil and Political Rights, Including the Question of Religious Intolerance*, U.N. Doc. E/CN.4/2006/5 (Jan. 9, 2006) (looking at examples of religious intolerance and proposing solutions).

159. *Id.* ¶ 38.

160. Opinion of Advocate General Kokott, *supra* note 16, ¶ 35; Opinion of Advocate General Sharpston, *supra* note 16, ¶ 87.

161. *See* Case C-157/15, Achbita v. G4S Secure Sol. NV, (Mar. 14, 2017), ¶ 35 http://curia.europa.eu/juris/document/document.jsf?docid=188852&pageIndex=0&doclang=EN&=1 (stating that an indirectly discriminatory law can still be permissible if a legitimate aim justifies it and if the means to achieving that aim are "necessary and appropriate").

162. *See* Gareth Davies, *Achbita v G4S: Religious Equality Squeezed Between Profit and Prejudice*, EUR. L. BLOG (Apr. 6, 2017), https://europeanlawblog.eu/2017/04/06/achbita-v-g4s-religious-equality-squeezed-

limitations on the right to manifest religion are those that the Convention lists or those that fall directly under the rights and freedoms that the Convention guarantees.[163]

The CJEU in *Achbita* stated that the company's right to promote a neutral image is a part of the "freedom to conduct a business," which is a fundamental right that the EU Charter of Fundamental Rights protects under Article 16.[164] Similarly, the ECtHR in *Eweida* ruled that the company's desire to protect its image was a legitimate aim, but it did not rule that its aim was a fundamental right.[165]

2. The CJEU did not Properly Balance Achbita's Right to Manifest Her Religion Against the Company's Right to Conduct a Business

The CJEU should have followed the Opinion of AG Sharpston and found that when there are conflicting interests, a balancing test is necessary to properly interpret the EU Directive.[166] There is ECtHR jurisprudence that suggests factors to consider when balancing the rights.[167] In jurisprudence like *S.A.S.* and *Şahin*, the court allowed

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between-profit-and-prejudice/ (criticizing the lack of a clear meaning of "neutrality" and noting that it is unclear if it means that the company wants to present an image to customers that it has no views on any political or religious questions and stating that if that is the goal, it would be difficult to maintain "neutrality" when making donations to political causes or when the leaders of the company speak out; also stating, "A policy of neutrality is a policy of respecting the prejudices of customers in the interest of the business").

163. *See* S.A.S v. France, 2014-III Eur. Ct. H.R. 341, 383 (Nussberger, J., dissenting) (stating that it is not clear what limitations "outside the scope of rights protected by the Convention" are acceptable).

164. Case C-157/15, *Achbita v. G4S Secure Sol. NV*, ¶ 38 (stating that the desire to project a neutral image to customers "relates" to the "freedom to conduct a business" and that the company's desire is legitimate if its clothing policy only targets employees that encounter the company's customers as a part of their job requirement).

165. *See* Eweida v. United Kingdom, 2013-I Eur. Ct. H.R. 215, 257 (explaining that the company wanted to project a specific corporate image).

166. Opinion of Advocate General Sharpston, *supra* note 16, ¶ 73.

167. *See* Jolly, *supra* note 52 (distinguishing *Eweida* as a "more nuanced and evidence-based approach to proportionality"); *see also* Monique Steijns, *Achbita and Bougnaoui: Raising More Questions than Answers*, EUTOPIA L. (Mar. 18, 2017), https://eutopialaw.com/2017/03/18/achbita-and-bougnaoui-raising-more-questions-than-answers/ (noting that the court in *Achbita* extensively studies the legitimacy of the aim and proportionality, but it does not analyze the proper balance between the rights).

the margin of appreciation shown to states to interfere with the court's ability to determine whether the limitation was necessary and more important than the right.[168] The analysis of the second applicant's case in *Eweida* shows that the ECtHR gave proper consideration to the balancing of the rights, but in the end found that the right of the hospital outweighed the right of the individual.[169] The ECtHR provides factors to consider when balancing rights in the analysis of the first applicant's case in *Eweida*.[170] Thus, even though the other cases provide important legal understanding of the court's balancing methods, the analysis of the first applicant's case in *Eweida* is most applicable to *Achbita* for balancing the rights because of the similarity in facts.

