

Religious Neutrality at Europe’s Highest Courts: Shifting Strategies

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ABSTRACT

This article demonstrates that recent manifestations of religious neutrality in the case-law of Europe’s highest courts amount to ‘shifting strategies’, which prompt systematic and excessive judicial restraint from European supranational courts. It argues that these shifting strategies end up (wrongly) framing the visibility of religion as the problem to be solved. It suggests an alternative approach, under which neutrality would only have a derivative and conditional value, to be established and assessed by European courts. The role of European courts would then no longer be to display (allegedly neutral) judicial restraint but to provide a democratic forum in which equality and liberty interests may be constantly confronted and revisited as new contestations emerge.

Until recently, religious neutrality was not a frequently used concept before Europe’s highest courts, namely, the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). In recent years, the concept has become the golden thread in religious freedom and discrimination decisions by the ECtHR and the CJEU, expanding to the whole of the public sphere and to the private employment sector as well. The expansion has provoked shifts in the meaning of the concept of neutrality, no longer (merely) a requirement of impartiality on the part of the state but more and more a requirement upon citizens to abstain from displaying their religion. This article argues that the more recent manifestations of religious neutrality in the ECtHR and CJEU case-law amount to ‘shifting strategies’ of Europe’s highest courts. By shifting strategies, the article refers to the ways in which the European courts have used religious neutrality to shift religious issues to different fora. For the sake of religious neutrality ‘as neutrality by ricochet’ (construed as neutrality of the European frameworks towards national traditions in respect of religion), religious issues have thus been shifted back to the national context in which they have emerged. For the sake of ‘religious neutrality as impartiality’ (construed—

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wrongly, I will argue—as neutrality of appearance, as imposed for example by company policies), the CJEU has also shifted religious issues to employers' sphere of prerogatives. One of the implicit goals of this double shift is to enhance the neutrality of Europe's highest courts themselves by avoiding too great an interference in controversial issues, deemed to be best solved at national or local level.

This article makes a contribution to the debate on the role and meaning of religious neutrality in the case-law of the ECtHR and CJEU. Its central descriptive claim is that the more recent manifestations of religious neutrality in the case-law of the ECtHR and CJEU amount to 'shifting strategies'. Its main analytical claim is that these shifting strategies wrongly end up framing the visibility of religion as the problem to be solved. Finally, normatively, the article makes the case for an alternative approach, based on an inclusive, open-ended and reason-giving process.

The article will be structured as follows. In a first part, focused on early decisions, I will argue that the judicial use of the concept of religious neutrality gradually strayed away from the liberal rationales which Europe's courts had ascribed to the concept. In a second part, I will submit that, through what I call shifting strategies, religious neutrality before European Courts has—save for the CJEU rulings in the *WABE* Case C-804/18 and *MH Müller Handel* Case C-341/19¹ (discussed in sections 3 and 4), which bring cause for cautious optimism—recently evolved towards a narrower meaning of judicial restraint, which far from bringing religious neutrality more in line with its liberal roots, has increased the distance between them and, paradoxically, has led to non-neutral positions by the courts. In a third part, I will examine the consequences of these shifting strategies for religious interests. I will argue that these shifting strategies (wrongly, as I will show) end up framing the visibility of religion as the problem to be solved. In a fourth and final part, I will suggest an alternative approach, under which neutrality would only have a derivative and conditional value, to be established and assessed by European courts. The role of European courts would then no longer be to display (allegedly neutral) judicial restraint but to provide a democratic forum in which equality and liberty interests may be constantly confronted and revisited as new contestations emerge.

1. CONTEXTUAL ANALYSIS: VARIATIONS OF NEUTRALITY BEFORE EUROPEAN COURTS

As Europe's highest courts have committed to a liberal conception of and foundation for fundamental rights,² this first section will briefly set out the significance of

- 1 *IX v WABE eV* and *MH Müller Handels GmbH v MJ* (Judgment of the Court (Grand Chamber) of 15 July 2021) <<https://curia.europa.eu/juris/liste.jsf?num=C-804/18>> (accessed 7 October 2022). *Adde*, *SCRL (Religious clothing)* (Judgment of the Court (Second Chamber) of 13 October 2022 Case C-344/20) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62020CJ0344>> (accessed 28 October 2022).
- 2 For a thesis that the ECHR framework can best be understood in terms of liberal legal rights: see George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007).

neutrality for liberalism and draw out the implications for legal reasoning at the level of European Courts, or, more exactly, given the paucity of early decisions on religion by the CJEU, at the level of the ECtHR.

A. The Neutrality of the Liberal State: A Derivative and Democratic Requirement

(i) *Neutrality as a derivative requirement*

The concept of neutrality lies at the heart of the liberal framework. The liberal state must be neutral, in that it must abstain from imposing one comprehensive doctrine or conception of the good upon individuals and communities.³ The liberal state will not coerce its citizens into following a particular conception of morality: 'Since a liberal state operates in a morally pluralistic social environment, the only way of respecting equal moral sovereignty of all individuals is by postulating the "priority of the right over the good"; hence — neutrality of the state vis-à-vis the conflicting moralities.'⁴ The restraint exercised by the state will guarantee citizens the autonomy to decide for themselves what constitutes a good life.⁵ Neutrality is thus indispensable to the legitimacy of state action and of the political system more generally⁶ as well as to the autonomy, equality, and liberty of citizens and communities within the state. The importance conferred upon neutrality is not therefore value-free: it relies on commitments to individual liberty and equality. Were the state not neutral, state policies might unduly advantage one section of society, in breach of equality; were the state not neutral, individuals and communities might have too little scope to determine their own moral directions, in breach of liberty and autonomy. These underlying values of equality, liberty and autonomy denote that liberalism itself is not neutral. However, far from undermining the importance of neutrality within liberalism, the lack of neutrality of liberalism is irrelevant to the legitimacy of the liberal state's own duty of neutrality. If neutrality derives from compelling values, it cannot be dismissed because of its non-neutral foundations but must be assessed against these underlying goals. The derivative value of neutrality is well captured by Gerald Gaus: 'Because these basic claims are intuitively compelling, so too is the conception of neutrality to which they give rise'.⁷ Moreover, neutrality within liberalism does not mean that the state has to be neutral towards illiberal views and practices.⁸ Neutrality of the liberal state does not postulate non-intervention by the state⁹ but requires that

3 John Rawls, *Justice as Fairness: A Restatement*, in Erwin Kelly (ed), (The Belknap Press of Harvard University Press 2001) 152; Will Kymlicka, 'Liberal Individualism and Liberal Neutrality' (1989) 99 *Ethics* 883.

4 Wojciech Sadowski, 'Theory of Punishment, Social Justice and Liberal Neutrality' (1989) 7 *Law and Philosophy* 351, 372.

5 Ronald Dworkin, 'Liberalism', reprinted in Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 181.

6 Thomas Nagel, *Equality and Partiality* (Oxford University Press 1991) 33.

7 Gerald F Gaus, 'Liberal Neutrality: A Compelling and Radical Principle' <<http://www.gaus.biz/GausOnNeutrality.pdf>> (accessed 10 September 2022), 2.

8 Sadowski (n 4) 372.

9 Showing how a radical understanding of liberal neutrality would lead to 'complete state inaction', Daniel M Weinstock, 'Neutralizing Perfection: Hurka on Liberal Neutrality' (1999) 38 *Dialogue* 45, 47.

the state justifies its intervention on the basis of overarching liberal values¹⁰ and following fair processes. It is in this support for a culture of justification and fair process that neutrality connects with democratic legitimacy.

(ii) *Neutrality as a democratic requirement*

In accounts of democracy as a reason-giving process,¹¹ justification of state action will be essential to indicate that the government is treating citizens as rational and free agents rather than subjects who have to accept and defer to whatever the sovereign decides, for the simple and only reason that he/she is the sovereign.¹² Justification for state action enacts both the accountability of government and the freedom of citizens, as justificatory agents¹³ and co-deliberators of legal decisions.¹⁴ In a deliberative perspective, justification also offers the grounds for further contestations and deliberation on the terms of legitimacy. Given the moral and religious pluralism of our societies, justification for state action will necessarily have to abide by neutrality requirements: the state may favour one set of interests over others, one group of citizens over others but it cannot do so out of subjective preference or belief in the inherent superiority of one conception of morality,¹⁵ only for reasons and/or through a process which appeal to overarching considerations necessary for the liberal commitment to seeking fair terms of cooperation, which all citizens can accept.¹⁶ Two main features of neutrality therefore emerge from this brief survey: negatively, neutrality does not postulate state non-intervention as the default position; positively, neutrality requires justification for state intervention in non-biased terms through non-biased procedures. Moreover, and interrelatedly, liberalism does not pursue neutrality for its own sake but as a vehicle for the broader foundational values.

