THE PROHIBITION OF THE ISLAMIC VEIL IN THE PRECEDENTS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION: AN ANALYSIS OF JUDGEMENTS C-157/15 AND C-188/15 [1]

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Abstract
This paper will deal with a brief study on the prohibition of the use of the Islamic veil in the precedents of the Court of Justice of the European Union, through the analysis of judgments C-157/15 and C-188/15. Firstly, it will look at the main nuances of the scarf in the Islamic religion, including the models used, its origin and also the importance of clothing in the religion. It will then analyze the right to freedom of religion and its manifestations, as well as the right for the State to uphold secularism. Next, it will examine the legislation of European countries that have sought to restrict the use of Islamic garments, which brought into play the interpretation of the European Court of Human Rights on this subject. Finally, the paper will do a detailed analysis of judgments C-157/15 and C-188/15 of the Court of Justice of the European Union, examining positions both in favor and also against the subject.

Keywords
Islamic veil, Court of Justice of the European Union, judgments C-157/15 and C-188/15.

Summary

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1. INTRODUCTION

The most famous religious symbol of Islam, the scarf or veil used by Muslim women, is a piece of clothing which can cover the entire body or only the hair, depending on the kind. There are many reasons why it is worn such as tradition, pressure from the State or from direct social relationships and even due to personal will, like the act of self-affirmation and empowerment.
The prohibition of the *hijab* in many European countries has brought about discussions regarding the legality of such measure. Practical cases have been brought to national and international Courts for the interpretation of regulations of fundamental rights related to the matter, more specifically the right to religious freedom and the right to a secular state.
The European Court of Human Rights, just as the European Union Court of Justice, encouraged to speak about the prohibition of the use of the *hijab* supported in a different context the possibility of its prohibition, in order to guarantee neutrality in public and private spaces.
The aim of this paper is to analyze the prohibition of the use of the *hijab* in the precedents of the European Court of Justice and the factual and legal bases used in the most recent decisions regarding the subject (judgement C-157/15 and C-188/15).
Thus, the importance of the piece of clothing for the Islamic religion, its origin and symbology, both in ancient times and in modern society will be approached.
After that, the right to religious freedom will be analyzed in all its formats and the prerogative of a secular state, as understood from the perspective of neutrality and impartiality.
Then, it will be studied the published Acts which limit the use of the *hijab* in some European countries and the interpretation of the European Court of Human Rights in this cases.
Finally, a detailed analysis of judgements C-157/15 and C-188/15 by the European Union Court of Justice will be done and the main aspects which based the decision as well as the repercussion of critiques and supporters in

the legal community will be discussed.

2. THE HIJAB: A BRIEF ANALYSIS OF ITS IMPORTANCE

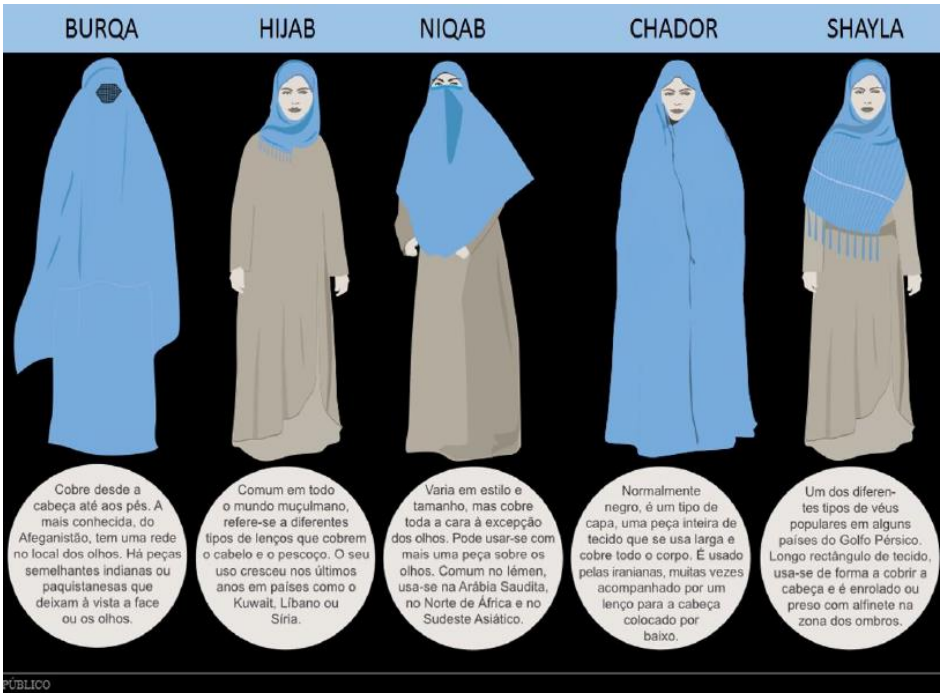
Clothing in general reveals collective and individual aspects of many groups in society. In the same way it sends a message to be deciphered, it also hides a lot: for example, parts of the body and individual motivations. Therefore, one's clothing style can cover the differences and highlight the convergence in a group of individuals. It can be said that the multiculturality of a society is reflected in the diversity of apparel, namely women's apparel[4].

Hence, in any community clothing reflects the sense of belonging to a group or category and so can reveal, from distance, the characteristics of the person, such as gender, age, ethnicity, or religion[5].

The *hijab*, specifically, consists of a tube-like scarf which was already a piece of clothing for Arabic people, even before Islam. In the Muslim context, five models of the garment are shown (Picture 01) whose use is modified according to the region and the school of thought followed[6].

Picture 01: Five *hijab/Islamic* garment models.

[4] SHOUTEN 2018, 09.
[5] SHOUTEN 2018, 02.
[6] MONTEIRO 2018, 17.