S.A.S. is an important case in ECtHR case-law involving limitations on the manifestation of religion under Article 9 of the ECHR. However, the facts in *S.A.S.* differ largely from the facts in *Achbita*. The ECtHR in *S.A.S.* ruled that France had a legitimate aim of trying to protect the freedoms and rights of others by protecting society's ability to "live together."[171] It also found that there was no violation of Article 9 because France's legitimate aim outweighed the right of the individual to manifest her religion.[172] The court

168. *See S.A.S v. France*, 2014-III Eur. Ct. H.R. at 380 (stating that the state is trying to protect the "principle of interaction between individuals" and that whether someone can challenge this principle is up to the society to decide; thus, the court gives a wide margin of appreciation to the state); *see also* Şahin v. Turkey, App. No. 44774/98, 44 Eur. H.R. Rep. 99, ¶ 110 (2005) (deciding that the courts role is simply to find whether the states actions were "justified in principle and proportionate").

169. *Eweida v. United Kingdom*, 2013-I Eur. Ct. H.R. at 259; *see also* Howard, *supra* note 71, at 168 (noting that *Eweida* is also a demonstration of the ECtHR's willingness to "balance the interest of applicants in their freedom to manifest their religion or belief with the interests of the State Party in restricting this freedom").

170. *See* Howard, *supra* note 71, at 168 (stating that in *Eweida*, the domestic courts did not fairly balance the rights because they gave too much weight to the right of the company instead of giving sufficient weight to the right of the individual to manifest her religion).

171. *See S.A.S v. France*, 2014-III Eur. Ct. H.R. at 371 (explaining that the court understands the view that people who "are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships," which in the court's opinion is "an indispensable element of community life" in France).

172. *Id.* at 381.

decided that France needed a wide margin of appreciation to determine what was necessary for society to "live together."[173]

The Belgian company in *Achbita* should not receive the same margin of appreciation because *S.A.S.* differs factually from *Achbita*. Even though France's ban was also applicable to all people and banned all items that covered the face in public places, the plaintiff in S.A.S. was fighting for the right to wear a niqab and burqa, which both cover the face.[174] In *Achbita*, the plaintiff was arguing for the right to wear a hijab, which only covers the head and the neck, in the workplace.[175]

Additionally, France's legitimate aim in *S.A.S.* is different from the Belgian company's legitimate aim in *Achbita*.[176] Many criticize the ECtHR's decision in *S.A.S.* because it ruled in favor of an abstract aim instead of the right of the individual to manifest her religion.[177] The dissenters in *S.A.S.* argue that an abstract aim should not outweigh a person's right to manifest her religion.[178] They also criticized the abstractness of "living together" because there was no evidence that wearing the burqa or niqab hindered society's ability to live together and communicate.[179] In *Achbita*, even though the

173. *Id.* at 380.

174. *Id.* at 353-54.

175. Case C-157/15, Achbita v. G4S Secure Sol. NV, ¶ 20 (Mar. 14, 2017), http://curia.europa.eu/juris/document/document.jsf?docid=188852&pageIndex=0&doclang=EN&=1.Case C-157/15.

176. *See S.A.S v. France*, 2014 Eur. Ct. H.R. at 371 (finding that France's aim of "living together" was "linked to" the legitimate aim of the "protection of the rights and freedoms of others"); *see also* Case C-157/15, *Achbita v. G4S Secure Sol. NV*, ¶ 38 (explaining that the company's desire to promote a neutral image to customers was a legitimate aim).

177. *See S.A.S v. France*, 2014-III Eur. Ct. H.R. at 383 (Nussberger, J., dissenting) (stating that the abstract aim of "living together" should not have outweighed the plaintiff's right to manifest her religion by wearing a burqa or niqab in public).

178. *Id.*

179. *Id.* at 385 (Nussberger, J., dissenting) (stating that even though the face does play a key role in communicating, it is possible to have human interaction without showing the full face); *see Human Rights Watch Submission to the Committee of Domestic Affairs and the High Councils of State/ General Affairs and House of the King of the Netherlands on Proposed Legislation to Restrict Full Face Coverings*, HUM. RTS. WATCH (Jan. 16, 2017), https://www.hrw.org/news/2017/01/16/human-rights-watch-submission-

company produced no evidence of a change in the company's neutral image, the CJEU ruled in favor of the company.[180] Lastly, the cases also differ in that the French ban was French law, while the ban in *Achbita* was based on an internal company rule.[181]

Instead of balancing the rights in *S.A.S.*, the ECtHR used the margin of appreciation to defer to the state.[182] The court reasoned that it is up to society to choose whether wearing the full-face veil in public is permissible.[183] It noted that when society must make the choice, the court should exercise restraint and allow the domestic policy-maker to have a greater role in the decision because the opinions of the society may largely differ.[184] Additionally, the court noted that it did not have other cases to rely on that concerned the full-face veil.[185] Thus, the ECtHR gave up its ability to balance the rights because of the margin of appreciation.[186]

Şahin is important case-law from the ECtHR concerning interpretations of Article 9 in relation to the Islamic veil, but the facts differ too much to apply the same wide margin of appreciation in

committee-domestic-affairs-and-high-councils-state (stating that there are less restrictive ways to promote living together).