In other words, under a liberal understanding, religious neutrality presents itself as a tool to protect (at times conflicting)¹⁷ values of autonomy, liberty and equality. In the paragraph to follow, I will examine the extent to which this liberal conception of neutrality has influenced the implementation of the concept in the legal reasoning of Europe's highest courts in cases involving religion.

B. Versions of Neutrality in the Jurisprudence of Europe's Highest Courts

The concept of neutrality translates into legal reasoning in various ways. Depending on whether the emphasis is placed on the underlying value of autonomy or on equality, judicial use of the concept of religious neutrality will lead to differing judicial

10 Peter De Marneffe, 'Liberalism, Liberty, and Neutrality' (1990) 19(3) *Philosophy & Public Affairs* 253.

11 Samuel Freeman, 'Democracy, Religion and Public Reason' (2020) 149(3) *Dædalus* 37.

12 Gaus (n 7) 12.

13 Kai Möller, 'Justifying the Culture of Justification' (2019) 17(4) *International Journal of Constitutional Law* 1078, 1093, who argues that persons, as justificatory agents, should have a right to challenge and demand adequate reason for any law or act that relevantly affects them.

14 Under a Rawlsian conception, citizens would have a fundamental interest to take part in political cooperation as co-deliberators: John Rawls, *Political Liberalism* (2nd edn, Columbia University Press 1996).

15 Charles Larmore, *Patterns of Moral Complexity* (Cambridge University Press 1987) 44.

16 Rawls (n 14).

17 On the tensions between equality and liberty, see Julian Rivers, 'Is Religious Freedom Under Threat from British Equality Laws' (2020) 33(2) *Studies in Christian Ethics* 179.

approaches and outcomes. As I will now show, until the recent instances of religious neutrality that I will examine in section 2, most commentators had observed a gradually more pronounced attention upon equality, versus autonomy, in the jurisprudence of the ECtHR. While the case-law of the CJEU had not yet yielded any conclusions, many authors had speculated that a similar (if not stronger) focus on equality would emanate from Luxembourg.¹⁸ Reviewing this early case-law on religious freedom of the ECtHR, Julie Ringelheim¹⁹ had identified two main rationales for the concept of religious neutrality—‘a duty of non-interference in merely religious disputes and an obligation to be impartial and non-discriminatory where a decision affecting a religious group must be taken’—and extracted three main manifestations of the concept in the case-law: ‘neutrality as absence of coercion’, ‘neutrality as absence of preference’ and ‘neutrality as exclusion of religion from the public sphere’. The two rationales echo the liberal values of autonomy, liberty and equality which, as demonstrated above, the concept of neutrality serves to promote. Non-interference in purely religious disputes preserves the autonomy and liberty needed for individuals and communities to live by their own (religious) conceptions, while the obligation of impartiality protects the equality between religious groups. The three identified manifestations do not however protect these interests to the same degree. The evolution from ‘neutrality as absence of coercion’ to ‘neutrality as absence of preference’ would signal a strengthening of the scrutiny of the court and the inclusion in its assessment of broader risks of pressures and stigmatization which might fall short of coercion or indoctrination per se but might nonetheless disproportionately weigh on someone’s conscience.²⁰ Given the more acute risks of pressures faced by vulnerable members of society, attention to equality concerns will therefore prompt review from the court, even where the autonomy or individual liberty of the claimant is not at risk. In the case of *Grzelak*,²¹ the ECtHR held for example that the school’s failure to provide a mark for the subject religion/ethics constituted a violation of Article 14 (protecting against discrimination in the enjoyment of convention rights) taken in conjunction with Article 9 (protecting freedom of thought, conscience, and religion).²² The right to opt-out from religious instruction courses may protect against coercion, but in the context of an overwhelming Catholic country (Poland), the stigmatizing effect of the exercise of the opt-out option, made visible to all and for ever by the absence of a mark for the subject, had a discriminatory effect upon the minorities who availed themselves of the option. Equality concerns thus reinforced the autonomy/individual liberty analysis to protect individual rights further and increase the justificatory burden on the state.²³ Unlike

18 For example, Erica Howard, ‘Protecting One’s Freedom to Manifest One’s Religion or Belief: Strasbourg or Luxembourg?’ (2014) 32(2) *Netherlands Quarterly of Human Rights* 159.

19 Julie Ringelheim, ‘State Religious Neutrality as a Common European Standard? Reappraising the European Court of Human Rights Approach’ (2017) 6 *Oxford Journal of Law and Religion* 24.

20 *ibid* 37.

21 *Grzelak v Poland*, App no 7710/02 (ECtHR, 15 June 2010), para 99.

22 Peter Cumper, ‘Religious Education in Europe in the Twenty-First Century’ in Myriam Hunter-Henin (ed), *Law, Religious Freedoms and Education in Europe* (Ashgate 2011) 207.

23 See however the remaining difficulties and inconsistencies of the ECtHR’s position, Myriam Hunter-Henin, ‘Law, Religion and the School’ in Silvio Ferrari (ed), *Routledge Handbook of Law and Religion* (Routledge 2014) 259.

the move from ‘absence of coercion’ to the ‘absence of preference’, the third manifestation of ‘neutrality as exclusion’ dilutes the justificatory burden of state coercive action and more readily allows interferences with individual liberties, by ‘designating individuals rather than the state as the bearer of neutrality requirements’.²⁴ Besides, conceptually, the rise in cases allowing ‘neutrality as exclusion of religion from the public sphere’ might encourage what some see as the hijacking of discussions on religious neutrality by one particular (exclusive) interpretation of neutrality, which ‘contends that this impartial framework can be achieved only if the state completely disregards religious and cultural differences’.²⁵ Such narrowing down of the discourse would infringe the recognition of the fact of pluralism, which underlie the need for neutrality in the first place.²⁶ Religious neutrality before Europe’s courts does not therefore always match the rationales which make neutrality valuable for liberalism, contrary to the liberal roots which the ECtHR had ascribed to Convention rights. While the ‘neutrality as absence of coercion’ and ‘neutrality as absence of preference’ would both abide by the liberal values of liberty, autonomy and equality underlying the concept of religious neutrality (albeit with a different emphasis), ‘neutrality as exclusion of religion’ would be problematic, as it undermines the autonomy of individuals who suffer restrictions and precludes any verification of the potentially unequal impact of the restrictions upon members of religious minorities, contrary to equality concerns. Focusing on more recent instances of the concept of religious neutrality, I will argue in the section to follow that the concept of religious neutrality before the ECtHR and the CJEU is currently evolving towards a duty of pure judicial restraint, which strays from these liberal roots even further.

2. CONCEPTUAL SHIFT: FROM RELIGIOUS NEUTRALITY TO JUDICIAL RESTRAINT

Religious neutrality, at the level of Europe’s highest courts, often takes on a meta-dimension. As states are expected, under the concept of religious neutrality, to remain impartial towards their citizens’ religious (or non-religious) views and ways of life, and as it is acknowledged that this duty of state impartiality can be translated through a diversity of constitutional arrangements towards religion, Europe’s highest courts bind themselves to a duty of *ricochet* neutrality: the duty to remain impartial towards Member States’ chosen constitutional arrangements in relation to religion. Before Europe’s courts, the concept of religious neutrality thus corresponds to two (at times overlapping) meanings: one reflects impartiality towards the interests at stake; the other refers to the relationships between European and national domestic courts and designates a duty of neutrality by the former towards the latter. I will call neutrality in the former sense, ‘neutrality as impartiality’ and neutrality in the latter sense, ‘neutrality by ricochet’.

Schematically, it is possible to identify two main bases to justify Europe’s courts’ duty of neutrality *by ricochet*: the doctrine of margin of appreciation and the notion of constitutional identity review. A preliminary clarification is therefore in order, to

24 Ringelheim (n 19) 39.

25 Roland Pierik and Wibren Van der Burg, ‘What Is Neutrality?’ (2014) 27(4) Ratio Juris 496, 498.

26 It is because of pluralism that the liberal state has to be neutral. s 1.A.

distinguish between the doctrines of 'margin of appreciation' and 'constitutional identity review'. As I will explain in section 4, the doctrine of margin of appreciation need not lead to a position of absolute judicial restraint by Europe's courts. A measured margin of appreciation may be justified and indeed welcome, out of respect for the pluralism within the Council of Europe or the European Union and the acknowledgment that domestic courts may be better placed to assess the contextual intricacies of a dispute. Such welcome margin of appreciation, as will be explained in detail in the final section, will however come with limits attached. Gatekeepers of those limits, Europe's courts will not therefore under this measured margin of appreciation abstain from exercising judicial review but exercise it in tandem with national courts. According to the proponents of the constitutional identity review approach, on the other hand,²⁷ Europe's courts, when bound by a duty of neutrality by ricochet, would need to refrain from exercising judicial review altogether. Indeed, according to this scholarship, constitutional identity should discard the review of supranational courts entirely as it relies on the idea that it is then up to 'national courts to solve disputes by looking "inward", in light of national specificities'²⁸ or, in more defensive terms, as it seeks 'to shield areas of the national legal systems from the influence of European law'.²⁹ Although absolute, the resulting judicial restraint would still be limited in scope to areas raising core constitutional elements of Member States' national systems. Only those core areas, which affect national identity, would need to be shielded from the scrutiny of Europe's courts, under the constitutional identity review approach.

