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CORE ANALYSIS

Bias and judicial narrative: a critical discourse analysis of the ECtHR and ECJ case law on religious symbols

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Abstract
The use of religious symbols has sparked heated debate and numerous judicial cases across Europe. Early case law from the European Court of Human Rights (ECtHR) has been criticised for allegedly employing biased discourses. However, it remains unclear whether such biased discourses are present in recent ECtHR rulings or in comparable decisions by the European Court of Justice (ECJ). This article applies Critical Discourse Analysis, a linguistic and social science approach, to examine the narratives used by the ECtHR and ECJ in cases involving religious symbols. It argues that religious and gender biases are pervasive in ECtHR judgements. While the ECJ generally employs neutral language, biased discourses occasionally emerge in the 'subtext' of its decisions. These biases are not incidental but serve as strategic tools within judicial narratives, reinforcing the argumentative legitimacy of rulings for audiences influenced by societal prejudices.

Keywords: fundamental rights; freedom of religion or belief; discrimination; discourse; judicial bias; ideology; narrative

1. Introduction

For decades, the use of religious symbols has sparked controversies in Europe.[1] Some countries prohibit the use of religious symbols by school pupils,[2] teachers,[3] judges,[4] or public officials at large[5]; the use of full-face covers in public spaces is sometimes prohibited.[6] Moreover, bans against religious symbols introduced by private employers have been upheld by the judiciary in several states.[7] The bans against religious symbols are generally formulated in neutral terms but

[1]We use the expression 'religious symbol', even though it is imprecise (see below, Section 3), because it is commonly employed by courts and scholars to refer to items capable of expressing allegiance to a specific religion or belief.

[2]Eg, France and certain Flemish municipalities, see E Howard, 'Bans on the Wearing of Burqas, Niqabs and Hijabs, Religious Freedom and the Secular Nature of the State' in J H Bhuiyan and A Black (eds), *Religious Freedom in Secular States* (Brill Nijhoff 2022) 73–94, 73–74; Human Rights Centre Clinic of the University of Essex, Human Rights of Women Wearing the Veil in Western Europe, Office of the High Commissioner for Human Rights, 2019, pp 15–22, available at <https://www.ohchr.org/en/women/publications-and-resources> accessed 15 March 2024.

[3]Eg, certain German states and Swiss cantons, see works cited in n 2.

[4]Eg, Germany and the Netherlands, see works cited in n 2.

[5]It is the case of France, see works cited in n 2.

[6]Such as Belgium, Austria, Bulgaria, Denmark, and France, see works cited in n 2.

[7]Eg, Belgium, France, see works cited in n 2.

disproportionately affect *Islamic* garments worn by *women*.[8] In the public debate in Europe, Islamic garments are often described as threats to women's rights, secularism, and public order.[9]

The bans on religious symbols have been the object of multiple judicial decisions of the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ) (hereafter collectively referred to as 'European Courts').

Numerous scholars have explored the biases underlying the *legal arguments* made by the European Courts. For instance, Baldi alleges that 'the ECtHR and the CJEU, by defining religion as a private matter, privilege a certain (secular/Western) way to live and experience religion'.[10] Some authors, at any rate, contend that the ECtHR has 'abandoned' its biased approach[11] and that the judgments of the ECJ are well-balanced.[12]

However, an analysis of the European Courts' *discourses* suggests that ideological biases are systematically present in most of their judgements in this area (by 'discourse', we refer to the way a topic is represented).[13] The importance of judicial discourse has been underscored by the ECtHR itself, which has recognised the need to avoid stereotyping in judicial decisions.[14] As noted by Foucault, – who inspired our methodological approach – the reproduction of certain discourses can indeed reinforce societal power imbalances.[15] Thus, biased discourses in the European Courts' judgments on religious symbols may potentially reinforce existing biases against minorities in Europe.

A few scholars have specifically examined the discourses of the ECtHR's early judgments on religious symbols. For example, Peroni argued that the Court marginalises Muslim women by making headscarves or verbs like 'the wearing' of the headscarf the grammatical subject of its sentences, thereby reinforcing the stereotype of Muslim women as 'victims' rather than agents.[16]

[8]See Joined Cases C-804/18 and C-341/19 *WABE and Müller* ECLI:EU:C:2021:594, para 59.

[9]See, eg, 'Marine Le Pen veut bannir les "idéologies islamistes" et interdire le voile dans l'espace public' (*La Voix du Nord*, 29 January 2021).