180. *See* Case C-157/15, *Achbita v. G4S Secure Sol. NV*, ¶ 45 (showing that there is no mention of evidence demonstrating an actual negative effect on the company's image of neutrality due to employees' choices to wear religious, political, or philosophical items).

181. *See S.A.S v. France*, 2014-III Eur. Ct. H.R. at 368 (explaining that the ban was "prescribed by law" because it was in sections 1, 2, and 3 of a French law); *see also* Case C-157/15, *Achbita v. G4S Secure Sol. NV*, ¶ 45 (specifying that G4S, a company, amended its workplace regulations to include a ban on all visible signs of religious, philosophical, or political beliefs).

182. *See S.A.S v. France*, 2014-III Eur. Ct. H.R. at 380 (stating that the court needed to exercise restraint and allow the domestic policy makers to decide whether a ban on all garments covering the face in public places should be permissible).

183. *Id.* (stating that the state is trying to protect the "principle of interaction between individuals" and this, in effect, is pluralism, tolerance, and broadmindedness; thus, society decides whether a person's actions affect this principle).

184. *Id.*

185. *Id.* at 380-81.

186. Morini, *supra* note 76, at 623 (noting that giving such a large margin of appreciation to states is "incompatible with its self-professed role as the overseer of the State as the 'neutral and impartial organiser' of the system of beliefs within the State").

Şahin to *Achbita*. In *Şahin*, a public educational institution introduced the ban while a private company introduced the ban in *Achbita*.[187] Additionally, the school in *Şahin* argued that its legitimate aims were secularism and equality while the company in *Achbita* argued that its legitimate aim was protecting its image.[188]

The ECtHR in *Şahin* displayed a preference for Turkey's aim of maintaining secularism and recognized it as legitimate even though it was not a fundamental right protected by the ECHR.[189] It did not examine proportionality, but it instead deferred to the desires and reasoning of the Turkish state through the margin of appreciation and, thus, limited its role.[190] The court decided that because the university authorities were in "direct and continuous contact with the education community," they were in a better position to assess the needs of the local community.[191]

Despite the ECtHR's prior reasoning in *Şahin*, the private company in *Achbita* should not receive the same wide margin of appreciation as Turkey in *Şahin*. Both bans applied to all religions and political or ideological beliefs.[192] However, the university in *Şahin* was a public university and, thus, the state could argue that there was a pressing social need to protect secularism.[193] The court in *Şahin* gave deference to the need of the state because it assumed that the public education community was better at determining the

187. Şahin v. Turkey, App. No. 44774/98, 44 Eur. H.R. Rep. 99, ¶ 70 (2005); Case C-157/15, *Achbita v. G4S Secure Sol. NV*, ¶ 11.

188. *See Şahin v. Turkey*, App. No. 44774/98, 44 Eur. H.R. Rep. ¶ 112 (stating that the Turkish courts found that the ban of Islamic headscarves at the university was based on principles of "secularism and equality"); *see also* Case C-157/15, *Achbita v. G4S Secure Sol. NV*, ¶ 38 (stating that the company's legitimate aim was to project a neutral image to its customers).

189. *See Şahin v. Turkey*, App. No. 44774/98, 44 Eur. H.R. Rep. ¶¶ 114, 116 (agreeing that secularism is "one of the fundamental principles of the Turkish State which are in harmony with the rule of law and respect for human rights").

190. *Id.* ¶ 110 (deciding that the courts role is simply to find whether the states actions were "justified in principle and proportionate"); Morini, *supra* note 76, at 623 (noting that the court did not analyze the proportionality of the ban on all headscarves and beards in maintaining secularism and that the simple reference to secularism was sufficient for the court to decide the case).

191. *Şahin v. Turkey*, App. No. 44774/98, 44 Eur. H.R. Rep. ¶ 121.

192. *Id.* ¶ 47; Case C-157/15, *Achbita v. G4S Secure Sol. NV*, ¶ 15.

193. *Şahin v. Turkey*, App. No. 44774/98, 44 Eur. H.R. Rep. ¶¶ 112, 143.

needs of the education community, but in *Achbita*, it was a private company that interfered with Achbita's right [194]. The desire of a private company should not receive as much deference as the pressing social need of a state.

Eweida is an important case for this issue because of the court's analysis of Article 9. There were four applicants in the case, but only the analyses of the first and second applicants are relevant to *Achbita*. While the court ruled in favor of the first applicant, it did not rule in favor of the second applicant.[195] The reasoning and analysis used for the first applicant in *Eweida* should apply to *Achbita* and the analysis for the second applicant in *Eweida* should not because of important factual differences.