This section will show that the type of restraint displayed by Europe's courts in recent instances of religious neutrality does not correspond to a measured margin of appreciation but is more akin to the absolute judicial retreat advocated under the constitutional identity review doctrine. The purpose of this section is not, however, to criticize the constitutional identity review doctrine per se,³⁰ but to show that even on these terms, the judicial restraint exhibited by Europe's courts in recent instances of religious neutrality would not equate to a duty of neutrality *by ricochet*, triggered in reaction to underlying constitutional principles affecting national identity, but to pure judicial restraint, out of a systematic (and, as I will argue, unwarranted) deference towards Member States' assessments, as soon as matters of religion are involved, regardless of whether questions of national identity are at stake. Two important cases decided by the ECtHR and the CJEU, respectively, the ECtHR's decision in *SAS v France*³¹ and the CJEU's ruling in *Achbita*,³² will be chosen as illustrations of the narrowing down of neutrality as pure judicial restraint.

27 See Monika Polzin, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law' (2016) 14 *International Journal of Constitutional Law* 411.

28 George P Fletcher, 'Constitutional Identity' (1993) *Cardozo Law Review* 737.

29 Fabbrini A Sajó, 'The Dangers of Constitutional Identity' (2019) 25(4) *European Law Journal* 1.

30 For powerful criticisms, see Ruti G Teitel, 'Reactionary Constitutional Identity' (1992) 14(3–4) *Cardozo Law Review* 747; Sajó (n 29).

31 *SAS v France* {GC}, App no 30985/96 (ECtHR, 1 July 2014).

32 C-157/15 *Achbita*, *Centrum voor Gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions* (Judgment of the Court 14 March 2017) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CJ0157>> (accessed 10 September 2022).

A. Presentation of Achbita and SAS

In *Achbita*, religious neutrality was at the core of the dispute between an employer and his religious employee. The company neutrality policy in place, in violation of which Ms Achbita insisted on wearing her Islamic *hijab*³³ at work, was the reason for her dismissal. By contrast, the SAS case did not directly deal with religious neutrality. In *SAS*, as explained below, it was a concern for a *vivre ensemble* which justified the contested restriction upon religious freedoms. Nonetheless, both cases deal with religious neutrality in a meta-sense. In both cases, Europe's courts claimed that their (alleged) position of neutrality expressed a duty of neutrality *by ricochet*, triggered by deference towards underlying longstanding national principles.

Using *Achbita* and *SAS* as case studies, this section will refute the existence of a position of neutrality, in either of its two meanings of 'neutrality by ricochet' or 'neutrality as impartiality'. First, it will demonstrate that whether in *Achbita* or *SAS*, no underlying constitutional principles or national traditions justified any greater deference on the part of Europe's courts. Second, it will submit that the deference displayed in both cases by Europe's courts itself failed to comply with neutrality-impartiality requirements.

B. Judicial Restraint Contrary to Neutrality by Ricochet

The characterization, by the CJEU, of Ms Achbita's dismissal as justifiable indirect discrimination under Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (the Directive),³⁴ was influenced by the broader national context. As Advocate General (AG) Juliane Kokott had noted: 'In Member States such as France, where secularism has constitutional status and therefore plays an instrumental role in social cohesion too, the wearing of visible religious symbols may legitimately be subject to stricter restrictions (even in the private sector and generally in public spaces).'³⁵ A national secularist interpretation of religious neutrality, in other words, would trigger a duty of neutrality on the part of the CJEU, construed as a duty of non-interference. The reference made to social cohesion, as well as the duty of neutral non-interference that would allegedly follow, echo the ECtHR's decision in the *SAS* case. In *SAS*, the ECtHR held that the French ban on the full covering of the face did not violate any Convention rights. As France was granted a wide margin of appreciation in relation to this 'choice of society', it was entitled, according to the Court, to consider that the covering of the face in the public sphere infringed the 'minimum requirements of life together'.³⁶ Undeniably, the 2010 French ban on face coverings had received strong parliamentary support.³⁷ It is therefore understandable why the ECtHR might have felt in *SAS* that the ban embodied a 'choice of society'.³⁸ Nonetheless, if human rights

33 A headscarf which covers the head but leaves the face visible.

34 (2000) OJ L303, 16: art 2(2)(b) of the Directive.

35 AG Juliane Kokott, Opinion Delivered on 31 May 2016, para 125 <<https://curia.europa.eu/juris/document/document.jsf?docid=179082&doclang=en>> (accessed 5 September 2022).

36 *SAS v France* (n 31) paras 121 and 122.

37 The French 2010 Law was voted by an overwhelming 335/1 majority before the Lower House of the French Parliament and a 246/1 majority before the Upper House.

38 *SAS v France* (n 31) para 153.

protection is to mean anything, majoritarian parliamentary pronouncements should not seal the debate before the ECtHR.³⁹ According to the framework of the European Convention on Human Rights, it is only where such legislative pronouncements pursue a legitimate aim, necessary in a democratic society, and where the restrictions imposed in pursuance to that aim are proportionate, that the interference with religious freedoms ought to be held compatible with the Convention. Besides, support for the ban was not as unanimous as suggested. The French Conseil d'Etat, in its report,⁴⁰ had warned that the ban would be incompatible with Convention rights and had recommended that its scope be curtailed. The deferential attitude adopted by the ECtHR in *SAS* therefore wrongly portrays a controversial move as a consensual choice of society.⁴¹ Similarly, in *Achbita*, the connection made between secularist countries and neutrality requirements presents as a settled principle, controversial trends seeking to extend neutrality requirements beyond the sphere of the state. Rather than a neutral acknowledgment of the state's own constitutional entrenched traditions, the judicial restraint exhibited by Europe's courts in recent instances therefore simply shifts controversies surrounding religion away from the European arena, without verifying whether these controversies actually involve longstanding constitutional principles or not. Far from being neutral, this mirroring of the most militant trends within secularist countries, weighs upon national debates and encourages a certain reshaping of traditional constitutional arrangements between state neutrality/*laïcité* and religion.⁴² As I will go on to demonstrate, the judicial restraint displayed in these two cases also fails to meet neutrality requirements, construed as a duty of impartiality.

C. Judicial Restraint Contrary to Neutrality as Impartiality

In one of the 2019 Reith Lectures,⁴³ Lord Sumption questioned the role of courts in adjudicating delicate controversies over human rights.⁴⁴ Following a conception of democratic legitimacy as parliamentary representative democracy, one of the arguments in favour of judicial restraint is that it would ensure that courts remain neutral in cases where no obvious right answer is available. In horizontal relationships, where religious interests clash with other individual rights,⁴⁵ it will appear delicate for

39 Contra, see Richard Bellamy, 'Political Constitutionalism and the Human Rights Act' (2011) 9 International Journal of Constitutional Law 86; Martin Loughlin, *Against Constitutionalism* (Harvard University Press 2022).

40 Rapport sur les solutions juridiques d'interdiction du port du voile intégral (*Report on the legal solutions to ban the full-face veil*) 25 March 2010, *Semaine Juridique* 2010, actualités 406.

41 The fact that the contestations emerged outside of Parliament is irrelevant. In a dialogic understanding of the relationships between legislature and judiciary, legislative action has no intrinsically superior claim to being *our* action. See Frank I Michelman, 'Foreword — The Supreme Court 1985 Term: Traces of Self-Government' (1986) 100(1) Harvard Law Review 4, 34.

42 On the evolution of *laïcité*, see Myriam Hunter-Henin, *Why Religious Freedom Matters for Democracy. Comparative Reflections from Britain and France for a democratic vivre ensemble* (Hart 2020).

43 Jonathan Sumption, 'Human Rights and Wrongs' Lecture 3 in The 2019 Reith Lectures, *Law and the Decline of Politics* <<https://www.bbc.co.uk/programmes/m00057m9>> <<https://ukhumanrightsblog.com/2019/06/04/the-reith-lectures-human-rights-v-democracy/>> (accessed 29 October 2022).