Source: Public Newspaper. The court's decision on the veil will "ban Muslim women off the job market".[7]

One of the most well-known versions about the origin of the veil mentions that many women were being attach and raped in Medina (city of the prophet Mohammed). The prophet, concerned, tried to assess why so many attacks were happening and found that the situation occurred because there were no distinctions between free women and the enslaved ones. So, in an attempt to protect Muslim women from violence, it was declared in the Koran that wives, daughters and women of the faithful ones had to cover

[7] MONTEIRO 2018, 17.

themselves with veils when they needed to go out in order to avoid being molested.[8]

It is known that there is a relevant discussion between philosophers, lawyers and sociologists about the veil representing or not a religious symbol.

While some scholars defend that covering the head and the hair is a precept of Muslim clothing according to the Koran and cannot be considered a symbol, others affirm that the veil is an expression of religion and faith[9].

In addition, according to Maria Shouten, some women wear the Islamic clothing only because it is a tradition where they live. Others adopt it due to pressure either from the state or their direct social environment. Likewise, modern Islamic women have deliberately chosen to wear the veil for practical reasons such as the act of self-assertion or as a mean to empowerment[10].

For the defense of the use of the veil in spontaneous ways, it is believed that such act can be understood as women's desires to participate in public and professional life. To reconcile such ambitions, an appropriate solution is the rule of separation (*hijab* or *purdah*), as imposed by Islam. In other words, the veil is an essential accessory for women to be modern, escaping tradition, besides the symbol of religious identity and the distinction from the Western world.[11]

Nevertheless, the use of the *burca* and the *niqab* is designated by Muslim groups that interpret the Koranic determination in an extreme way; it is relevant to assess that, in certain cases, such a designation is accepted by women who believe that this is the correct way to present themselves in public and to demonstrate their love to God.[12]

Still, about the use of the Islamic veil, Cássia Juliana Monteiros clarifies:

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[8] COLLARES 2011, 3.
[9] MONTEIRO 2018, 18.
[10] SHOUTEN 2018, 02.
[11] SHOUTEN 2018, 09.
[12] FERREIRA 2013, 185.

> o Islão não impõe o uso de determinado modelo de véu, seja a *burqa*, o *niqab*, a *shayla*, o *chador* ou o *hijab*. O Alcorão, livro sagrado do Islão, apenas preceitua dever a mulher cobrir-se, sendo o *hijab* o modelo mais comum no mundo islâmico: "Ó Profeta, dize a tuas esposas, às tuas filhas e às mulheres dos fiéis que (quando saírem) se cubram com as suas mantas; isso é mais conveniente, para que se distingam das demais e não sejam molestadas; sabei que Deus é Indulgente, Misericordiosíssimo" (Alcorão, 33:59). Porém, é de salientar que, em alguns Países, cujo governo é confessional, como a Arábia Saudita e o Irão, o uso do véu é obrigatório por lei e o incumprimento da norma gera penalidades para as mulheres. Quanto a isto, o referido Professor fez questão de ressaltar que esse tipo de obrigatoriedade vem do Estado e não da religião.[13]

In this context, Francirosy Campos B. Ferreira calls the attention to the fact that the relation between the veil and the liberty of these women is manifested in the arguments that sanction or defend the clothing under the pretext that it is the product of women's "free choice" and an evidence of their "liberation" from the supremacy of Western cultural codes.[14]

Ferreira asserts that the use of such piece of clothing has been more and more stigmatized by society and means of communication. Considering that every woman who wears a *burca* or a *niqab* is submissive and must be "saved" by Westerns is just as violent as forcing them to wear the clothing. It is important to say that the veil does not subtract the thought, and its absence

[13] MONTEIRO 2018, 18. Islam does not impose the use of a determined veil, whether it be the *burqa*, the *niqab*, the *shayla*, the *chador* or the *hijab*. The Quran, sacred Islamic book, only precepts that the woman must cover herself, and the *hijab* is the most common type of clothing in the Islamic world: "O Prophet! Tell thy wives and daughters, and the believing women, that they should cast their outer garments over their persons (when abroad): that is most convenient, that they should be known (as such) and not molested. And Allah is Oft-Forgiving, Most Merciful" (Quran, 33:59). However, it is important to state that in some countries whose government is confessional, such as Saudi Arabia and Iran, the veil is enforced by law and not following it leads to penalties to women. As for that, the professor emphasized that it is a requirement of the State and not the religion. (translated freely)

[14] FERREIRA 2013, 185.

does not mean autonomy.[15]

Following the same line of reasoning, Cláudia Mayorga clarifies that it is common to observe the absence of women in debates – not because there aren't any or because they don't want to speak up about the issues mentioned –, but mostly due to the colonial, patriarchal and Eurocentric practice of considering non-Western women as objects of discourses and practices and not as subjects. The problem of interacting with peoples with distinct customs and histories and many times antagonistic has overtaken intellectuals from all over Europe, but the emergence of these topics have constantly been built on the silence (or silencing) of Latin women, the ones from East Europe and also the Muslims. It is a discourse about women and not from women.[16]

In this standard, it is possible to conclude that the veil consists of a symbolic element of groups and religion. Considering that the process of recognition happens through dialog (both in intimate and public spheres) and, considering that religion is one of the ways of composition of the identify of human being, the veil represents part of the Muslim woman's identity, whether it is in her "self", following the dogmas of her religion, or as in her "self" in the civil society she lives in.[17]

3. THE RIGHT TO RELIGIOUS FREEDOM AND TO STATE SECULARITY

The definition of religion is not simple. It is not about an exact concept or scientific finding that offers a result. Etymologically the term means *religare*, to reconnect, to unite people under one faith.[18]

[15] FERREIRA 2013, 186.
[16] MAYORGA 2011, 01-06.
[17] RINCK 2011, 148.
[18] RIBEIRO 2010, 12.

However, what the theories agree on the matter is that the definition of religion is linked to the social-cultural context and history when it is constructed and to the theoretical perspective which supports it.