[10]G Baldi, 'Re-Conceptualizing Equality in the Work Place: A Reading of the Latest CJEU's Opinions over the Practice of Veiling' 7 (2018) Oxford Journal of Law and Religion 296, 306. See also E Howard, *Headscarves and the Court of Justice of the European Union: An Analysis of the Case Law* (Taylor & Francis 2023) 174; A Hambler, 'Neutrality and Workplace Restrictions on Headscarves and Religious Dress: Lessons from Achbita and Bougnaoui' 47 (2018) Industrial Law Journal 149. More generally, see, inter alia, M Sjöholm, *Gender-Sensitive Norm Interpretation by Regional Human Rights Law Systems* (Brill Nijhoff 2017) 653. See also N Alkiviadou, 'Freedom of Religion: Lifting the Veils of Power and Prejudice' 24 (2020) The International Journal of Human Rights 509, 530; C Evans, 'The "Islamic Scarf" in the European Court of Human Rights | Melbourne Journal of International Law' 7 (2006) Melbourne Journal of International Law 52; S Langlaude, 'Indoctrination, Secularism, Religious Liberty, and the ECHR' 55 (2006) The International and Comparative Law Quarterly 929, 938.

[11]E Brems et al, 'Head-Covering Bans in Belgian Courtrooms and Beyond: Headscarf Persecution and the Complicity of Supranational Courts' 39 (2017) Human Rights Quarterly 882, 902; see also E Howard, *Law and the Wearing of Religious Symbols in Europe* (Routledge 2020) 93.

[12]See F Spitaleri, 'Religious Freedom and Employment Discrimination in the Case Law of the European Court of Justice' in L Paladini and MA Iglesias Vázquez (eds), *Protection and Promotion of Freedom of Religions and Beliefs in the European Context* (Springer International Publishing 2023) 215–36, 236.

[13]See S Hall, 'The West and the Rest: Discourse and Power' in S Hall and B Gieben (eds), *Formations of Modernity* (Polity Press 1992) 185–227, 201: 'A discourse is a group of statements which provide a language for talking about – ie, a way of representing – a particular kind of knowledge about a topic'.

[14]*J.L. v Italy* App no 5671/16 (ECtHR, 27 May 2021) para 141 (translation by the authors); the ECtHR referred to 'sexist' stereotypes in this case, but it stands to reason that similar considerations should apply to other stereotypes, such as racial or religious stereotypes.

[15]M Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977* (Knopf Doubleday Publishing Group 1980) 93.

[16]L Peroni, 'Religion and Culture in the Discourse of the European Court of Human Rights: The Risks of Stereotyping and Naturalising' 10 (2014) International Journal of Law in Context 195, 203 and 206; see also K Nieminen, 'Disobedient Subjects – Constructing the Subject, the State and Religion in the European Court of Human Rights' 21 (2015) Social Identities 312; G Evolvi and M Gatti, 'Proselytism and Ostentation: A Critical Discourse Analysis of the European Court of Human Rights' Case Law on Religious Symbols' 14 (2021) Journal of Religion in Europe 162.

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However, the literature has yet to systematically study the discourses in the ECtHR's more recent judgments or those of the ECJ.

This article aims to fill this gap by examining the presence and role of biased discourses in the European Courts' judgments on religious symbols. First, it argues that, while religion- and gender-related biased discourses are particularly evident in the ECtHR's early case law as noted in the literature, they are also present – albeit in a more nuanced form – throughout the case law of the ECtHR and, over time, have even 'spilt over' into the judgments of the ECJ. This article thus contributes to the literature on religious symbols by highlighting a continuity in the European Courts' case law: although they generally avoid the harsh language used by the ECtHR in the early 2000s, their discourse reveals that many of their underlying assumptions remain largely unchanged. It should be noted that, while religion- and gender- related biases may be connected to other biases (eg, against persons of a certain class or ethnicity), we did not find evidence of classism or racism in our sample.

Secondly, this article contends that biased discourses are not incidental: the European Courts have used them to construct narratives aimed at persuading their audiences. In other words, the European Courts have incorporated societal prejudices that often underpin prohibitions of Islamic headscarves in Europe to support their decisions through argumentation.[17] This analysis thus contributes to scholarship in Critical Discourse Analysis and Law and Literature by revealing how biased discourses contribute to the development of judicial narratives and, ultimately, to the justification of judicial decisions.