44 *ibid.*

45 I here take the existence of human rights conflicts for granted. For a discussion as to their very existence, see Stijn Smet and Eva Brems (eds), *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony* (Oxford University Press 2017).

courts, especially supranational courts, to arbitrate between competing interests. When the employer has clearly entrenched directions on how to conduct their business in the form of a company policy, supranational courts thus feel inhibited—strong judicial review standing against the employer’s right to conduct their business, protected under article 16 of the EU Charter of Fundamental Rights. Indeed, the CJEU considered in *Achbita* that an employer’s wish to project an image of neutrality towards customers was in principle legitimate under the employer’s right to conduct a business, provided it was enforced consistently. By constraining judicial review to a minimum and conferring a presumption of legitimacy on company policies, the Court however is not deferring to parliamentary legislative pronouncements, which were unclear in this context, but taking a stance. Even assuming that democracy should mean national representative parliamentary democracy,⁴⁶ the argument for judicial restraint that flows from it is therefore, I submit, questionable. That is because, by definition, when faced with difficult cases, courts will have no parliamentary clear position to which they can defer. Judicial non-intervention in such cases will not embody a neutral stalling position; it will reflect a philosophical stance. In *Achbita*, the presumption of legitimacy granted to company policies seems to implicitly adopt a reasoning in terms of spheres of competence. It places the private sphere of contractual autonomy as the natural baseline of legal regulation in the workplace. Far from being neutral, this position reflects an ordoliberal stance,⁴⁷ one in which economic liberties should be immune from interferences, and the Constitution would mainly serve to protect the autonomy and freedom of economic exchanges.⁴⁸ My objection is not that judicial outcomes should be value-free. What is problematic is the illusion that minimum judicial review is automatically neutral. This illusion precludes any awareness of the real impact of judicial restraint—above all, the advantage it is likely to confer on one of the parties. By restricting their scrutiny to a minimum, and shifting the dispute to national fora, for the sake of religious neutrality, European courts, paradoxically, thus face the risk of violating the obligation of impartiality required under the concept of neutrality. As section 3 will now argue, this shift of forum also carries a non-neutral message as to the preferable outcome: one that supports legal solutions which hide rather than solve religious issues.

3. FROM RELIGIOUS NEUTRALITY TO A NEUTRALIZATION OF RELIGIOUS ISSUES

Rather than solving religious issues, neutrality, as used in these recent cases, tends to hide religion,⁴⁹ contrary, as I will show, to the very ideals of state impartiality and democracy on which religious neutrality was first derived (see section 1). Drawing

46 For alternative theories of democracy beyond the state, see for example, Oliver Gerstenberg, *Euroconstitutionalism and Its Discontents* (Oxford University Press 2018).

47 *ibid* 134.

48 Friedrich von Hayek, ‘The Economic Conditions of Inter-state Federalism’ (1939) V *New Commonwealth Quarterly* 131, reprinted in Friedrich von Hayek, *Individualism and Economic Order* (University of Chicago Press 1947).

49 On this blindness of religious neutrality, see Stéphanie Hennette-Vauchez, ‘Religious Neutrality, Laïcité and Colorblindness: A Comparative Analysis’ (2021) 42(2) *Cardozo Law Review* 540.

on the contrasted reasonings of AG Rantos⁵⁰ and of the CJEU in the *WABE* and *MH Müller Handel* cases,⁵¹ this section will show how, once the concealing of religion has been postulated as the solution, the visibility of religion becomes the problem and the neutrality of appearance, the baseline. Far from being neutral, this baseline is itself a source of discrimination against religious citizens, especially against religious citizens of minority religions. The section will argue that, in this respect, the CJEU rulings in *WABE* and *MH Müller* mark a positive turn in the jurisprudence of the CJEU on religious neutrality.

A. The Problem of the Visibility of Religion

The cases of *WABE* and *Müller Handel* resemble the facts of *Achbita*: in all of these cases, the employer sought to enforce a neutrality policy which either prohibited the wearing of *all* signs of a political nature, philosophical or religious (*WABE*) or the wearing of those which were conspicuous or large-sized (*Müller Handel*).

(i) Opinion of AG Rantos

According to AG Rantos, the neutrality policy of the creche, in *WABE*, pursued a legitimate aim (the prohibition of *visible* signs), in an appropriate and strictly necessary manner (as it only applied to employees in contact with parents and their children). The visibility of religion was thus portrayed as a problem, which the neutrality policy could legitimately address. Visibility was also one of the main criteria to measure the necessity and appropriateness of the prohibition that followed on the wearing of symbols. As long as only the employees *in view* of the public were affected, that is to say those with contact-facing roles, the restriction was thus deemed strictly necessary, subject to the possibility of offering alternative non-contact-facing roles.⁵² Given this emphasis on visibility, AG Rantos also logically considered that a prohibition targeting large-scale or conspicuous signs was legitimate. The larger and more visible the sign, the more likely that it might cause tensions or unease.⁵³ Limiting the prohibition to these more visible and ostentatious signs would not be problematic but on the contrary reflect restraint, as required under the principle of proportionality.⁵⁴ The reasoning flows from the *Achbita* ruling under which the conflicting rights at stake were defined as competing rights to project a certain image, the right of the employer to determine the corporate image of neutrality clashing with employees' desire to display visible signs of personal philosophical, political or religious affiliation.⁵⁵ Following the reasoning of the CJEU in *Achbita* and in AG Rantos' Opinion, when the restrictions imposed by the employer upon the employee's rights apply to employees who are in view of customers, they are then presumed to belong to the

50 AG Rantos Opinion delivered on 25 February 2021 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62019CC0341>> (accessed 20 October 2022).

51 *WABE* and *MH Müller Handels* (n 1).

52 AG Rantos Opinion (n 50) paras 62–63.

53 *ibid*, para 74.

54 *ibid*, para 75.

55 *Achbita* (n 32) paras 38–40.

core of the corporate world in which ‘image is everything’.⁵⁶ The growing importance of the corporate *image* would thus lead to a corresponding increasing presentation of the *visibility* of religion in the workplace as a problem to be solved and irrefutably as a question falling within the employers’ prerogatives. By contrast, the rulings by the CJEU in *WABE* and *Müller Handel* start with the assumption that religion may feature in the workplace and call for *visibility* and transparency of the reasons behind its restriction.

(ii) *The WABE and Müller Handel rulings*

More convincingly in my view, the CJEU,⁵⁷ embracing the culture of justification referred in section 1,⁵⁸ thus ruled in *WABE* and *Müller Handel* that the employer would need to *prove* that the neutrality policy and ensuing concealing of religion relied on a genuine need⁵⁹ and was limited to what was strictly necessary.⁶⁰ Distinguishing between discreet and ostentatious/large-sized religious symbols would moreover implicitly draw distinctions between members of minority religions and others, contrary to the equality considerations underlying neutrality. In holding that a policy which would prohibit only conspicuous or large-sized signs religious signs would not show restraint but amount to direct discrimination,⁶¹ the CJEU thus took on board equality concerns. As the targeting of large-sized symbols is inextricably linked to a protected ground, it would fall, according to the court, under the prohibition of direct discrimination, which is more difficult to justify.⁶² For the CJEU, in these rulings, singling out particular religious symbols because of their greater visibility would not be in principle legitimate, but inherently suspicious. Framing the visibility of religion as a problem would no longer it seems be a successful strategy for employers seeking to dilute anti-discrimination requirements. Subject to the reservations discussed in section 4, the rulings of *WABE* and *Müller Handel* therefore mark a positive turn for the protection of equality in the workplace. In comparison with the clear (but at times, as explained, conflicting) stance taken by the CJEU, the ECtHR has always been more ambivalent about framing the visibility of religion as the problem.

(iii) *Comparison with the ECtHR case-law*

In many ECtHR decisions upholding restrictions on religious manifestation, the contested religious symbols were particularly visible. The ECtHR thus held that the

56 Louis-Léon Christians, ‘Les mutations du concept d’entreprise de tendance. Essai de prospective juridique sur les futures entreprises post-séculières’ in Bernard Callebats, Hélène de Courrèges and Valérie Parisot (eds), *Les Religions et le droit du travail. Regards croisés d’ici et d’ailleurs* (Bruylant 2019) 253.

57 For a commentary, see Erica Howard, ‘Headscarves and the CJEU: Protecting Fundamental Rights and Pandering to Prejudice: The CJEU Does Both’ (2022) 29(2) *Maastricht Journal of European and Comparative Law* 245; Lucy Vickers, ‘Religious Discrimination and Headscarves—Take Two’ *Oxford Human Rights Hub* (29 July 2021) <<https://ohrh.law.ox.ac.uk/religious-discrimination-and-headscarves-take-two/>> (accessed 15 October 2022).

58 Möller (n 13).

59 *MH Müller Handels* (n 1) para 64.

60 *ibid*, para 76.

61 *ibid*, para 73.

62 Under art 4(1) of the Directive, direct discrimination may only be justified if it corresponds to a genuine and determining occupational requirement.