Understood as the first of all freedoms, religious freedom expresses the faculty which individuals have of joining a determined worldview. Within this fundamental right there is also the freedom of beliefs, of worship, of conscience, of expression, of choice of religion, of changing religion, of not following any religion, of believing, of not believing, of doubting, as well as being an atheist.[19]

According to the philosopher Paulo Adragão, the first historical affirmation of religious freedom from communities was supported in the dissemination of Christianism in ancient times and in the belief in the existence of a God that transcends the world.[20]

In legal contemporary reasoning, however, the fundamental rights are inviolable prerogative and are inherent to human dignity. In the case of the right to religious freedom, this expresses the protection of conscience and belief, and the free practice of cults and liturgies is ensured.

As Jürgen Habermas once said: 'the affirmation of the first fundamental right [the first declaration of human rights] generated the judicial obligation of achieving superior moral contents buried in the memory of humanity'.[21] (translated freely)

This way, the Democratic State is responsible for protecting such freedom, besides assuring neutrality, thus understood as the duty of protecting the different forms of cult and expression of all beliefs. The State is not allowed to privilege the practice of a confession upon the other, nor even censor the practice or non-practice of any religion. On the contrary, it is its duty to collaborate with the plurality of confessions equally.[22]

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[19] MONTEIRO 2018, 29.
[20] ADRAGÃO 2002, 115.
[21] MONTEIRO 2018, 29.
[22] MONTEIRO 2018, 29.

As for the State secularity, the term *laico* (a synonym of *secular*) comes from the Greek *laïkós* and arises from the concept of laicism, or secularism, which represents the autonomy of any human activity. The meaning of Secular State is, therefore, the State which is not submitted to the rules of any religion. More specifically, the laicity implies State neutrality in religious matters. This neutrality has two different sides: the first refers to the exclusion of religion from the State and its public spheres and the second refers to the impartiality of the State concerning religions: it has to treat all beliefs equally. Besides, it is necessary to emphasize that secularity is overall a political phenomenon and not a religious problem, that is, it derives from the state and not from religion.[23]

More than guaranteeing citizens' rights, secularity makes the State protect and respect them.

Consequently, according to Marília de Francheschi Neto Domingos, principles guaranteed by secularity are: the freedom of religious or non-religious beliefs; freedom to practice a given religion, in case the individual has one; to change religion; freedom of not being persecuted nor offended due to conspicuous practices of other religions; to families, the freedom to opt for a religious education, or not, of their descendants; freedom so that the religious education does not clash with other convictions; the freedom of not being discriminated by individuals, organizations or even the public services due to beliefs.[24]

The beginning of the discussions about State secularity is attributed to France, which, in 1789, included religious freedom in the Declaration of Human Rights and Citizens and institutionalized the principle of separation between church and State, through educational Acts in 1880.[25]

[23] MARIANO 2011, 238-258.
[24] DOMINGOS 2010, 55.
[25] MONTEIRO 2018, 56.

As a pioneer of democratic construction with its ideal of rationality when establishing principals and judicial laws, France contributed a lot for the development of the beginning aforementioned principle.[26]
About this historical development, Paulo Gustavo Guedes Fontes states that:

> As terríveis guerras religiosas que abalaram a sociedade francesa no século XVI, com a Reforma Protestante, levam a um primeiro texto relevante para a laicidade […]. A segunda etapa relevante da laicização viria com a Revolução Francesa, consagrada que foi a liberdade de religião na Declaração dos Direitos do Homem e do Cidadão de 1789. Aí sim nos aproximamos da concepção individualista das liberdades de crença, de expressão, de pensamento etc. Mas a realidade social manifestava a presença ainda relevante do fenômeno religioso e da influência católica e por isso, inicialmente, a Revolução não cogitou separar totalmente as instâncias estatais da Igreja, mas submetê-la aos seus membros com a votação de uma "constituição civil" que o clero deveria jurar, como forma de fidelidade ao novo regime […] O século XIX, contudo, demonstrou a profunda resistência da Igreja em relação à República e seu apoio e proximidade dos movimentos monárquicos de restauração. A etapa seguinte, talvez a mais profunda da laicização, já foi mencionada anteriormente: ocorreu durante a chamada Terceira República e culminou na Lei de 1905. Os cemitérios passaram à autoridade dos prefeitos, que não podiam condicionar os funerais a quaisquer questões religiosas ou relativas às circunstâncias da morte. O ensino religioso foi proibido nas escolas públicas e também foram vedadas quaisquer subvenções do Estado e das pessoas públicas às associações e congregações religiosas.[27]

[26] FONTES 2016, 183-184.
[27] FONTES 2016,183-184. The terrible religious wars that shook the French society in the XVI century, like the Protestant Reformation, lead to a first relevant text to laicity […]. The second relevant stage of laicity would come with the French Revolution, consecrated that it was the freedom of religion in the Declaration of Human and

It was in the Third Republic which was established after the fall of Napoleon the Third, from 1870 to the World War I, when stricter measures in terms of secularity were adopted and nowadays are effective in many countries.
However, it is important to note that questions concerning laicity are complex. They involve the relation and interpenetration in private and public spheres of social life and demand practical solutions and good sense, focused on the achievement of social peace.[28]
In such standard, being the concepts about the principles which assure religious freedom and state secularity shown, its interdisciplinarity and application in the judicial and social contexts must be established.
It is certain that countries have sovereignty to decide on the legislation created and applied within their own territories. However, in a Democratic State of Law, the individual freedoms must be respected and so must the cultural and religious manifestations which stemming from them.
That because the State that is truly based on the preservation of Human Rights and the ideals of freedom and equality must promote the approximation of many religious manifestation in the public environment. A given public institution is not responsible for exteriorizing any religiosity, but it must be ready to accept all beliefs and manifestations of religious natures. That also implies that it cannot allow the human being entitled to Human Rights to be only the national citizen. It is a responsibility of the