While the literature has often explored judicial bias by concentrating on the views of individual judges,[18] this article ascertains the influence of societal biases on adjudication by focusing on the justification of judges' decisions. To this purpose, we employ Critical Discourse Analysis, a linguistic and social science approach aimed at examining the relationship between language, ideology, power, and social structure.[19] The article analyses the case law of two courts – the ECtHR and the ECJ – to show that the use of biased discourses is not necessarily motivated by the views of individual judges, or the lasting influence of a single court's precedent, but can be part of argumentative strategies used by different courts to justify decisions (in the eyes of biased audiences) in comparable cases. While the ECtHR and ECJ belong to separate legal orders, they apply analogous rules and are likely to develop similar discourses. Their case law, therefore, may be compared for our purposes.[20]

This article is divided into ten sections. Section 2 explores, from a theoretical perspective, the influence of biased discourses on judicial argumentation and narrative. Section 3 presents our case study about religious symbols. To explore the discourses of the European Courts, we employ Critical Discourse Analysis, an approach described in the methodology (Section 4). Subsequently, we discuss the analysis results: Section 5 shows that the discourses of the European Courts denied the agency of Muslim women who wore religious symbols. This narrative enabled the European Courts to assume that Islamic headscarves 'ostentatiously' displayed religious belonging (Section 6) and impacted on State and employers' neutrality (Section 7), others' rights (Section 8), and public safety and order (Section 9). The article is concluded in Section 10, with a discussion of the methodological and practical implications of the results of the analysis.

[17]The interaction between the judicial narratives and the justification of ECJ decisions is explored, among others, by A Bailleux et al (eds), *Les récits judiciaires de l'Europe. Dynamiques et conflits* (Larcier 2021).

[18]See, eg, E Voeten, 'The Impartiality of International Judges: Evidence from the European Court of Human Rights' 102 (2008) American Political Science Review 417; see, further, below, Section 2.

[19]T Catalano and LR Waugh, *Critical Discourse Analysis, Critical Discourse Studies and Beyond* (Springer International Publishing 2020) 1.

[20]See, further, below, Section 4.

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2. The role of biased discourse in adjudication

Judicial bias has been extensively examined in both legal and social science scholarship. One may distinguish between: (a) personal bias, ie, deficit of impartiality motivated by personal reasons, such as personal gain[21]; this form of bias falls outside the scope of this article; and (b) ideological[22] bias, ie, deficit of impartiality motivated by beliefs and values.[23] A deficit of impartiality in the exercise of the judicial function may be due to the convictions of individual judges but may also be motivated by the judge's expectations about the preconceptions of their audiences; the latter form of ideological bias is explored in this article, as shown below.

Judges routinely deny that they act in an ideologically biased manner; for instance, the current ECJ President, Lenaerts, argued that judges should not engage in 'strategic behaviour to dispose ideological stakes' and that the Court of Justice refrained from crossing 'the dividing line between law and politics'.[24] However, numerous empirical studies have demonstrated that judicial bias is widespread. The literature has focused particularly on the bias of individual judges, showing, eg, that, in the US, 'being a conservative or a liberal ... is highly predictive of [judicial] decision making'.[25] The bias of international judges has also been explored, by alleging, for example, that ICJ judges tend to vote in favour of their home states.[26] Some authors have argued that 'ideology is present in the CJEU adjudication process', too.[27] There are relatively few studies in this area, as it is difficult to determine the political preferences of individual ECJ judges[28] because their positions are not revealed by the Court's judgements. The approach we use, ie, an analysis of the court's discourses, bypasses this problem, by elucidating the ideological biases underlying ECJ judgements, irrespective of the personal opinions of ECJ judges (see below, Section 4).

Several theorists, with different perspectives, have acknowledged the role of judicial bias. Some US realists, in particular, argued that judges' ideologies 'influence individual judgements and patterns of decisions'.[29] Biases and prejudices, as noted by Frank, affect the judge's reasoning as they do the reasoning of ordinary people.[30] A coherent theory of ideology in adjudication was

[21]Cognitive bias would also fall in this category; on cognitive bias, see M Adjaout-Ponsard, 'Biais cognitifs et comportement judiciaire' 3 (2021) Les Cahiers de la Justice 485.

[22]By 'ideology', we refer to a coherent and relatively stable set of beliefs, see K Knight, 'Transformations of the Concept of Ideology in the Twentieth Century' 100 (2006) American Political Science Review 619.

[23]EA Posner, 'Does Political Bias in the Judiciary Matter?: Implications of Judicial Bias Studies for Legal and Constitutional Reform' 75 (2008) University of Chicago Law Review 853. It is to be noted that Posner refers to 'political' bias instead of 'ideological' bias.