French 2004 law banning the wearing of ostentatious symbols by pupils in French state primary and secondary schools⁶³ was compatible with Convention rights⁶⁴ as were the French and Belgian laws banning the full covering of the face in the public sphere.⁶⁵ However, if the legislation reviewed targeted particularly *visible* religious symbols, the visibility of the symbols under restriction was not the ground for the compatibility of the legislation with the ECHR framework, the ECtHR deferring instead to the national constitutional principle of *laïcité* or to a national choice of society. It has been shown that the deference displayed by the court towards France as to what constituted the requirements of the ‘*vivre ensemble*’ in *SAS* has thus far remained confined to full-face covering symbols and has not evolved into a general principle applicable to all visible religious symbols.⁶⁶ Although the incompatibility of the full-face veil with the national ‘*vivre ensemble*’ could be extended to other visible religious symbols, it was not the visibility of the symbol that justified the outcome in *SAS*, but the specificity of the religious symbol in question, the court noting the importance of the face as justification for the ban.⁶⁷ While the observation is tantamount to rejecting particular symbols outright (namely the burqa and niqab) and sits therefore uneasily with the principle that the state is to refrain from assessing the legitimacy of particular forms of religious symbols,⁶⁸ the framing of the legal issue as ‘the invisibility of the face’ rather than ‘the visibility of religion’ leaves most religious symbols outside of the prohibitive reach of ‘neutrality as exclusion from the public sphere’.⁶⁹ Moreover, the *Eweida* decision⁷⁰ emphasized that it was up to the individual claimant to determine when the wearing of a particular religious symbol was a religious requirement.⁷¹ If the contested symbol in *Eweida* happened to be a discreet cross, the disproportionality of the interference caused with the employee’s religious freedom was mainly based on the inconsistencies in the employer’s behaviour. Since

63 Loi n 2004-228 of 15 March 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges, lycées publics, *JO* 17 March 2004, 5190.

64 *Bayrak v France*, App no 14308/08.

65 *SAS v France* (n 31); *Belcacemi & Oussar v Belgium*, App n 37798/13 and *Dakir v Belgium*, App no 37798/13 (ECtHR, 11 July 2017). For an interesting comparative analysis of these decisions, Megan Pearson, ‘What Happened to “Vivre Ensemble?” Developments after *SAS v France*’ (2021) 10 *Oxford Journal of Law and Religion* 185.

66 Pearson (n 65).

67 Koen Lemmens, ‘Larvatus Prodeo? Why Concealing the Face Can Be Incompatible with a European Conception of Human Rights’ (2014) 39(1) *European Law Review* 47.

68 ECtHR 26 September 1996 *Manoussakis and Others v Greece*, 1996-IV, para 47; Myriam Hunter-Henin, ‘Living Together in an Age of Religious Diversity: Lessons from Baby Loup and *SAS*’ (2015) 4(1) *Oxford Journal of Law and Religion* 1.

69 The emphasis on the face might also rely on an implicit democratic requirement of being open to communication, see Dominique Schnapper, *De la Démocratie en France : République, nation, laïcité* (Odile Jacob 2017) 305; Guy Haarscher and Gérard Gonzales, ‘Consécration jésuitique d’une exigence fondamentale de la civilité démocratique. Le voile intégral sous le regard des juges de la Cour européenne (Cour eur. dr. h., Gde Ch., 1^{er} juillet, 2014, S.A.S. c. France)’ (2015) 19 *Revue trimestrielle des droits de l’homme* 219. Contra, arguing that the ban on the burqa amounts to an antidemocratic populist move: Myriam Hunter-Henin, ‘The Legal Face of Populism’ (2017) Jean Monnet Working Paper Series Public Law and the New Populism, Working Paper 9/17, <<https://jeanmonnetprogram.org/papers/paper-serie/2017/>> (accessed 29 October 2022).

70 *Eweida and Others v UK*, App no 51671/10 (ECtHR, 15 January 2013).

71 *ibid*, para 82.

the employer had been able to grant other employees the right to wear religious symbols at work and had ultimately changed its uniform policy to allow the wearing of religious jewellery, the argument that the prohibition suffered by Ms Eweida to wear a cross over her uniform was a proportionate interference, strictly necessary to protect the company's commercial image, could not stand.⁷² The relatively small size of the symbol under scrutiny therefore appeared one of the elements pointing to the inconsistencies of the employer's argument rather than the decisive factor.⁷³ The size of the symbol or visibility of the religious manifestation does not therefore seem to carry a decisive weight in the jurisprudence of the ECtHR. This reticence to frame the visibility of religion as the problem does not necessarily lead to greater tolerance towards religious manifestations since discreet signs will be less likely to escape restrictions;⁷⁴ however, it is more respectful, as I will now argue, of the abovementioned values underlying the concept of religious neutrality.

B. The Problem of the Visibility of Religion as a Problem

Framing the visibility of religion as a problem leads courts to deciding from the outset and in the abstract which religious practices are acceptable and which ones are not. Such abstract pre-determination infringes the impartiality at the heart of neutrality: the principle that the state should allow citizens and groups the autonomy to decide for themselves what constitutes a good life.⁷⁵ An abstract pre-determination would also struggle to meet the justificatory burden which the duty of neutrality imposes on the state.⁷⁶ Precisely, my main criticism of the reasoning adopted in *Achbita* and AG Rantos' Opinion is its unproven premise that the visibility of religion is a problem. Do the *WABE* and *MH Müller Handels* rulings mark a clear departure from the *Achbita* reasoning? All depends on how onerous it will be for employers to prove, as per required by the CJEU,⁷⁷ a genuine need for a neutrality policy in cases of indirect discrimination.⁷⁸ While it befalls on national courts to carry out the proportionality test, the CJEU suggested in the rulings that courts should look for specific evidence.⁷⁹ This call for actual evidence was reiterated in paragraph 70: '... thirdly, that the prohibition in question is limited to what is strictly necessary having regard to the actual scale and severity of the adverse consequences that the employer is seeking to avoid by adopting that prohibition'. Where the CJEU in *Achbita* relied on a presumption of

72 *ibid*, para 94.

73 *Contra*, *Achbita* (n 32) paras 37–39.

74 *Ebrahimi v France*, App no 64846/11 (ECtHR, 26 November 2015), in which the prohibition to wear a religious symbol was held not to violate the Convention even though the public hospital employee was merely wearing a small headress. *Adde*, *Bayrak v France* (n 64) in which a pupil had agreed to wear a simple cap in lieu of a headscarf, para 2(10).

75 s 1.A.

76 *ibid*.

77 *MH Müller Handels* (n 1) para 64.

78 For an argument that these cases should be characterized as amounting to direct discrimination, see Joseph Weiler, 'Je Suis Achbita' (2017) 28 *European Journal of International Law* 989, 1005. On the limits between direct and indirect discrimination, see also Opinion by AG Medina, delivered 28 April 2022 <<https://curia.europa.eu/juris/document/document.jsf?text=&docid=258501&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1>> (accessed 29 October 2022).

79 *MH Müller Handels* (n 1) para 85.

legitimacy, merely constrained by a requirement of consistency, in *WABE* and *MH Müller Handel*, the court thus demanded that the policy be justified and that it be applied, not merely consistently but with proportionality. In the final section to follow, I will draw out the role of Europe supranational courts in religious controversies, construed in light of a conception of religious neutrality respectful of the ideals of state impartiality and democracy on which the concept was first derived and discussed in the process the possible limitations of the *WABE* and *MH Müller* rulings.

4. NEW DIRECTIONS FOR EUROPE'S COURTS

Building on a conception of religious neutrality respectful of the ideals of state impartiality and democracy, this final section will argue that supranational courts should not refrain from exercising judicial review in the face of delicate controversies over religious interests. As I will show, rather than excluding national or contextual assessments, the judicial review carried out by Europe's highest courts need not exclude but can on the contrary reinforce and build upon the review exercised at a more local level. Neutrality of supranational courts in delicate cases would not therefore entail pure judicial restraint but require that Europe's highest courts ensure that no interests are excluded from the outset. In other words, neutrality of Europe's highest courts would no longer have a concealing, but a revealing effect on the underlying interests at stake.