Citizen Rights of 1789. That was when we approached the individual concept of freedom of belief, of expression, of thought etc. But the social reality manifested the still strong presence of the religious phenomenon and of catholic influence and, so, initially, the revolution did not deliberate on separating state and church completely, but to submit it to its members with the voting of a "civil constitution" where the clergy must swear, as a way to show fidelity to the new regimen […]. The XIX century, however, showed the profound resistance of the church towards the Republic and its support to monarchic movements of restauration. The following step, perhaps the deepest of laicization, was already mentioned: it happened during the Third Republic and resulted in the Act of 1905. The cemeteries went under the authority of mayors, who could not condition funerals to any religious matter or related to the circumstances of death. Religious studies were prohibited in public schools and any subsidy of the State and public people to religious association and congregations was forbidden. (translated freely)

[28] FONTES 2016, 184.

State to receive well all individuals, all religious manifestations, all opinions, and cultures, organizing and allowing the existence of plurality.[29]

According to the philosopher Habermas, in open and multicultural societies, equality can be understood not only as the right not to be discriminated for belonging to a culture unlike the major one, but, above all, as a right to diversity.[30]

The right to equality, thus, is essential in any democratic project, though such value is often confused, imposing the action against all forms of discrimination and the equal practice of human rights. Likewise, the right to equality entails the right to difference that is inspired in the belief that we are equal but different, and different but, above all, equal.[31]

Thus, religious freedom has in fact to be understood as a right of adhering or professing or not a given religion, publicly or privately, individually or within a community where such faith is shared. However, such right – and, therefore, all manifestations inherent to religious freedom – is not absolute. In the democratic society, open and multicultural, characterized by the existence of a plurality of religions which must coexist the public legislator can limit such freedom when necessary to ensure safety and protection to public health or moral, or to protect the rights and freedoms of others. This is the attempted way of conciliating the interests of many groups and guaranteeing respect for and from the convictions of others.[32]

Therefore, the balance between religious values and laicity would lead to some questions as important as the characterization of the highlighted principle.

First, it is necessary to question if the policies of equal recognition which bases the universal policy of dignity – though it has the same base as the

[29] CALEGARI 2016, 45.
[30] FAGGIANI 2020, 166.
[31] PIOVESAN 2012, 268-269.
[32] FAGGIANI 2020, 169.

policy of acknowledgement of the difference – would or would not lead to the compliance of particularities of cultural diversity.[33]

Moreover, it is enquired if an Act that imposes homogenization of the public space would be protecting the universal values of neutrality and secularity or somehow promoting the overlapping of a culture by another.

It is also examined if the prohibition of use of veil by women in the name of a universal value, which represents the autonomy of the Secular State, in a way that Muslim women are not identified religiously in public spaces would be legitimate and adequate or if it would lead to a violation of the right of freedom of belief.

After these reflections, it is relevant to conclude this topic with the observations of Fontes who states that the State is secular, as are its public services and employees, but the civil society is not and in some way it will never be. It is free in its consciences and behaviors, under the condition of respecting the rules of public order which are democratically definite. As for conciliation with the public order represented by the interest of individuals who do not profess a given religion, there is no doubt of its need. It is not about justifying any conduct because of religious freedom. The "accommodation" aforementioned is many times necessary as an eminently practical matter with the purpose of allowing religious manifestations without it becoming oppressive to others.[34]

4. THE PROHIBITION OF USE OF THE ISLAMIC VEIL IN SOME EUROPEAN STATES AND THE JURIDICAL POSITION OF THE EUROPEAN COURT OF HUMAN RIGHTS

Both the European Court for Human Rights and the Court of the European Union give their members legitimacy to regulate the relationship between

[33] RINCK 2011, 149.
[34] FONTES 2016, 186.

religion and society, theirs Courts are responsible only for deciding if there is compatibility between the internal regulations and the desired objective.[35] The European Court of Human Rights (EuCHR) plays a fundamental role as guardian of the right to religious freedom in its internal (right to believe or not) and external (right to manifesting such beliefs, publicly or privately) dimensions.[36]

In a brief contextualization, it is known that the Council of Europe is an international organization founded in May 1949 by 47 states, including the 27 ones which form the European Union. The European Court of Human Rights (EUCHR) is responsible for the application and implementation of the European Convention of Human Rights (ECHR) signed by the members of the Council to protect the human rights, the democracy and the state of law.

In the past few years, there has been a relevant discussion in most State-members of the European Council concerning the possibility of limiting the use of religious symbols, particularly the Islamic veil.

Even though there is a European agreement on the use of this apparel according to the dispositions of international law, an anti-Islam wave has progressively been strengthened after recent terrorist attacks and the recent increase of migratory flow.[37]

The generalized prohibition of use of the veil in public spaces at first began only in France and Belgium, then it was also introduced in Bulgaria, Leetonia, Austria, Denmark, and Norway. The Bulgarian Act of September 30th, 2016 prohibited the *niqab* and the *burca* in public spaces; Leetonia passed a law, in the same year, prohibiting the *full-face*. Austria passed an Anti-Face-Covering Act in 2017, envisioning the duty of letting jaw and hair visible in public. Norway passed a law prohibiting the use of clothes that covered the face even if partially, in June 2018 (the restriction affects schools

[35] GUÉRIOS e KAMEL 2014, 80.
[36] JERÓNIMO 2010, 497.
[37] FAGGIANI 2020, 167.

and universities). In the Netherlands, the Act of June 26th, 2018, imposes the partial prohibition of clothing that covers the face such as a *burqa* and a *niqab* (leaving the *hijab* out) in public spaces, such as public transportation, schools, hospitals or public administration buildings.[38]