The second applicant in *Eweida* worked for a hospital. The hospital realized that the plaintiff's dangling necklace could pose serious health and safety issues.[196] To protect the health and safety of the employee and the patients, the hospital argued that it was necessary to ban the second applicant from wearing a cross around her neck.[197] This is different from the company's explanation in *Achbita*, where the company only wanted to ban the plaintiff from wearing the hijab to protect its neutral image, despite providing no evidence that, if she were to wear it, there would be a negative effect on the company's image.[198]

The hospital also suggested alternative places for the second applicant in Eweida to keep her necklace on her person, but she rejected those suggestions.[199] Additionally, the hospital prevented other employees who wanted to wear loose and dangling religious items from doing so for the same reason of protecting public health

194. *Id.* ¶ 121; Case C-157/15, *Achbita v. G4S Secure Sol. NV*, ¶ 10.

195. *See* Eweida v. United Kingdom, 2013-I Eur. Ct. H.R. 257, 259 (ruling that the company violated the first applicant's Article 9 right to manifest her religion because there was no "encroachment on the interest of others" and that the hospital in the second applicant's case did not violate the second applicant's right to manifest her religion under Article 9 of the ECHR because limitation was "necessary in a democratic society").

196. *Id.* at 259.

197. *Id.*

198. Case C-157/15, *Achbita v. G4S Secure Sol. NV*, ¶¶13, 38.

199. *Eweida v. United Kingdom*, 2013-I Eur. Ct. H.R. at 258.

and safety, while the plaintiff in *Achbita* was the only person that the company openly tried to restrict from wearing a hijab, or other religious item.[200]

In *Eweida*, the court's outcome in the second applicant's case is different from that of the first applicant despite a similar fact pattern.[201] The outcome was different because the court adequately applied the proportionality analysis in each case based on the facts of the specific case.[202] While the ECtHR recognized the great weight given to the individual's right to manifest her religion, it recognized that the health and safety of the hospital was more important.[203] The ECtHR was rational in its deference to the hospital in this situation because the hospital had a legitimate and important aim of protecting health and safety.[204] Also, the hospital was well-equipped to determine what would constitute a risk to health and safety in the hospital ward.[205]

The first applicant in *Eweida* experienced a situation that is largely comparable to Achbita's case. Both plaintiffs wanted to manifest their religion in the workplace, they both were in direct contact with employees, and both companies wanted to protect their images by promoting a specific image to customers.[206] There is one difference

200. *Id.*; Case C-157/15, *Achbita v. G4S Secure Sol. NV*, ¶ 13.

201. *See Eweida v. United Kingdom*, 2013-I Eur. Ct. H.R. at 226, 228 (explaining how both parties wanted to wear a cross around their neck in the workplace).

202. *See* Michael Bartlet, *Conscience in the Courts – Another View of Eweida*, 171 LAW & JUST. – CHRISTIAN L. REV. 70, 76-78 (2013) (noting that there was a fair balance used by the court in *Eweida*, which the court in *Şahin* ignored); *see also* Howard, *supra* note 71, at 168 (stating that there was a fair balance in the second applicant's case because the hospital's reasoning for asking the second applicant to remove her cross, the protection of the health and safety of the hospital ward, was of much greater importance than the reasoning of the company in the first applicant's case in *Eweida*).

203. *See Eweida v. United Kingdom*, 2013-I Eur. Ct. H.R. at 259 (noting that health and safety "was inherently of a greater magnitude").

204. *Id.*

205. *See* Cranmer, *supra* note 121, at 74 (explaining that the NHS Trust created its uniform based on health and safety and followed the guidelines from the Department of Health on acceptable "dress for clinical staff").

206. *Eweida v. United Kingdom*, 2013-I Eur. Ct. H.R. at 255-56; Case C-157/15, Achbita v. G4S Secure Sol. NV, ¶¶ 12-13, 41, 38 (Mar. 14, 2017), http://curia.europa.eu/juris/document/document.jsf?docid=188852&pageIndex=0&

between the cases in that the first applicant in *Eweida* only wanted to wear a small cross around her neck, while the plaintiff in *Achbita* wanted to wear an Islamic veil around her head.[207]

Nevertheless, both items would have been visible to customers.[208] British Airways only began objecting to the plaintiff's necklace because it was noticeable.[209] The court in *Eweida* decided that Eweida's right to manifest her religion by wearing a cross with her uniform outweighed the right of the company to project to its customers a specific image, or brand.[210] However, the CJEU did not rule the same way in *Achbita* despite the similarities in the facts of the cases because it did not attempt to balance the rights.[211] Had the CJEU balanced the competing rights, it would have found that there are great similarities between *Achbita* and *Eweida* and that the plaintiff's right to manifest her religion outweighs the right of the Belgian company to protect its neutral image.