As shown in above sections, religious neutrality is founded on the values of individual liberty/autonomy and equality, taking into account the reasonable and unavoidable pluralism of our multicultural societies. Moreover, in a deliberative and justificatory conception of democracy, religious neutrality serves democracy by imposing objective justification for state action and by ensuring that no member of society is excluded outright from the conversation. If equality is construed in a participatory sense, as striving to ensure that citizens have equal opportunities to contribute to democracy, it is hard to reconcile with the blindness towards underlying vulnerabilities triggered by recent instances of religious neutrality.⁸⁰ Moreover, when individuals wish to manifest their faith at work, for example, by wearing a head covering or a cross, they are engaged in a communicative act.⁸¹ In an account of democracy that makes reason-giving and open-mindedness central,⁸² these communicative acts become part of the larger conversation of society, which all citizens should ideally be able to join on an equal footing. Seen in that light, the pluralism that religious interests bring to democratic debate enhances democracy and strengthens equality.⁸³ This section will draw out the role of supranational courts against this overall framework. It

80 See Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 *International Journal of Constitutional Law* 712.

81 For Jürgen Habermas, communicative acts would moreover be conducive of a mutual learning process, which would reinforce social integration: *The Theory of Communicative Action, Volume Two: Lifeworld and System: A Critique of Functionalist Reason* (trans Thomas A McCarthy, Beacon Press 1987).

82 Josh Cohen, 'Establishment, Exclusion, and Democracy's Public Reason' in R Jay Wallace, Rahul Kumar and Samuel Freeman (eds), *Reasons and Recognition: Essays in Honor of Thomas M Scanlon* (Oxford University Press 2011) 256.

83 On the links between religious freedom, religious discrimination, equality and democracy, Myriam Hunter-Henin, 'Religious Discrimination and Religious Freedom: Democracy as the Missing Link' (2021) 21(4) *International Journal of Discrimination and the Law* 357. Contra, AG Rantos Opinion (n 50) para 87, for whom religious freedom and equal treatment are strictly separate.

will examine two areas where Europe's highest courts ought, as I will argue, to move away from a position of pure judicial restraint, in order to help foster a democratic framework, defined as an inclusive, open-ended and reason-giving process.

These two areas are, first, areas where customer preferences weigh on the legal outcome and second, areas where Member States are granted a margin of appreciation. I have selected these two areas for two main reasons. First, they correspond to the two different trends, identified in section 2, within the meaning of the concept of religious neutrality before Europe's courts: 'neutrality as impartiality' and 'neutrality by ricochet'. Second, these two areas are also interesting because that is where the positive turn marked (as argued in section 3) by the CJEU rulings in *Wabe* and *MH Müller Handel* may face limitations.

A. Customer Preferences before European Courts

(i) *Contradictory role of customers' preferences in direct and indirect discrimination cases*

Both the Directive 2000/78⁸⁴ and the ECHR, on which the CJEU and ECtHR, respectively, based their pronouncements on religious neutrality, emphasize the importance and value of pluralism. As AG Sharpston has observed: 'the very existence of Directive 2000/78, enacted as it was to combat discrimination on any of the prohibited grounds, represents a public and praiseworthy commitment towards diversity and tolerance, including religious tolerance'.⁸⁵ More generally, pluralism, tolerance, and equality are immanent in the European Union.⁸⁶ Similarly, since *Kokkinakis v Greece*,⁸⁷ the ECtHR has connected diversity and tolerance, including religious pluralism,⁸⁸ with the commitment to the ECHR framework, and more broadly, to democracy. Against this background, exclusionary measures, which would have the effect of pushing vulnerable members of society out of key sectors of work and society, would therefore require careful scrutiny. Certainly, the CJEU ruled in the *Bougnaoui* case⁸⁹ concomitant to *Achbita*, that direct discrimination, allowed under article 4(1) of the Directive in the restrictive situation where it is justified under 'a genuine and determining occupational requirement', had to rely on objective grounds, in light of the activities concerned, and could not be based upon subjective considerations, such as the willingness of the employer to take account of the particular wishes of the customer.⁹⁰ Were customer preferences allowed to justify discriminatory measures, the employer would be entitled to set aside protection against discrimination in instances where potential victims need it

84 Directive 2000/78 (n 34).

85 Former AG Eleanor Sharpston's Shadow Opinion, 'Headscarves at Work (Cases C-804/18 and C-341/19)' (23 March 2021) para 134 <<http://eulawanalysis.blogspot.com/2021/03/>> (accessed 22 September 2022).

86 art 2 of the Treaty of the European Union.

87 *Kokkinakis v Greece*, App no 14307/88 (ECtHR, 25 May 1993) para 31.

88 On the concept, see Aernout Nieuwenhuis, 'The Concept of Pluralism in the Case-Law of the European Court of Human Rights' (2007) 3 European Constitutional Law Review 367.

89 *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA* (Judgment of the Court 14 March 2017) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CJ0188>> (accessed 10 October 2022).

90 *ibid*, para 40.

most: where prejudice and intolerance are in a strong position to impose exclusionary views because of the economic pressures they can exert.⁹¹ Yet, as long as these customers' wishes had been anticipated and entrenched in a policy, the CJEU allowed in *Achbita* what it had prohibited in *Bouganoui*.⁹² The role conferred to customers' preferences remains ambiguous in the subsequent rulings of *WABE* and *MH Müller Handel*.

(ii) *Ambiguous role of customers' preferences in WABE and MH Müller Handel*

While the CJEU, in its *WABE* and *MH Müller Handel* rulings, underlined the need for objective reasons to justify even merely indirectly discriminatory measures,⁹³ customers' wishes featured amongst the illustrations of such reasons.⁹⁴ The addition of the requirement that customers' wishes be legitimate, however, as well as the overall emphasis in the rulings on precise and objective justifications, would seem to indicate a welcome (in my view) shift whereby customers' preferences would themselves need to rely on objective reasons. Preferably, however, the CJEU should arguably have gone further and aligned its position with the one adopted in its case-law on racial discrimination. In the latter, as illustrated by the *Feryn* C-54/07 case,⁹⁵ the CJEU did not allow customers' preferences to feature at all in its reasoning. In *Feryn*, the statement publicly issued by the director of the *Feryn* company announcing that his firm would not recruit 'immigrants' was characterized as direct discrimination on the ground of race and ethnic origin.⁹⁶ The fact that this anti-immigrant recruitment policy statement was presented as a way of complying with customers' requirements⁹⁷ was not given any consideration. Whilst the condition in *WABE* and *MH Müller Handel* that customers' preferences rely on objective and legitimate reasons

91 See also of this view, Opinion of AG Sharpston, delivered on 13 July 2016 in Case C-188/15 *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA* <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CC0188>> (accessed 10 October 2022), para 133: 'Where the customer's attitude may itself be indicative of prejudice based on one of the "prohibited factors", such as religion, it seems to me particularly dangerous to excuse the employer from compliance with an equal treatment requirement in order to pander to that prejudice.'

92 On the contradictions between *Achbita* and *Bouganoui*: see Myriam Hunter-Henin, 'Lessons from the European Courts' Hijab Rulings' (6 April 2017) <<https://www.ucl.ac.uk/european-institute/news/2017/apr/lessons-european-courts-hijab-rulings>> (accessed 10 October 2022).

93 *MH Müller Handels* (n 1) para 64.

94 *MH Müller Handels* (n 1) para 70.

95 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* (Judgment of the Court 10 July 2008) <<https://curia.europa.eu/juris/document/document.jsf?docid=67586&doclang=en>> (last accessed 29 October 2022).

96 *ibid*, para 25.

97 The employer had stated: 'I must comply with my customers' requirements. If you say, "I want that particular product or I want it like this and like that", and I say, "I'm not doing it, I'll send those people", then you say, "I don't need that door". Then I'm putting myself out of business. We must meet the customers' requirements. This isn't my problem. I didn't create this problem in Belgium. I want the firm to do well, and I want us to achieve our turnover at the end of the year, and how do I do that? – I must do it the way the customer wants it done!"; *ibid*, para 4. It is worth noting that the *Feryn* case was a direct discrimination case whereas customers' preferences in *WABE* and *MH Müller Handels* were discussed in the context of indirect discrimination. However, given the contested and porous limits between the categories of direct and indirect discrimination, the CJEU could have provided more explanation. On the distinction between direct and indirect discrimination in religion cases, see Opinion by AG Medina, 28 April 2022 <<https://curia.europa.eu/juris/document/document.jsf?text=&docid=258501&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1>> (accessed 29 October 2022).

ought to avoid reintroducing prejudices through the back door, a safer and more logical way to protect against customers' prejudices would have been to require objective and legitimate reasons for employers' restrictions to religious freedoms. The detour via customers' preferences is at best, superfluous, at worst, contradictory. The CJEU, despite the welcome turn in *WABE* and *MH Müller Handel*, remains therefore ambiguous in the role to be accorded to customers' preferences in religious discrimination cases. The ECtHR has also been ambiguous towards evidentiary hurdles faced by employers seeking to justify restrictive measures upon their employees' freedom to manifest their religious faith at work.