Specifically concerning the French legislation, the first legislation was Act number 228 from 2004 that prohibited the use of ostensive religious symbol in schools and other educational facilities except for universities, however. That Act was adopted as a consequence of the principle of secularism and, in practice, it impeded the use of the Islamic veil by teachers, employees and, also, young Muslim students. Notice that this is about the Islamic veil as a whole and not only the "entire veil" which hides most part of the face.[39]

According to the French Government, the objective of this imposition was to reach secularity in public school in the country. So, the use of symbols that show conspicuity of religiosity was forbidden in public schools. Thus, the use of any veil was condemned whether it be the *burka*, the *niqab*, the *chador* or the *hijab*. The referred legal diploma forbids not only the use of the Islamic veil, but also any ostensive religious symbol, such as the Jewish kippa and the Christian crosses.[40]

After that, in 2009 manifestations from the National Assembly announced the intend of prohibiting the *burka* in France which was considered offensive in the matter of gender equality besides fostering insecurity when it comes to identification of people, climaxing in the approval of Act number 1192/2010. This legislation considered wearing anything that would hide the face liable of a fine. It also stated heavier punishment for those who forced a person to use such clothing ("forced dissimulation)".[41]

Even though it is still uncertain, the prohibition of its use was justified not only because of the secularity and to the women's human rights, but also

[38] FAGGIANI 2020, 168.
[39] FONTES 2016,183.
[40] CALEGARI 2016, 33.
[41] FONTES 2016, 183.

based on the protection of public order. Thus, besides the entire veil, the use of the *balaclava* and the helmet for those who are not riding a bike. But the new rule created problems, in fact, for the Muslim population since the prohibition struck their social and religious customs directly.[42]

It is important to state that these Acts were endorsed by the French jurisdiction and by the EUCHR.

Therefore, concerning the precedents of the EUCHR, Valentina Faggiane clarifies the many phases of understanding of the Court concerning the Islamic veil:

> A jurisprudência do TEDH sobre essa vestimenta religiosa pode ser subdividida em três fases: na primeira, apenas remete à decisão discricionária nacional, tentando ser neutra a fim de evitar contrastes com os Estados. (...) Nessa fase, o TEDH justifica geralmente a sua posição, considerando que os Estados, tendo em conta o princípio da subsidiariedade, podem compreender melhor os requisitos e os contextos locais, devido à sua maior proximidade, especialmente no que se refere a questões sobre as relações entre o Estado e as diferentes religiões (...) Posteriormente, no segundo estágio (...) uma involução pode ser observada. (...) No entanto, decorre da leitura desses pronunciamentos que a posição do TEDH é ambígua, uma vez que parece não estar inteiramente convencido da solução proposta: ele primeiro critica essas proibições, refutando os argumentos dos respectivos governos, mas depois confirma a compatibilidade de tais medidas com a CEDH. E, finalmente, uma terceira fase provavelmente se abriu, embora não sem incertezas e problemáticas, com a recente Sentença Lachiri, na qual, pela primeira vez, o TEDH declarou que a proibição de usar o véu (neste caso é um *hijab*) viola o art. 9º da CEDH.[43]

[42] CALEGARI 2016, 33.

[43] FAGGIANI 2020, 169-171. The precedents of the EUCHR about this religious apparel can be subdivided in three phases: the first, which only refers to the discretionary national decision tries to be neutral in order to avoid

In this standard of analysis of the decisions of the EUCHR, it is possible to notice that they formulate three pillars over which a legitimately accepted restriction must be based on: the restriction must be stipulated by law; it must search the concretization of one or more interests of the democratic society like public order and security, healthy, moral, or rights and freedom of others; and, third, the restriction needs to protect these public interests effectively and be proportional to the objective persecuted by the State.[44]
Thus, the EUCHR when deciding that the French Act number 1192/2010 is in accordance with the ECHR caused an important repercussion all over the world and intensified the judicial and social discussion on the shock between the values of religious freedom and state secularity.
In fact, the decision was not surprising, since the European Course has already supported its French state's point of view when decided favorably to the prohibition of use of the veil in schools. According to the winning votes, there is the need for authorities to identify the individuals to prevent crimes. Furthermore, the decision of prohibiting such garment to preserve the Human Rights would be within the margin of appreciation of the States. For all these reasons, the Court understood that the French Act does not offend the right of women and also does not harm the respect to private and familiar life, to freedom of thought or religious consciousness.[45]

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contrasts with the States. (…) In this phase, the EUCHR generally justifies its position, considering that the States given the principles of subsidiarity can better comprehend the requests and local contexts because of its higher proximity, especially when referring to matters about the relationship between the State and different religions (…). Then, in the second stage (...) an involution can be observed. (…) However, from the reading of these announcements that the position of the EUCHR is ambiguous, since it seems not to be entirely convinced of the proposed solution: it first criticizes the prohibition, refuting the arguments of the respective governments, but then confirms the compatibility of such measures with the ECHR. And, finally, the third stage was probably opened, though uncertain and with problems, with the recent Lachiri Sentence in which, for the first time, the EUCHR declared the prohibition of use of the veil (in this case a *hijab*) violates article 9 of the ECHR. (translated freely)

[44] GUÉRIOS e KAMEL 2014, 81.

[45] CALEGARI 2016, 40.

However, when it comes to the EUCHR's decision of considering the prohibition legitimate, there is a lot of criticism about the judicial arguments on which the judgment was supported.

In Callegari's point of view, such prohibition raises the matter that implicates different treatment for Christians and Muslims since nuns and priests can walk around wearing their habits or cassocks and Jews can wear their *kippas*. Likewise, the matter of the prohibition of the veil in schools and public spaces for the preservation of state secularity is questioned, considering that a truly secular state should allow all religious manifestations or none. Consequently, if the veil is prohibited in schools, should catholic students not wear crucifixes (even if tiny ones)? Finally, the pretext of defending the rights of women is attacked under the allegation that the veil represents an oppression to Muslim tradition.[46]

5. THE PROHIBITION OF USE OF THE ISLAMIC VEIL IN THE PRECEDENTS OF THE EUROPEAN UNION COURT OF JUSTICE

After analyzing the precedents of the European Court of Justice concerning the use of the veil or Islamic headgear, now the theme is studied from the point of view of the European Union Court of Justice.