The ECtHR in *Eweida* did not recognize the British company's right to present a specific image as a fundamental right, but merely as a legitimate aim.[212] Therefore, *Eweida* differs from *Achbita* because the ECtHR in *Eweida* was not trying to balance two fundamental rights, as the court faced in *Achbita*. The court in *Eweida* realized that there was a fundamental right conflicting with a mere legitimate aim, and it decided that since there was no evidence demonstrating that the manifestation of religion negatively affected the legitimate aim, the right to manifest was more important.[213] In *Achbita*, the situation is more complicated because the court would need to decide which fundamental right is more important since the CJEU determined that the company's right to protect its neutral image was a part of the fundamental right to "conduct a business."[214]

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207. *Eweida v. United Kingdom*, 2013-I Eur. Ct. H.R. at 255-56; Case C-157/15, *Achbita v. G4S Secure Sol. NV*, ¶ 12.

208. *Eweida v. United Kingdom*, 2013-I Eur. Ct. H.R. at 255; Case C-157/15, *Achbita v. G4S Secure Sol. NV*, ¶¶ 12-13.

209. *Eweida v. United Kingdom*, 2013-I Eur. Ct. H.R. at 255.

210. *Id.* ¶ 94.

211. Case C-157/15, *Achbita v. G4S Secure Sol. NV*, ¶ 22.

212. *Eweida v. United Kingdom*, 2013-I Eur. Ct. H.R. at 257.

213. *Id.*

214. Case C-157/15, *Achbita v. G4S Secure Sol. NV*, ¶ 38.

However, even though one court needed to balance a fundamental right with a legitimate aim and the other needed to balance two fundamental rights, both cases lacked evidence showing any harm to the company's image because of an employee's manifestation of religion.[215] This similarity implies that the court in *Achbita* would still need to follow the analysis in *Eweida*.[216] Additionally, Sharpston considers the competing rights of the company and the individual and still comes to the conclusion that the right of the individual in a situation like this has more weight than the right of the company.[217] In *Achbita*, the CJEU faced two conflicting rights, but it deferred to the right of the company and not the right of the individual.[218]

The court's analysis in *Eweida* should act as a guide for analyzing limitations placed on a person's Article 9 right.[219] It's analysis suggests that the CJEU should have narrowed the margin of appreciation and given Achbita's right to manifest her religion more weight than the company's desire to promote a specific image of neutrality.[220] Instead, the court rules in favor of the company and

215. *Id.*; *see also* Jolly, *supra* note 52 (stating that there was no evidence of a "real encroachment on the interests of others").

216. *See* Steijns, *supra* note 167 (recognizing that the court's decision in *Achbita* contradicts the ECtHR's decision in *Eweida* because it does not give more weight to the individual's right to manifest her religion).

217. Opinion of Advocate General Sharpston, *supra* note 16, ¶ 133.

218. Case C-157/15, *Achbita v. G4S Secure Sol. NV*, ¶¶ 38, 45.

219. *See* Bartlet, *supra* note 202, at 72 (stating that the analysis in *Eweida* reaffirms multiculturalism and several developments in the law and the analysis applies to Christianity as well as other religions, such as Islam); *see also* Jolly, *supra* note 52 (recognizing the nuanced and evidence-based approach to the courts analysis of proportionality).

220. *See* Saila Ouald Chaib, *European Court of Justice Keeps the Door to Religious Discrimination in the Private Workplace Opened. The European Court of Human Rights Could Close it.*, STRASBOURG OBSERVERS (Mar. 27, 2017), https://strasbourgobservers.com/2017/03/27/european-court-of-justice-keeps-the-door-to-religious-discrimination-in-the-private-workplace-opened-the-european-court-of-human-rights-could-close-it/ (stating that the freedom to conduct a business is significant in the courts reasoning, but it barely considers Achbita's fundamental human right to manifest her religion); *see also* Jolly, *supra* note 52 (noting that the proportionality test of the company's right and Achbita's right was superficial once the court found that the company's goal was a legitimate aim because Article 16 of the EU Charter of Fundamental Rights recognizes the freedom to conduct a business as a fundamental right).

supports the assumption that a customer who sees an employee manifesting her religion will automatically believe that the employee represents the entire company's religious views.[221]

a. The CJEU Failed to Balance Achbita's Right to Manifest Her Religion and the Company's Right under Article 18 of the ICCPR due to the UNHRC's desire to Strictly Apply Limitations