[24]K Lenaerts, 'Discovering the Law of the EU: The European Court of Justice and the Comparative Law Method' in T Perišin and S Rodin (eds), *The Transformation or Reconstitution of Europe* (Bloomsbury Publishing 2020) 63–88.

[25]A Harris and M Sen, 'Bias and Judging' 2 (2019) Annual Review of Political Science 241–59, 254; see also, *ex multis*, G Sisk et al, 'Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions' 65 (2004) Ohio State Law Journal 491.

[26]E Posner and M de Figueredo, 'Is the International Court of Justice Biased?' 34 (2005) The Journal of Legal Studies 599; See, further, M Kuijer, 'Voting Behaviour and National Bias in the European Court of Human Rights and the International Court of Justice' 10 (1997) Leiden Journal of International Law 49; Voeten (n 18).

[27]T Ćapeta, 'Ideology and Legal Reasoning at the European Court of Justice' in T Perišin and S Rodin (eds), *The Transformation or Reconstitution of Europe* (Bloomsbury Publishing 2020) 89–120; See also A Skrbic, 'Ideology in the Adjudication of the ECJ' 42 (2023) Law and Philosophy 561; A H Zhang et al, 'Judging in Europe: Do Legal Traditions Matter?' 14 (2018) Journal of Competition Law and Economics 144; J Frankenreiter, 'The Politics of Citations at the ECJ: Policy Preferences of EU Member State Governments and the Citation Behavior of Members of the European Court of Justice' 14 (2017) Journal of Empirical Legal Studies 813; M Malecki, 'Do ECJ Judges All Speak with the Same Voice? Evidence of Divergent Preferences from the Judgments of Chambers' 19 (2012) Journal of European Public Policy 59.

[28]Ćapeta (n 27) 106.

[29]JW Singer, 'Legal Realism Now' 76 (1988) California Law Review 465, 470. See also, inter alia, LG Mills, *A Penchant for Prejudice* (University of Michigan Press 1999) 17.

[30]J Frank, *Law and the Modern Mind* (Transaction Publishers 1963) 156.

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developed by Duncan Kennedy, a founder of the Critical Legal Studies movement.[31] Kennedy argued that 'ideology influences adjudication, by structuring legal discourse and through strategic choice in interpretation'.[32] However, the judge is also subject to an internal constraint (she is 'looking for a legal argument that looks good to her') and an external constraint ('the judge is looking for a legal argument that looks good to the audience').[33] Judges may experience a conflict between the requirement of ideological neutrality and the inevitable impact of ideology on the decision making process.[34] To dispel the 'anxiety' created by this conflict, judges often deny the ideological element in adjudication.[35]

Despite this process of denial, a judge's bias may arguably surface in their judgements, as suggested by Lajoie, through a synthesis of rhetorical analysis and legal hermeneutics.[36] Lajoie's point of departure is Perelman's finding whereby all argumentation in aiming to persuade, must be adapted to the audience and is, hence 'based on beliefs accepted by the audience'.[37] According to Lajoie, courts address several audiences. On the one hand, government and public opinion.[38] Courts satisfy the expectations of these audiences by deciding the outcome of cases in a way that is generally consistent with what they perceive as 'dominant interests' in society and the 'dominant values' that underlie them[39]; dominant values are those of the 'majority', which consists of the 'dominant groups' in society.[40] On the other hand, courts must address the legal community. To convince the legal community, and preserve their legitimacy,[41] courts must provide arguments that are legally consistent.[42] It should be noted that the legal community includes the courts themselves: each judge must convince themselves and, then, their colleagues (and, potentially, other courts).[43] Given the need to preserve the 'apparent rationality' of the judgement and avoid accusations of arbitrariness, judges are unlikely to refer explicitly to dominant values in the text of

[31]D Kennedy, *A Critique of Adjudication* (Harvard University Press 1998); See also, inter alia, R Mańko, 'Judicial Decision-Making, Ideology and the Political: Towards an Agonistic Theory of Adjudication' 33 (2022) Law and Critique 175, 183.

[32]Kennedy (n 31) 19. See also D Kennedy, 'The Hermeneutic of Suspicion in Contemporary American Legal Thought' 25 (2014) Law and Critique 91.

[33]Kennedy (n 31) 161.

[34]Ibid., 203.

[35]Ibid., 194.