For this purpose, the decisions C-157/15[47] and C-188/15[48], from March 14th, 2017, will be studied. In them, there were the detrimental reasons for the interpretation of the topics of equal treatment, discrimination in virtue of religion or convictions, internal regulation of a company that forbid the use of visibly political, philosophical or religious symbols at work, direct discrimination, inexistence, indirect discrimination, the prohibition of use of the Islamic veil imposed to a worker.

[46] CALEGARI 2016, 41.
[47] Court of Justice of the European Union 2017a, 2-7.
[48] Court of Justice of the European Union 2017b, 2-7.

The C-157/15 lawsuit concerns a request of judicial decision presented by Samira Achbita and G4S Secure Solutions NV, for the interpretation of the 2nd Article, n. 2, paragraph a), Directive 2000/78/CE of the Council, from November 27, 2000, which establishes the general scenario of equality of treatment at work and professional activity.

In this case, G4S imposed the prohibition of use of visible symbols of political, philosophical, or religious symbols and any ritualistic practices related to such convictions (inserting the Islamic Veil in this context).

According to the Directive 2000/78:

> Article 2:
>
> 1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.
>
> 2. For the purposes of paragraph 1:
>
> (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;
>
> (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:
>
> (i) that provision, criterion, or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, […]

> 5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

G4S is a private company which provides services of reception to clients, both in public and private sectors.

On February 12th, 2003, S. Achbita, a Muslim started working at G4S as a receptionist. At the time, there was an unwritten rule at G4S which stated that employees could not wear visible signs of their political, philosophical, or religious convictions.

In April 2006, S. Achbita informed her superiors of her intention of using the Islamic veil during working hours.

In response, the directors of G4S informed S. Achbita that the use of such veil would not be tolerated since the use of visibly political, philosophical, or religious items was contrary to the company's policy of neutrality.

On May 12th, 2006, after being absent from work for some time due to an illness. S. Achbita communicated her employer that she would return to work on May 15 and that she would wear the Islamic veil.

On May 29th, 2006, the Council of the company approved the modification of its internal regulation which came into effect on June 13th, 2006, stating that "it was forbidden to wear visible symbols of political, philosophical or religious convictions or practice any ritual related to such convictions".

On June 12th, 2006, S. Achbita was fired because of her reaffirmed intention of wearing the veil at work.

The action was considered unfounded at first and second degrees in the internal jurisdiction. The allegation was that the dismissal could not be considered unjust since the general prohibition of the use of visible items of political, philosophical, or religious conviction did not imply direct discrimination. Besides, it was understood that there was no manifestation of any indirect discrimination or violation of individual or religious freedom

in the case.
As for the inexistence of direct discrimination, the decision of the Court highlighted that S. Achbita had not been fired due to her faith, but for insisting on manifesting it during working hours.
As for the judicial matter, the judicial body of review analyzed, substantially, if the Article 2, n. 2, paragraph a), of the Directive 2000/78 should be interpreted in a sense that the prohibition of the Islamic veil – an internal measure by a private company which prohibits the use of any item of political, philosophical or religious convictions in the workplace – constituted a direct forbidden discrimination.
The ECJ, after citing the articles of the Directive 2000/78, understood by the parts as violated, and announcing that the ECHR predicts in its Article 9, that "any person has the right to freedom of thought, consciousness and religion, implicating this right to the freedom of changing religion or belief, as well as manifesting such belief, individually or collectively, in public or in private, by means of cults, rehearsals, practices and rites of celebration", as well as bringing Article 10, n. 1 of the Letter of Fundamental Rights of the European Union (the Letter), where the right to freedom of consciousness and religion is figured, began to be a part of the case.
Here are the conclusions worthy of highlighting:
- Accordingly to Article 10, n. 1, the Letter, the right to freedom of consciousness and religion also implies the freedom of changing religion or conviction, as well as the freedom of manifesting such religion or conviction, individually or collectively, in public or in private, through cults, teaching, practices or rites of celebration;
- The right guaranteed in article 10, n. 1, of the Letter corresponds to the right guaranteed in article 9 of the ECHR, sharing the same view;
- The Union legislator attempted to maintain the approach when adopting the Directive 2000/78, in the sense that it covers the *forum internum*, that is, the fact of having convictions, and the *forum externum*, that is, the public manifestation of religious faith.
- Secondly, it must be determined if the internal law in the main lawsuit

results of a difference of treatment between workers because of religion or convictions and, if that is the case, if such difference constitutes a direct discrimination as its meaning in article 2, n. 2, paragraph a) of the Directive 2000/78;
- In the present case, the internal rule in the main lawsuit refers to the use of visible political, philosophical, or religious symbols and, therefore, refers to any kind of manifestation. It must be understood that the rule treats all employees in an equal manner, imposing, in a general way, neutrality in clothing;
- Consequently, the internal regulation does not differ from the treatment based on religion and conviction, as in Article 2, n. 2, paragraph a) of the Directive 2000/78;
- It is possible that the internal rule, as the company rule in the case, configures a difference of treatment indirectly based on religion or convictions (in the terms of Article 2, n. 2, paragraph b), of the Directive 2000/78), if it is demonstrated that the apparent neutral obligation it contains results, in fact, in a specific disadvantage for people that follow a determined religion or determined conviction, what is a matter for the judicial body to verify;
- However, this difference in treatment does not constitute indirect discrimination if it is objectively justified by a legitimate objective and if the means for its realization were adequate and necessary;
- First, concerning the existence of a legitimate objective, it must be highlighted that the will of maintaining in the relationship between clients whether publicly or privately, a policy of political, philosophical and religious neutrality is considered legitimate;
- In effect, the will of the employer of having an image of neutrality to clients concerns the company's religious freedom, acknowledged in article 16 of the Letter, and has, at first, a legitimate character, namely as it affect only the employees which are in contact with the employer's clients;
- Second, it must be observed that the act of forbidding the use of visible symbols of political, philosophical or religious convictions to workers is