Under a broader spectrum of applying the balancing analysis, The CJEU's decision in *Achbita* goes against Article 18 of the ICCPR. Even though the Human Rights Committee and Special Rapporteurs repeat that courts should apply the limitations clause of Article 18 strictly, the international community has used limitations on the right to manifest religion as the rule instead of as the exception.[222] The CJEU in *Achbita* allowed the restriction on Achbita's right to manifest her religion without a sufficient justification. The HRC has stated that there should be a preference for the rights that the Covenant guarantees.[223] The ICCPR guarantees the right to manifest religion and not the right to present a neutral position to customers.[224] Thus, in *Achbita*, there should have been a natural preference for allowing the right to manifest religion to outweigh the right of the company. Instead, the court leniently applied the limitation.

Therefore, if the CJEU would have considered ECtHR case-law in applying a balancing analysis in *Achbita*, the ECtHR's previous case-law as well as UN reports would have suggested that the CJEU needed to rule in favor of the plaintiff. The legitimate aim of

221. *See* Jolly, *supra* note 52 (pointing out the inconsistency in the company's thought process in disregarding that employees see other employees wearing religious items and the company does not view that as compromising its neutral image, but it assumes that if a customer sees an employee wearing a religious item, the customer will be unable to distinguish the individual's beliefs from the company's beliefs); *see also* Davies, *supra* note 162 (criticizing the decision because it is hard to accept that customers would believe that the belief of the employee is the official position of the company).

222. *See* General Comment No. 22, *supra* note 150, ¶ 8 (noting that any potential limitation is only acceptable if it is in the Covenant).

223. *See generally id.* (explaining that the limitation cannot vitiate the rights guaranteed under the Covenant and that the courts should prioritize protecting the guaranteed rights).

224. International Covenant on Civil and Political Rights, *supra* note 21, at 178.

promoting a neutral image should not outweigh the right of the individual to manifest her religion.[225] Additionally, whether the law is "necessary in a democratic society" depends on whether the law is necessary to protect an important social need.[226] Pluralism plays a significant role in determining this factor because pluralism promotes the tolerance and respect of different beliefs.[227] This often invokes the need to balance the belief of an individual with the overall social needs of the society. In *Achbita*, the social need overlapped with the legitimate aim and *Eweida* suggests that when balanced against each other, a company's need to promote a specific image is not more important than the right of the individual to manifest her religion. Additionally, despite whether the court would have found the company's aim of promoting a neutral image to be legitimate, in analyzing proportionality and balancing the rights, it would have needed to decide in favor of the individual.

Lastly, under Article 18, the UNHRC has suggested that courts should strictly allow limitations on the right to manifest religion and that there should be a natural preference for the rights guaranteed by the ICCPR.[228] The UNHRC requires that any limitation on the right to manifest religion have a legitimate aim in the Article justify it.[229] The company's aim of protecting neutrality is not one of the legitimate aims in Article 18, and the ICCPR does not protect it as a fundamental right.[230] Therefore, had the CJEU analyzed *Achbita*

225. Eweida v. United Kingdom, 2013-I Eur. Ct. H.R. 215, 257.

226. *See* Howard, *supra* note 71, at 163 (stating that "necessary in a democratic society" means that the limitation must relate to an important social need and it must be proportionate to legitimate aim and "justified by relevant and sufficient reasons").

227. *See* Parker, *supra* note 70, at 96 ("The autonomy of religious communities is in fact indispensable to pluralism in a democratic society."); *see also* Morini, *supra* note 76, at 615 (stating that the ECtHR demonstrates that the "principle of pluralism is fundamental when considering the justifiability of a restriction on religious freedom); *cf.* Şahin v. Turkey, App. No. 44774/98, 44 Eur. H.R. Rep. 99, ¶ 1067 (2005) (recognizing, also, that sometimes restrictions on the right to manifest religion are necessary to provide a respectful environment of tolerance for all religions).

228. General Comment No. 22, *supra* note 150, ¶ 8.

229. *See* Shaheed, *supra* note 155, ¶ 43 (stating that many states fail to provide justification "pursuant to the criteria" in Article 18 of the ICCPR for limitations on the right to manifest religion).

230. International Covenant on Civil and Political Rights, *supra* note 21, at 178.

under Article 18 of the ICCPR it would have needed to rule in favor of the plaintiff.