[36]A Lajoie, *Quand les minorités font la loi* (PUF 2002); See also S Bernatchez, 'Le rôle des valeurs et du contexte dans la transformation de la fonction de juger' in P Noreau and L Rolland (eds), *Mélanges Andrée Lajoie – Le droit, une variable dépendante* (Thémis 2008) 333–57.

[37]C Perelman, *The New Rhetoric and the Humanities: Essays on Rhetoric and Its Applications* (Harvard University Press 1998) 14; C Perelman, 'La Motivation des Décisions de Justice, Essai de Synthèse' in C Perelman and P Foriers (eds), *La motivation des décisions de justice* (Bruylant 1978) 415–28, 425. See also A Lajoie, *Jugements de Valeurs* (PUF 1997) 265. On Perelman's definition of the 'universal audience', see inter alia ET Feteris, *Fundamentals of Legal Argumentation* (Springer Netherlands 2017) 73; B Bartocci, 'Argomentazione e Politica: Democrazia e Nuova Retorica in Chaïm Perelman' 15 (2010) Ars interpretandi 120.

[38]Lajoie, *Jugements de Valeurs* (n 37), see text to n 280 and 281.

[39]Lajoie, *Quand les minorités font la loi* (n 36) 140. See also G Timsit, *Les figures du jugement* (PUF 1993) 163, 183–6; G Timsit, 'La loi. A la recherche du paradigme perdu' 34 (1996) Revue européenne des sciences sociales 57, 70.

[40]A Lajoie et al, 'Les cheminements sous-textuels et surdéterminés du raisonnement judiciaire: les valeurs des femmes dans le discours des juges de la Cour suprême du Canada' in O Pfersmann and G Timsit (eds), *Raisonnement juridique et interprétation* (Éditions de la Sorbonne 2001) 129–66, 129.

[41]A Lajoie, 'Dans l'angle mort de l'analyse systémale' in N Belloubet-Frier et al (eds), *Études en l'honneur de Gérard Timsit* (Bruylant 2004) 127–39.

[42]Lajoie, *Jugements de Valeurs* (n 37), text to n 154; see also A Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford University Press 2016) 298.

[43]Lajoie, *Jugements de Valeurs* (n 37) 74, 110; See C Perelman and L Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation* (University of Notre Dame Pess 1991) 30; Bernatchez (n 36), p 343. See further, S Levinson, 'The Rhetoric of the Judicial Opinion' in P Brooks and P Gewirtz (eds), *Law's Stories: Narrative and Rhetoric in the Law* (Yale University Press 1996) 187–205, 199.

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their judgements.[44] They tend to conceal dominant values in the 'subtext' of their decisions,[45] hiding their real rationale behind a 'screen of neutrality'.[46]

Lajoie applied this theoretical framework to the 20th-century case law of the Canadian Supreme Court, hypothesising that it could be used in respect of other tribunals.[47] In the present article, we apply this theoretical framework to the European courts' case law on religious symbols. It should be noted that we do not intend to verify whether the outcome of judgments, in general terms, corresponds to dominant values. The outcomes of the judgments in our sample – the European Courts' case law on religious signs – are quite evidently consistent with dominant European values concerning secularism and Islam.[48] This article is concerned primarily with determining whether, in judgments whose outcome conforms to dominant values, such values appear in the 'subtext' of the judgments, as Lajoie suggested. Unlike that author, who used traditional legal tools, we employ a linguistic and social science approach, Critical Discourse Analysis,[49] to better analyse the 'subtext' of the courts' judgments and reveal traces of dominant values in their discourses. We thus answer our first research question: *which biases are reflected in the European Courts' judgments about religious symbols?*

It may be wondered why judges, who want to be perceived as ideologically neutral, should *conceal* the references to dominant values in the subtext of their decisions instead of eliminating such references altogether. It is possible that courts leave traces of their biases in their judgments because such biases are a manifestation of their unexamined cultural beliefs.[50] However, one may put forward an alternative explanation: courts consciously or unconsciously employ discourses reflecting dominant values to persuade their audiences (including themselves). The literature has already shown that courts employ specific discourses to corroborate their *interpretation* of legal sources. For instance, Stoppioni argued that investment tribunals employed neoliberal language in the 'sub-textual premises' of their awards to ensure a 'pro-investor' interpretation of investment treaties.[51] Garcia Blesa similarly pointed at the arbitral tribunals' 'use of a legal language already permeated by the assumptions and goals of neoliberalization'.[52] The present article suggests that courts also use biased discourses to enhance the persuasiveness of their *narratives* (by 'narrative' we mean the telling of a story,[53] ie, a representation of events connected temporally and causally).[54] Law and Literature scholars have widely explored the relationship between law and narrative.[55] As is well known, law is permeated by narratives[56]: no matter how strictly a case is argued, 'it will always

[44]Lajoie, *Quand les minorités font la loi* (n 36) 143.