(iii) *The role of customers' preferences before the ECtHR*

The ECtHR refused in *Eweida*⁹⁸ to take the argument of the need for a neutral corporate image at face value,⁹⁹ but, in other decisions,¹⁰⁰ it accepted assumptions as to clients' needs and vulnerability as justification for bans on religious signs in the workplace, without requiring evidence that the display of religious signs would indeed potentially cause harm to the public concerned. It is possible, however, that such inconsistency in the levels of scrutiny of the ECtHR was linked to the applicability in the latter decisions of the constitutional principle of *laïcité* and the wide margin of appreciation triggered out of deference towards states' constitutional arrangements in relation to religion. I will argue however that the doctrine of margin of appreciation, whilst legitimate, should have a clearer and narrower remit.

B. Margin of Appreciation before European Courts

The concept of margin of appreciation is built into both the EU and ECHR frameworks and is particularly potent in matters of religion where the case-law of both the CJEU and the ECtHR has developed on the basis of the respect owed to the diversity of Member States' Church/State arrangements.¹⁰¹ The margin of appreciation is therefore an expression of pluralism within Europe. In the words of Dean Spielmann,¹⁰² the doctrine 'makes for a body of human rights law that accepts pluralism over uniformity, as long as the fundamental guarantees are effectively observed'. In line with the proviso that the fundamental guarantees be effectively observed, the doctrine logically does not paralyse judicial review but merely primarily locates it with domestic courts. If the role of supranational courts is inevitably reduced under the doctrine of margin of appreciation, it is not therefore annihilated, supranational courts remaining in charge of verifying that domestic courts have carried out judicial

98 *Eweida and Others v UK* (n 70).

99 s 3.A.

100 See for example, *Ebrahimiyan v France* (n 74), taking on board the argument that the prohibition faced by a Muslim employee of a public hospital in France to wear a small headdress sought to protect patients.

101 art 17 of the Lisbon Treaty, states that 'the Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.' The doctrine has been present within the ECHR since its early days: *Greece v the United Kingdom*, App no 176/56, Report of the European Commission of Human Rights of 26 September 1958.

102 Dean Spielmann, 'Whither the Margin of Appreciation?' (2014) 67(1) *Current Legal Problems* 49.

review.¹⁰³ The margin of appreciation would therefore lead to judicial restraint as to outcomes but would maintain judicial review in a procedural sense. This measured meaning of the doctrine of the margin of appreciation, by contrast to the pure judicial restraint analysed in section 2, would, as I will now explain, be more compatible with the conception of religious neutrality defended in earlier sections—a conception grounded on pluralism, enhancing of democratic deliberation and rooted in liberty and equality values.

This paragraph will explain how the doctrine of margin of appreciation can support these abovementioned values of pluralism and equality and be democracy-enhancing. Respect for pluralism, as already noted, underlies the doctrine of margin of appreciation, designed to preserve Member States' various traditions and legal arrangements pertaining to state/religion relationships. Compliance with equality may on the other hand appear problematic. For historical reasons, state/church traditional arrangements will often advantage certain religious convictions over others, so that deference towards these models would seem to entrench unequal positions. The majority religion will indeed often be privileged in national arrangements, either because of the established status of its Church¹⁰⁴ or its cultural adequacy with the chosen 'secular' model.¹⁰⁵ Even within minority religions, it will often be the case that those closer to the majority religion or settled into the country for centuries will have negotiated compromises¹⁰⁶ or adapted to the majority ways, which make them more compatible with majority values than other minority beliefs and trends. At first sight, it would therefore seem that a commitment to equality will undo the doctrine of margin of appreciation or that the doctrine will sacrifice equality commitments. Either way, it would seem difficult to see how respect for the doctrine of margin of appreciation and for equality could go hand in hand in religion cases. However, more careful examination reveals possibilities of compatibility between the deference towards national arrangements, inherent in the doctrine of margin of appreciation, and equality commitments. First, a commitment to equality need not unravel national arrangements in matters of religion. Given that none of the historical settlements in matters of religion would likely pass the test of equality in the abstract,¹⁰⁷ the commitment to equality would not threaten to steer Member States towards one particular model. Vice versa, respect for such arrangements is no argument for Europe's highest courts shying away from ensuring that equality interests have not

103 *ibid*: 'It is therefore neither a gift nor a concession, but more an incentive to the domestic judge to conduct the necessary Convention review'.

104 See Robert M Morris (ed), *Church and State in 21st Century Britain: The Future of Church Establishment* (Palgrave Macmillan 2009). And for a recent vivid critique of the establishment model, Jonathan Chaplin, *Beyond Establishment: Resetting Church-State Relations in England* (SCM Press 2022).

105 Silvio Ferrari, 'The Christian Roots of the Secular State' in Rene Provost (ed), *Mapping the Legal Boundaries of Belonging: Religion and Multiculturalism from Israel to Canada* (Oxford University Press 2014) 25.

106 See for example the special derogations granted to Quakers and Jews in the UK allowing marriage ceremonies to abide by the rites or usage of the Jews or Society of Friends, without the additional requirements, which all other minority non Church-of-England weddings need to comply with: see Russell Sandberg, *Religion and Marriage Law: The Need for Reform* (Bristol University Press 2021).

107 Contra Martha Nussbaum, defending the superiority, from an egalitarian perspective, of a separatist model, Martha Nussbaum, *Liberty of Conscience: In Defence of America's Tradition of Religious Equality* (Basic Books 2008).

been sacrificed in the implementation of the said arrangements. As explained above, under the doctrine of the margin of appreciation, European courts will defer to domestic courts' assessments, in light of new contestations, as to the compatibility/interpretation of national constitutional principles with equality and liberty values, but European courts would be expected to verify that domestic courts have had the opportunity to carry out and have actually carried out such assessment. Indeed, this procedural input of European courts is to be welcome as being democracy-enhancing.

(i) *Margin of appreciation and democratic-enhancing judicial reasoning*

If the doctrine of the margin of appreciation only grants national authorities the prime role on the condition that they do exercise their responsibilities and review the underlying conflict, the doctrine can work to ensure that all interests at stake have had the opportunity to be heard. As the set of interests most likely to be muffled, when judicial scrutiny is limited, is the interests of minority and vulnerable members of society, this deliberative-enhancing input would also serve the inclusiveness of legal reasoning. Finally, by requiring that domestic courts review the implications of constitutional arrangements as new contestations emerge, Europe's courts would preclude the ossification of solutions. Without encroaching upon national traditions or contradicting the doctrine of margin of appreciation, Europe's highest courts would hereby strengthen democracy, defined as an inclusive, open-ended and reason-giving process: it would ensure that national constitutional arrangements are construed in ways that do not exclude outright but take on board (new) minorities' interests; that they are open to review and that the restrictions that ensue are justified.

The CJEU, in the *WABE* and *MH Müller Handel* rulings, leant towards such a (welcome, in my view) deliberative tone: it indicated that the margin of appreciation is compatible with a balancing process between competing interests.¹⁰⁸ The margin of appreciation granted to Member States, the CJEU asserted in these rulings, would thus exist within the balancing process between competing interests but would not exclude it. In its *Egenberger*¹⁰⁹ and *IR*¹¹⁰ rulings, the CJEU had anticipated this direction by denying religious employers a sphere of autonomy, which would have placed their decisions outside the reach of judicial review. In these two German cases, religious employers were able to avail themselves of a longstanding constitutional national position in favour of granting extensive autonomy to religious organizations and Churches. Nonetheless, the CJEU considered that the deference owed to German constitutional arrangements in matters of religion could not paralyse judicial proportionality tests and deprive employees whose conflicting rights had been

108 *MH Müller Handels* (n 1) paras 86 and 87.

109 Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V* (Judgment of the Court (Grand Chamber) 17 April 2018) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CJ0414>> (accessed 10 October 2022).

110 Case C-68/17 *IR v JQ* (Judgment of the Court (Grand Chamber) 11 September 2018) <<https://curia.europa.eu/juris/document/document.jsf?jsessionid=A00BAA47CA011AB36582BFA217100B27?text=&docid=205521&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=289537>> (accessed 10 October 2022).

affected of their right to a judicial review. By refusing that given spheres be immune from judicial scrutiny, such an approach had a revealing effect on the underlying interests at stake, in line with the deliberative and participatory goals advocated in this section. It also matched the reasoning which the ECtHR had adopted in prior cases involving religious employers.¹¹¹ In the paragraph to follow, I will argue that both the CJEU and (to a lesser degree) the ECtHR have, by contrast to the above-mentioned cases, allowed religious interests to be unduly restricted in the context of secularist separatist Belgian and French systems.