IV. RECOMMENDATIONS

A. REDUCE THE MARGIN OF APPRECIATION

While there are benefits to the margin of appreciation, it may be necessary to lessen the wide berth the ECtHR has given to states when deciding cases concerning the right to manifest religion. When it comes to the right to manifest one's religion, the ECtHR is prone to allowing the state to determine if a limitation on the right is necessary and more important than the right itself.[231] It gives a wide margin of appreciation because of the idea that the states have a better understanding of the desires of and consensus among the people.[232]

In *Şahin v. Turkey*, the court looked at the development of Turkey's laws.[233] At that time in Turkey's history, there was a large wave of secularism and the leaders of the State were trying to remove anything that promoted Islamic power.[234] Thus, the government enacted many bans that greatly affected Muslim believers.[235] The government's desire to promote secularism was not necessarily the desire of all the citizens, but the desires of the many outweighed the desires of the few. The laws should not only protect the desires of the majority or the leaders, but it should also protect the rights of the minority.

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231. *See Şahin v. Turkey*, App. No. 44774/98, 44 Eur. H.R. Rep. ¶¶ 87-88 (noting the wide margin of appreciation given to Turkey in trying to protect secularism and equality); *see also* S.A.S v. France, 2014-III Eur. Ct. H.R. 341, 380 (noting the wide margin of appreciation given to France in trying to protect the freedoms of others); Eweida v. United Kingdom, 2013-I Eur. Ct. H.R. 215, 259 (noting the wide margin of appreciation given to the hospital for the second applicant because the hospital could determine what was best for health and clinical safety).

232. *See* Kratochvil, *supra* note 82, at 326 (stating that this is known as the "better position rationale").

233. *See Şahin v. Turkey*, App. No. 44774/98, 44 Eur. H.R. Rep. ¶ 30 (stating that there were many laws banning religious attire in various areas of Turkish society).

234. *Id.*

235. *Id.*

Without a set standard for the margin of appreciation, the doctrine will not adequately be able to consider the growth and change a country can go through. At the time that the ECtHR decided *Şahin*, Turkey greatly promoted secularism; however, after the leadership changed, Turkey began to remove many of the restrictions and bans on the religious population.[236] If the court bases its ruling on whether to protect the right to manifest religion solely on the laws of the state instead of a standard, the ECtHR will always bend to the will of states, which will render its opinions useless.[237]

Some may view the flexibility of the margin of appreciation as a necessary tool, but the doctrine can sometimes harm people who deserve to have their fundamental rights protected because there is no formula for when the court should provide deference to the state or for determining the scope of that deference.[238] Without a formula, the court can use the margin of appreciation as an escape from answering tough questions. In *S.A.S.*, the ECtHR argued that wearing headscarves in public was a societal question, but in the first applicant's case in *Eweida*, the defendant was a company and the court decided which right was more important.[239] Under this logic, whenever the limitation on an individual's right "protects" a societal right, the societal right will prevail. However, this cannot be a rule because the ECtHR has consistently mentioned that pluralism and tolerance are significant in analyzing cases concerning the right to

236. *See* Arsu & Bilefsky, *supra* note 104 (noting that the head scarf ban is emotionally charged and divides the country).

237. *See* Morini, *supra* note 76, at 623 (noting that large margins of appreciation are "incompatible with [the ECtHR's] self-professed role as the overseer of the State as the 'neutral and impartial organiser' of the system of beliefs within the State").

238. *See* Kratochvil, *supra* note 82, at 325 (stating that "no simple formula can describe" how the margin of appreciation works and it has a "casuistic, uneven, and largely unpredictable nature" because it is unclear when courts should use the margin of appreciation doctrine and what its limits and boundaries are; thus, "the consequences of invoking it are far from predictable or precise").

239. *See* S.A.S v. France, 2014-III Eur. Ct. H.R. 341, 380 (stating that the court needed to exercise restraint and allow domestic policy makers to decide whether a ban on all garments covering the face in public places should be permissible); *see also* Eweida v. United Kingdom, 2013-I Eur. Ct. H.R. 215, 257 (deciding that the right of the individual to manifest her religion was more important than the right of the company to project a specific image to customers).

manifest religion.[240] Thus, sometimes pluralism and tolerance will need to outweigh the desire to give a state a wide margin of appreciation to protect a societal right.

The margin of appreciation doctrine can also contradict the purpose of the ECHR. The ECHR ensures the rights of individuals no matter what state they are in. It protects the fundamental rights of human beings, which are so basic and necessary that States have a positive obligation to protect them.[241] Thus, it may help protect those fundamental rights if, when challenged, the court fully analyzes and weighs the competing rights rather than simply defer to the state.