[45]Ibid; Lajoie et al (n 40) 160; see also Kennedy (n 31) 112.

[46]Lajoie, *Jugements de Valeurs* (n 37) 240.

[47]Lajoie et al (n 40) 129.

[48]See below, Section 3.

[49]On our methodology, see below, Section 4.

[50]See P Brooks, 'Narrative in and of the Law' in J Phelan and PJ Rabinovitz (eds), *A Companion to Narrative Theory* (Wiley 2005) 415–26, 418.

[51]E Stoppioni, *Le droit non écrit dans le contentieux international économique – une analyse critique de discours* (Brill 2022) 52 and 530.

[52]J Garcia Blesa, 'Indeterminacy, Ideology and Legitimacy in International Investment Arbitration: Controlling International Private Networks of Legal Governance?' 35 (2022) International Journal for the Semiotics of Law 1967, 1987.

[53]A Sari, 'Norm Contestation for Strategic Effect: Legal Narratives as Information Advantage' 83 (2023) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 119, 125.

[54]See S Onega and J Garcia Landa, 'Introduction' in S Onega and J Garcia Landa (eds), *Narratology: An Introduction* (Routledge 1996) 1–14, 3; See further, M-L Ryan, 'Toward a Definition of Narrative' in D Herman (ed), *The Cambridge Companion to Narrative* (Cambridge University Press 2007) 22–36; Bianchi (n 42) 292.

[55]See CO Frank, 'Narrative and Law' in K Dolin (ed), *Law and Literature* (Cambridge University Press 2018) 42–57, 41.

[56]R Grunewald, *Narratives of Guilt and Innocence: The Power of Storytelling in Wrongful Conviction Cases* (New York University Press 2023) 200; P Brooks, 'The Law as Narrative and Rhetoric' in P Brooks and P Gewirtz (eds), *Law's Stories: Narrative and Rhetoric in the Law* (Yale University Press 1996) 14–23.

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be a story'.[57] Courts, as noted by Brooks, do not simply recount happenings but 'give them a shape, give them a point' and to do so 'they necessarily espouse some sort of "point of view" or perspective'.[58] Such narratives constitutes 'an integral element of a legal argument', which carries as much argumentative weight as legal interpretation.[59] Lawyers persuade courts 'by telling stories'[60]; Courts must then 'choose between competing representations of legal reality placed before them',[61] and eventually craft their own narratives to persuade their audiences.

Judges employ various techniques to enhance the persuasiveness of their narratives. For instance, Courts introduce information that is relevant to their argument[62] and neglect other evidence[63]; they use the same definition for different elements, thus reducing such elements 'to what they have in them that is identical or interchangeable'[64]; they employ legal presumptions and deploy 'the rule/exception paradigm in order to shift the argumentative burden of proof'.[65] Courts may also resort to strategies that de-emphasise the perspective of an actor,[66] such as: nominalisation, ie, 'turning verbs into nouns'[67] (eg, *the wearing of a headscarf* might have some kind of proselytising effect),[68] and passivisation, ie, privileging the use of the passive voice over the active voice[69] (eg, the use of the headscarf *is presented or perceived* as a compulsory religious duty).[70]

Moreover, courts may employ what Bruner defines as 'narrative banalisation': a storytelling 'so socially conventional, so well known, so in keeping with the canon' that a reader scarcely questions it.[71] 'That which goes without saying', as noted by Bianchi, is legal argumentation to be particularly valued[72]: the more a narrative is perceived as 'natural', the more cogent it is.[73] Narratives that 'correspond to the dominant cultural expectations', in particular, are often not problematised[74] because dominant ideologies tend to be imagined as 'naturally or irreducibly "given"'.[75]

It may be expected that judges, consciously or unconsciously, employ discourses reflecting dominant values to create socially conventional narratives likely to persuade their audiences (including themselves). This article explores the use of biased discourses as part of a court's narrative strategy by addressing its second research question: *what role do biased discourses play in the European Courts' narrative about religious symbols?*

[57]WR Fisher, *Human Communication as Narration: Toward a Philosophy of Reason, Value, and Action* (University of South Carolina Press 1989) 49.