what could guarantee a policy of neutrality, in case the policy is conducted in a coherent and systematic way, as a general policy, being applied to all people who have contact with clients;
- Third, concerning the necessary character of the prohibition in the case, it must be verified if the prohibition is limited to what is necessary. In the case, it must be certified that the prohibition of any symbol or item of clothing possibly associated with religious belief or political or philosophical conviction concerns only the workers of G4S that have relationships with clients;
- In case it is verified that the referred prohibition must be considered strictly necessary to achieve the persecuted objective;
- Thus, it was decided that Article 2, n. 2, paragraph a) of the Directive 2000/78 must be interpreted in the sense that the prohibition of the Islamic veil does not constitute a direct discrimination because of religion or conviction;
- In contrast, the internal rule of the company can build indirect discrimination, in terms of Article 2, n. 2, paragraph b) of the Directive 2000/78, if it is demonstrated that the obligation implies a specific disadvantage to people that follow a religion or conviction, except if justified by a legitimate objective, such as the persecution by the employer, in the relationships with clients, of a policy of political, philosophical and religious neutrality, concerning the judicial body of review to verify.
As for the decision relative to lawsuit C-188/15, it is stated that A. Bougnaoui found, in October 2007, before her recruiting by the private company Micropole, a representative of it who informed her that using the veil would get her in trouble when having contact with clients.
When A. Bougnaoui presented herself, on February 4th, 2008, at Micropole for her internship she wore a simple bandana. After that, she wore the Islamic veil to work. At the end of the internship, the Micropole hired her, after July 15th, 2008, in a contract with no expiry date, as a project engineer. Consequently, A. Bougnaoui was fired by a letter from June 22nd, 2009 which stated that she had to make some professional displacements to

clients and that in one of those visits the client informed the company that the use of the veil bothered many collaborators. When the company hired her, the topic of the veil was approached in a clear way: that when in contact with clients it would not be possible to wear the veil every time. In a meeting on June 17th, the principle of neutrality was reaffirmed and the employee was questioned if she could accept such professional demands and accept not to wear the veil, to which she responded negatively.

Based on these facts, the end of her working contract was considered just. After filling a lawsuit under the allegation of discriminatory dismissal, the French court, the *Court de Cassation*, decided to suspend it and submit the ECJ to the following question "must the clauses of Article 4, n. 1 of the Directive 2000/78 be interpreted in the sense that it constitutes an essential professional requirement and determining, due to the nature of the professional activity or the conditions of its execution, the desire of a client of the company of computer services that the services be interrupted because the employee of the company wears the Islamic veil?"

Concerning the lawsuit C-188/15, a summary of the court's conclusions:

- First, it must be reminded that Article 1 of the aforementioned Directive established a general guideline to fight discrimination because of religion or conviction, of disability, of age and sexual orientation, concerning employment and professional activity, putting the principle of equality of treatment into practice by the State-Members.
- As for the definition of religion, this Directive does not state one;
- Nevertheless, the Union legislator referred to the fundamental rights as guaranteed in by the ECHR.
- That between the rights that result from common traditions to the State of Law and that were reaffirmed in the Letter, it is the right to freedom of consciousness and religion, consecrated in article 10, n. 1, of this Diploma;
- As the ECHR and consequently the Letter attribute a broad sense to the concept of religion – given that the freedom of expression one's religion is included in this concept –, it must be considered that the Union legislator intended to maintain the same approach when adopting Directive 2000/78

when it comes to the concept of religion as it is in Article 1, including *forum internum* and *forum externum*;
- Secondly, the decision of review does not make it clear if the matter of the judicial body is based on the finding of a difference in the directly based on religion or convictions, or in the difference of treatment indirectly based on these criteria;
- In this regard, if the action of firing A. Bougnaoui was based on the disrespect of a company's internal regulation which prohibited the use of any visible symbols of political, philosophical, or religious convictions. And, in case this neutral regulation implies concrete disadvantage to people who follow a determined religion or conviction like A. Bougnaoui, it must be concluded that there is a difference in treatment indirectly based on religion or convictions as prescribed by article 2, n. 2, paragraph b), of the Directive 2000/78;
- However, in compliance to Article 2, n. 2, paragraph b), i) of this directive, the difference in treatment does not constitute indirect discrimination if it is justified by a legitimate objective such as the implementation of a neutral policy concerning clients and if the means to achieving it are adequate and necessary;
- On the other hand, in case A. Bougnaoui's argument is not based on the existence of an internal rule, as referred in n. 32 of the present decision, it must be assessed if the employer's will of considering the wish of the client that the services be provided by an employee who does not wear the Islamic veil, constitutes an essential and determining professional requirement, according to article n. 4, n. 1 from the Directive 2000/78;
- About this, according to the terms of this disposition, the State-Members can predict that a difference in treatment based on a given characteristic related to any of the reasons mentioned in article 1 of the directive will not be understood as discrimination whenever due to the nature of the professional activity or the context of its execution, this characteristic constitutes an essential and determining request for the exercise of the activity when the object is legitimate and the request, proportional;

- In this aspect, it is important to remember that the Court of Law has continuously declared that it is a result of article 4, n. 1 from Directive 2000/78 that it is not the reason which bases the difference of treatment but a characteristic related to such reason which must constitute an essential and determining request;
- On the other hand, it must be highlighted that a characteristic related to religion can constitute an essential and determining request only in limited circumstances;
- It is also important to underline that, in the terms of article 4, n. 1 of Directive 2000/78, the concept of "essential and determining request for the exercise of the activity", in conformity with the disposition, refers to a demand objectively dictated by the nature or conditions of exercise of the professional activity;
- By contrast, it cannot encompass subjective considerations, such as the will of the employer of considering the concrete wishes of the client;
- This way, the questions submitted by the judicial body of review must be answered, that article 4, n. 1 in the Directive 2000/78 must be interpreted in a way that the will of the employer of considering the client's wishes of interrupting the service provided by an employee who wears the Islamic veil cannot be considered a determining and essential professional request in the sense of this disposition.