B. ESTABLISH A TEST FOR THE NEED TO BALANCE INTERESTS

The CJEU failed to adequately balance the right of the individual with the right of the corporation. When there are conflicting interests, balancing the interests of the parties is very important.[242] Even though Article 9 does not specify that there should be a balance of fundamental rights that are in conflict, ECtHR case law implies that this is necessary.[243] *Eweida* stands as an example of this. The court saw it necessary to balance the rights, and the ECtHR in *S.A.S. v. France* mentioned the need to do so, even though it failed to accomplish an adequate balance.[244]

There is no test that establishes how to create an adequate balance

240. *See S.A.S v. France*, 2014-III Eur. Ct. H.R. at 378-79 (stating that states have a duty to promote tolerance); *see also Eweida v. United Kingdom*, 2013-I Eur. Ct. H.R. at 257 (stating that a "healthy democratic society needs to tolerate and sustain pluralism and diversity"); Şahin v. Turkey, App. No. 44774/98, 44 Eur. H.R. Rep. 99, ¶ 108 (2005) ("Pluralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals or groups of individuals which are justified in order to maintain and promote the ideals and values of a democratic society.").

241. *Şahin v. Turkey*, App. No. 44774/98, 44 Eur. H.R. Rep. ¶ 106; *see also Eweida v. United Kingdom*, 2013-I Eur. Ct. H.R. at 256 (noting that states have a positive obligation under Article 9 of the ECHR).

242. *S.A.S v. France*, 2014-III Eur. Ct. H.R. at 373; *see generally Eweida v. United Kingdom*, 2013-I Eur. Ct. H.R. at 254 (noting the required balance between competing interests is subject to the margin of appreciation given to states).

243. *Şahin v. Turkey*, App. No. 44774/98, 44 Eur. H.R. Rep. 99, ¶ 108; *Eweida v. United Kingdom*, 2013-I Eur. Ct. H.R. at 259-60; *S.A.S v. France*, 2014 Eur. Ct. H.R. at 383 (Nussberger, J., dissenting).

244. *S.A.S v. France*, 2014 Eur. Ct. H.R. at 373.

between the right to manifest religion and another right. *Eweida* gives factors to consider for determining a balance through its balance of the right to manifest religion and the right of the company to project a specific image to customers.[245] The court in its analysis recognizes that the right to manifest one's religion is a fundamental right, while the right to project a specific business image is merely a legitimate aim of the company.[246] One may consider this analysis to only apply when the rights in conflict are a fundamental right and a right that is not fundamental.

The analysis used for the first applicant in *Eweida* may not solely be sufficient to establish a test for balancing two fundamental rights. The ECtHR only suggested that if a right is fundamental, it outweighs a mere legitimate aim that is not in Article 9. The court's decision of the second applicant's case in *Eweida* supports this idea.[247] The ECtHR allowed a legitimate aim mentioned in Article 9, protecting public health and safety, to outweigh the fundamental right of manifesting one's religion.[248] However, it does not say that the reason for doing so was because this legitimate aim was in Article 9 of the ECHR. Overall, it appears that the court leaves the balancing test to the discretion of the judges.

Whether there can be a limitation on a fundamental right should not be solely based on the judge's discretion. Without a specific test, it is likely that courts will continue to use the margin of appreciation and rule in favor of the limitation, but this is contrary to how courts

245. *See Eweida v. United Kingdom*, 2013-I Eur. Ct. H.R. at 257 ("On one side of the scales was Ms Eweida's desire to manifest her religious belief. As previously noted, this is a fundamental right: because a healthy democratic society needs to tolerate and sustain pluralism and diversity; but also because of the value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others. On the other side of the scales was the employer's wish to project a certain corporate image. The Court considers that, while this aim was undoubtedly legitimate, the domestic courts accorded it too much weight.").

246. *Id.*

247. *See id.* at 259 (stating that the right of the employee to manifest her religion did not outweigh the right or need of the hospital in protecting public health and safety).

248. *See id.* (explaining that while the right to manifest religion was a weighty fundamental right, the right of the hospital to protect "public health and safety," which the ECHR lists as a legitimate aim, was more important in this situation).

should interpret the limitations clause.

V. CONCLUSION

If the CJEU had followed AG Sharpston's Opinion for Bougnaoui and applied a balancing analysis for the two conflicting interests in Achbita's case, it would have realized the need to rule in favor of the plaintiff. Denying Achbita the right to wear a hijab in the workplace merely because the company assumed a ban like this would help to promote a neutral image to its customers, violated her right to manifest her religion. The company in *Achbita* did not support its desire to promote a neutral image with evidence demonstrating that the employee caused actual harm to the company by wearing her hijab. Additionally, regardless of whether there was evidence supporting the assumption of the company, the right of an individual to manifest her religion should outweigh the desire to promote a specific image. Therefore, interpretations of the balancing analysis used for Article 9 of the ECHR and Article 18 of the ICCPR suggest that the ban in *Achbita* on all visible signs of religious, philosophical, and political signs in the workplace violated the plaintiff's right to manifest her religion.