[58]P Brooks, 'Narrative Transactions – Does the Law Need a Narratology?' (2013) 18 Yale Journal of Law & the Humanities 13.

[59]G Henderson, *Creating Legal Worlds: Story and Style in a Culture of Argument* (University of Toronto Press 2018) 3; see also, inter alia, RM Cover, 'Foreword: Nomos and Narrative' 97 (1983) Harvard Law Review 4.

[60]C Rideout, 'Storytelling, Narrative Rationality, and Legal Persuasion' 14 (2008) The Journal of the Legal Writing Institute 53, 54.

[61]Sari (n 53) 127.

[62]KC Swiss, 'Confined to a Narrative: Approaching Rape Shield Laws Through Legal Narratology' 6 (2014) Washington University Jurisprudence Review 398.

[63]M Fludernik, 'A Narratology of the Law? Narratives in Legal Discourse' 1 (2014) Critical Analysis of Law 88.

[64]Perelman and Olbrechts-Tyteca (n 43) 210.

[65]Bianchi (n 42) 298.

[66]T Van Leeuwen, *Discourse and Practice: New Tools for Critical Analysis* (Oxford University Press 2008) 29.

[67]R Fowler et al, *Language and Control* (Routledge 2018) 14.

[68]See Peroni (n 16) 202.

[69]See, further, N Fairclough 'The Language of Critical Discourse Analysis: Reply to Michael Billig' 19 (2008) Discourse & Society 811.

[70]Peroni (n 16) 202.

[71]J Bruner, 'The Narrative Construction of Reality' 18 (1991) Critical Inquiry 1, 9. See also AG Amsterdam and J Bruner, *Minding the Law* (Harvard University Press 2009) 136.

[72]Bianchi (n 42) 298.

[73]AL Bernardino, 'The Discursive Construction of Facts in International Adjudication' 11 (2020) Journal of International Dispute Settlement 175, 189.

[74]J Otten, 'Narratives in International Law' in D Roth-Isigkeit (ed), *The Grammar of Global Law* (Normative Orders Working Paper 2016) 16–48, 30.

[75]R Jaeggi, 'Rethinking Ideology' in B de Bruin and C Zurn (eds), *New Waves In Political Philosophy* (Springer 2008) 63–86, 65; Otten (n 74) 30.

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3. Case study: the case law of the European Courts about religious symbols

In the field of religion, secularism arguably constitutes the 'dominant value' in Europe. To be sure, the nature of secularism varies in different States: for instance, France is characterised by a strict separation between State and religious groups (*laicité*), while some countries have agreements with specific religious communities (eg, Italy and Spain).[76] However, the different forms of European secularism have a common element: they were developed in the context of predominantly single-religion (Christian) societies.[77] As a consequence, Christianity plays a special role in most European countries. While, over the last decades, there has been a significant decline in religiosity throughout Europe,[78] Christians continue to benefit from several privileges (eg, Christian holidays are recognised as national holidays).[79] Moreover, 'latent' Christian narratives persist in the public sphere[80]; for instance, it is a commonplace to argue that the 'European way of life' is based on 'Christian values'.[81] Even European Union (EU) institutions, as noted by McCrea, tend to perceive more readily threats to secular law when they come from minority faiths than when they come from Christianity.[82] This approach, which sets Christianity aside from other religions in Europe, may be termed 'Christian secularism'.[83]

While the European secular identity is inclusive in respect of Christianity, it tends to exclude those that are perceived as 'non-European' and incompatible with the secularist project, especially Muslims, as noted by Asad.[84] Islam is often assumed to be incompatible, in particular, with women's autonomy and freedoms.[85] The controversies regarding the Islamic headscarf can be understood from this perspective. The visibility of the Islamic headscarf is often seen as problematic because it challenges the 'secular normality' of Europe.[86] The headscarf is not necessarily intended to function as a 'symbol' (a sign used to represent something else)[87] or to express religiosity, but is used for a variety of purposes, notably to comply with religious requirements.[88] Nonetheless, in the European public debate, the headscarf is often presented as

[76]See, eg, L Zucca, *A Secular Europe: Law and Religion in the European Constitutional Landscape* (Oxford University Press 2012) 23–44.

[77]R Bhargava, 'How Secular Is European Secularism?' 16 (2014) European Societies 329.

[78]See GA Zurlo, 'Religions in Europe: A Statistical Summary' in G Davie and LN Leustean (eds), *The Oxford Handbook of Religion and Europe* (Oxford University Press 2021) 793–8.