Given the conclusions referring to the interpretation of common rules in both lawsuits the company judicially can prohibit employees of wearing religious symbols including the veil when understanding that it does not constitutes direct discrimination, in terms of the Directive 2000/78.

The prohibition of the use of the Islamic veil instituted by an internal rule of private company is not direct religious discrimination on its own. In other words, the internal rule does not establish difference of treatment between workers and imposes neutrality of clothing to all equally, what is considered legitimate and not a violation to freedom of belief.

However, in the absence of an internal rule or regulation, the judges of the European Court considered that the businesspeople can not demand that

an employee to abandon the veil only because it is the will or demand of a client, as it does not characterize a "professional request".

There were many divergences whether this decision was correct or not, many critics based themselves in the fact that when refusing to work without the Islamic veil the employee was disobeying the laws of her religion, so it is not a selfish or shallow attitude.

The second asserted topic was that the rule of the company violated not only the freedom of expression of belief, but also the right to labor of the Muslim woman, considering that they cannot work without wearing the veil. Likewise, it was understood that the Court violated the right to dignity, to freedom of expression, to religious freedom (including the right of cult), to labor and to social integration, under the argument that such attitudes contribute to prejudice and to the segregation of the Islamic people[49].

Going against the ruling of the Court, Francirosy Campos Ferreira alerts to the fact that the prohibition of the Islamic veil is a disrespect to religious and ethnical diversity. The excuse of protecting these women does not convince the community nor the Human Rights. There are two major reasons for such prohibition: first, for a matter of security which leads to the association of the use of the *burca* and the *niqab* with terrorism; second, because it hurts the customs and traditions of a country. However, the prohibition of the use of such garments can possibly hinder the civil and ideological discourse[50] which would not be legitimate in a Democratic State of Law.

Despite the critiques exposed before, it is certain that the understanding of the ECJ also received compliments from defenders of the prohibition of the use of the veil as a way of guaranteeing neutrality in public and private places.

For them, in these cases and in other ones there is the need to ponder on

[49] ALMEIDA 2018, 5.
[50] FERREIRA 2013, 184.

two fundamental rights: on one hand, the freedom of manifesting religion or belief and, on the other hand, state secularity. If the limitation of that right was limited by law (or regulation), if it were homogenous and necessary to the affirmation of a democratic society, then it does not face illegality.
They affirm that great accomplishments must be considered for the liberation of the use of the Islamic item of clothing such as the promotion of equality between genders and the active participation of woman in public life. In this context, secularity and the principal of gender equality fit in the values that inspired the Letter and the ECHR where individual freedom of manifesting religion can be limited to defend such principles.
Besides, the restriction is considered an imperative social necessity for the protection of women especially those who chose not to wear the veil from discriminative attitudes of those who profess the Islamic faith.
In effect, it was understood that in a democratic society the State is allowed to prohibit the use of the Islamic veil if the apparel is harmful to democracy, to equality and to the protection of the right to neutrality of the State, in order to allow a harmonious coexistence of different religions.

CONCLUSION

The present study aimed at examining the recent decisions of the European Union Court of Law C-157/15 and C-188/15, contributing to the study of (il)legality of the prohibition of the use of the Islamic veil in public and private environments.
The principles that assure religious freedom and State secularity are fundamental in a Democratic State of Law. The right to equality, likewise, is essential to any democratic project and such values are confused imposing the fight against all kinds of discrimination and equal practice of human rights.
Religious freedom, in fact, must be understood to choosing or not to profess a religion, publicly or privately, individually or in a community that

shares the same belief. However, such right cannot be considered absolute, it has to coexist with others in an open and multicultural society.

This way, the right of the individual to express and manifest religious beliefs without discrimination can clash with the respect to State secularity, it is necessary the balance between values for the resolution of the stir on the prohibition of the veil.

Also, the edition of Acts of some European countries that prohibit the use of the Muslim veils, totally or partially, was studied emphasizing the French Act n. 1192/2010 which considered the use of any apparel which would hide the face in public spaces a misdemeanor.

The theme was analyzed under the view of the European Union Court Justice, two of the Court's decisions being the object of study, lawsuits C-157/15[51] and C-188/15[52] from March 14th, 2017.

It is concluded that the prohibition of the Islamic veil instituted in an internal rule of a private company does not constitute direct religious discrimination on its own. However, in the absence of an internal rule or regulation, the judges of the European Court considered that the businesspeople cannot demand that an employee stop wearing the veil only because of the wishes of a client, as it is not a professional request.

It is certain that the understanding of the ECJ was criticized and also complimented by operators and scholars.

The critics defended that the company inflicted the freedom of religious expression, the right to labor of the Muslim woman, and also the rights to dignity and equality.

Supporters of the prohibition, however, affirm that it is a way of guaranteeing neutrality in public and private spaces. Besides, they highlighted that the decision matches the great accomplishments towards

[51] Court of Justice of the European Union 2017a, 2-7.
[52] Court of Justice of the European Union 2017b, 2-7.

the liberation of the use of Islamic items of clothing such as the promotion of gender equality and the active participation of women in public life.
In this context, it is asserted that in a democratic society the State is allowed to prohibit the use of the Islamic veil when such item harms the protection to the right of neutrality of the State, the democracy and equality, in order to allow the harmonious coexistence between different religions.

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