(ii) *Excessive and exclusionary margin of appreciation*

Admittedly, the line between what constitutes a (warranted) measured margin of appreciation and what falls outside a legitimate margin is not always clear-cut. It might indeed be difficult at times to determine when exactly a set of interest is being legitimately restricted and when it is being outright excluded from the conversation, hence becomes illegitimate in a deliberative and inclusive perspective.¹¹² In the French and Belgian contexts,¹¹³ both Europe's courts have however arguably awarded too great a margin of appreciation to the state. Both the CJEU and ECtHR have allowed great leeway to the state in these contexts, to the extent that individual competing rights have been largely deprived of any meaningful review. In *Achbita*¹¹⁴ and *Ebrahimian*,¹¹⁵ the CJEU and ECtHR thus, respectively, upheld religious neutrality requirements imposed against employees, with little regard for the implications upon employee's competing rights to religious freedom. If deference to constitutional traditions, as expressed in the above-mentioned cases opposing religious employers to their employees, should not deprive employees of their right to judicial review, it is not clear why employees working in secularist separatist countries should not be entitled to the same level of judicial protection. In this respect, the ECtHR has however thus far fared slightly better than the CJEU. While the CJEU, in *Achbita*, applied the principle of *laïcité* beyond its remit, the ECtHR, in *Ebrahimian*, invoked the principle of *laïcité* in a context where it was undeniably applicable under French Law. Furthermore, while the ECtHR, in *Ebrahimian*, (wrongly) abstained from checking that the neutrality requirements flowing from the

111 *Schüth v Germany*, App no 1620/03 (ECtHR, 23 September 2010); *Obst v Germany*, App no 425/03 (ECtHR, 23 September 2010); *Siebenhaar v Germany*, App no 18136/02 (ECtHR, 3 February 2011); *Fernandez Martinez v Spain*, App no 56030/07 (ECtHR Grand Chamber, 12 June 2014).

112 See for example the conflicting views taken by the Advocate General and the CJEU in the recent ritual slaughter case as to whether the contested Flemish decree removed all religious exemptions and denied religious views altogether or left the core of the exemption intact. For the former view, see AG Hogan's Opinion, delivered on 10 September 2020 <<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62019CC0336>> (accessed 5 September 2022). For the latter view, see Case C-336/19 *Centraal Israëlitisch Consistorij van België and Others* (Judgment of the Court (Grand Chamber) 17 December 2020) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62019CJ0336>> (accessed 5 September 2022).

113 The assimilation of the two national contexts is itself problematic. Both countries are familiar with the concept of *laïcité* but the concept, as well as the relationships between State and religion are construed in very different ways in each country. See Jean-Paul Willaime, 'European Integration, *Laïcité* and Religion, Religion' (2009) 37(1–2) *State & Society* 23.

114 *Achbita* (n 32).

115 *Ebrahimian v France* (n 74).

principle of *laïcité* had been subject to any proportionality review before domestic courts, it left the door open to restrictions in the future were neutrality requirements to apply beyond the educational/hospital sectors and beyond public agents. By contrast, the CJEU in *Achbita* left complete *carte blanche* to states of secularist separatist traditions to restrict religious manifestations, even where these traditions were not involved at all.¹¹⁶ It is not certain that the CJEU has radically moved away from this excessive deferential stance towards neutrality requirements.

(iii) *The uncertain impact of the WABE and MH Müller Handel rulings*

The CJEU, in the *WABE* and *MH Müller Handel* rulings,¹¹⁷ has certainly emphasized the importance of balancing tests, even when these sought to protect religious employees against neutrality requirements—as in *Achbita*—rather than employees against employers enforcing a religious ethos, as in *Egenberger* and *IR*. The *WABE* and *MH Müller Handel* rulings however did not take place against the national secularist separatist French context (to which the court hastily assimilates the Belgian context). The only official endorsement that could be adduced for the neutrality policies at stake in these rulings was local—the neutrality policy imposed by the employer in *WABE* having followed local recommendations of the City of Hamburg.¹¹⁸ Arguably, the incentive for the Court to steer the balance towards neutrality requirements was not therefore as pressing as in *Achbita* or *Ebrahimian*, where neutrality requirements were seen (wrongly or not) as flowing from a constitutional national tradition. It is not therefore certain that the CJEU would not retort to the excessive use of margin of appreciation it exhibited in *Achbita*, were the issues raised in *WABE* and *MH Müller Handel* to arise in a national separatist secularist context. The *SCRL* subsequent ruling of 13 October 2022 gives cause for strengthened optimism, by reiterating precisely the *WABE* and *MH Müller Handel* solution in the context of a Belgian dispute but it does not remove doubts altogether since the preliminary reference questions did not focus on the required level of scrutiny under indirect discrimination but rather on the contours of the category of indirect discrimination.

If it is therefore too early to evaluate with certainty the progress made in that direction by the latest *WABE* and *MH Müller Handel* rulings, this section has argued that it would be feasible and desirable to devise a concept of religious neutrality which combines deference towards national assessments, without sacrificing overarching values of equality and liberty or abandoning the democratic qualities of inclusiveness and deliberativeness of legal reasoning. The question that is left open but would be beyond the scope of this article to answer, is whether the concept of religious neutrality is, at the level of Europe's highest courts, a necessary or even helpful detour to achieve these purposes.

116 *Laïcité* requirements do not apply to the private law employment sphere. But see the blurred contours of the private/public spheres under the French Law of 24 August 2021 strengthening respect for Republican principles: LOI n° 2021-1109 du 24 août 2021 confortant le respect des principes de la République <<https://www.legifrance.gouv.fr/dossierlegislatif/JORFDOLE000042635616/>> (accessed 29 October 2022).

117 *MH Müller Handels* (n 1).

118 Recommendations for the Education of Children in Day Care Facilities, published in March 2012 by the Office for Employment, Social Affairs, Family and Integration of the City of Hamburg.

5. CONCLUSION

This article has shown how the concept of religious neutrality, as used before Europe's highest courts, fails to comply with the overarching values which the concept was initially designed to promote— the autonomy which citizens ought to enjoy in order to decide for themselves what constitutes a good life; the liberty for them to live according to their chosen conception of the good life and the opportunity for citizens and groups to do so on equal terms. Whereas the case-law of the ECtHR seemed at first to move into a more demanding direction, gradually adding equality concerns to its initial focus on liberty and autonomy, recent instances, both before the ECtHR and the CJEU, have equated the use of religious neutrality with systematic pure judicial restraint, hereby diluting commitment to and protection of these foundational values and, in a conception of democracy as a deliberative, open-ended and reason-giving process, consequently betraying the democratic legitimacy of legal outcomes.

Moreover, the article has argued that the pure judicial restraint displayed for the sake of religious neutrality in recent instances itself, paradoxically, infringes neutrality, be it 'neutrality as impartiality', that is, the duty of Europe's highest courts to be impartial towards the interests at stake or 'neutrality as *ricochet*', that is, their duty to be neutral towards the diversity of constitutional national models of church/state arrangements in Europe. As the analysis of the ECtHR *SAS* and CJEU *Achbita* cases has revealed, by restricting their scrutiny to a minimum, for the sake of religious neutrality,¹¹⁹ European courts face the risk of giving the upper hand to one of the parties involved, in violation of neutrality requirements. Besides, judicial restraint in these instances did not defer to longstanding constitutional national principles pertaining to religion as these principles, as shown in section 2, were not applicable. Further criticisms can be raised in relation to the implications of these recent instances of religious neutrality for the protection of religious interests. The article has thus demonstrated how recent instances of religious neutrality, by framing the visibility of religion as the problem to be solved, have neutralized rather than protected religious interests, in ways which betray both liberty and equality values.

The article has instead offered new directions for the concept of religious neutrality before Europe's highest courts. Rather than hiding religion (or the most visible manifestations of religion), rather than systematically shifting issues of religion to national authorities, religious neutrality should, the article has argued, promote the pluralism that religious interests bring to democratic debate, hence enhance democracy and strengthen equality. Concretely, instead of reverting to a position of systematic restraint through shifting strategies, courts should require objective justification for restrictions to religious interests and ensure that all underlying interests have had the opportunity to be considered. While the reasoning adopted by the CJEU in the rulings of *WABE* and *MH Müller Handel* is on the right track, this article has argued that the weight granted to customers' preferences and to the margin of appreciation doctrine in justifying restrictions to religious freedom remains ambiguous. It has

119 While the decision in *SAS* does not rely on neutrality but on the concept of *vivre ensemble*, this article has shown that it is expressly motivated by the intention to adopt a neutral stance towards national assessments in matters of religion, cf s 2.

been submitted that European courts should more clearly assert that neither should exclude a balancing process between the competing interests at stake or a requirement to provide objective justification for restrictions.

Religious neutrality is an ambiguous concept. If taken to mean that European supranational courts should turn a blind eye and adopt a position of judicial restraint, this article has argued that it should be resisted. Religious neutrality would then only reinforce the propensity to accept the *statu quo*, merely out of familiarity or conformity. As submitted here, democracy, by contrast, requires judges, including supranational European judges, to offer a forum where all can be seen and heard. If religious neutrality is to deserve a role at the level of Europe's highest courts, it should therefore be construed in ways that reveal rather than hide all underlying interests at stake.