[79]AS Lauwers, 'Religion, Secularity, Culture? Investigating Christian Privilege in Western Europe' 23 (2023) Ethnicities 403.

[80]J Torpey, 'A (Post-) Secular Age? Religion and the Two Exceptionalisms' 77 (2010) Social Research: An International Quarterly 269.

[81]See, eg, European People's Party, 'EPP Manifesto' (EPP 2019) <https://www.epp.eu/papers/epp-manifesto/> accessed 16 February 2024, 5: 'We have to protect our European way of life by preserving our Christian values'.

[82]R McCrea, 'Faith at Work: The European Court's Headscarf Ruling' (UCL European Institute, 28 March 2017) <https://www.ucl.ac.uk/european-institute/news/2017/mar/faith-work-european-courts-headscarf-ruling> accessed 16 February 2024; R Mccrea, *Religion and the Public Order of the European Union* (Oxford University Press 2014).

[83]See, further, inter alia, M Okwueze, 'Religion, Culture and Secularism: Beyond the Western Paradigm' in U Okeja (ed), *Religion in the Era of Postsecularism* (Routledge 2019) 83–102.

[84]T Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford University Press 2003).

[85]N van den Brandt, 'Secularity, Gender, and Emancipation: Thinking through Feminist Activism and Feminist Approaches to the Secular' 49 (2019) Religion 691.

[86]N Jeldtoft, 'The Hypervisibility of Islam' in N Dessing and L Woodhead (eds), *Everyday Lived Islam in Europe* (Routledge 2013) 23–38, 26. See also Asad (n 84) 165; van den Brandt (n 85).

[87]See, eg, the definition of 'symbol' in the Cambridge Dictionary, at <https://dictionary.cambridge.org/dictionary/english/symbol> accessed 14 March 2024.

[88]N Karaman and M Christian, '"Should I Wear a Headscarf to Be a Good Muslim Woman?": Situated Meanings of the Hijab Among Muslim College Women in America' 92 (2022) Sociological Inquiry 225. See also Federal Constitutional Court of Germany, judgement of the Second Division of 24 September 2003, 2BvR 1436/042, paras 50–52.

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a uniform of Islamic extremism,[89] a sign linked to terrorism,[90] and a symbol of repressive attitudes toward women.[91] According to some critics of Islam, women with a headscarf maintain a 'false consciousness' and are not entirely free.[92] This may explain why, in various European countries, public opinion tends to disapprove of the use of headscarves by schoolgirls and workers.[93] Against this background, it is perhaps not surprising that prohibitions of religious symbols in European countries, while usually formulated in neutral terms, affect mostly women who wear a headscarf because of their Muslim faith.[94]

Bans of religious symbols, introduced by public authorities or private employers, have repeatedly been brought to the attention of the European Courts. As noted by Weiler, the European Courts are likely to be wary about upending practices, such as the ban of religious symbols, 'which are rife throughout many Member States'.[95] In other words, there is arguably a 'dominant interest' in upholding headscarf bans in Europe. Some authors indeed suggested that the European Courts adopted a lenient approach in their case law, to the point that the scrutiny of headscarf bans was almost absent.[96] The literature particularly noted that early ECtHR case law employed biased *discourses*, including a stereotypical representation of Muslim women as passive subjects.[97] Skeet argued that the ECtHR's representations 'seemed redolent of the colonial discourses' that 'constructed Orientalised women differently to "Western" women and to Orientalised men'.[98] Peroni, who conducted a Critical Discourse Analysis (an approach we also use), argued that, by 'backgrounding' Muslim women, the ECtHR excluded 'all possibility of balancing the importance of their practices' against 'the importance of the public interests or rights of others at issue'.[99] The literature thus suggested that the ECtHR occasionally employed biased discourses regarding religious symbols, particularly in its early case law. However, it has neither systematically investigated the discourses of the European Courts about religious symbols nor fully explained how such discourses have influenced their adjudication. The present article seeks to fill this gap by systematically analysing the discourses of the European Courts, aiming to identify the ideological biases underlying them and explaining their role in the courts' argumentation.

4. Methodology

This article aims to explore the discourses of the European Courts about religious symbols and their influence on the courts' adjudication. Our sample includes the judgments on religious

[89]G Evolvi, 'The Veil and Its Materiality: Muslim Women's Digital Narratives about the Burkini Ban' 34 (2019) Journal of Contemporary Religion 469.

[90]J Freedman, 'The Headscarf Debate: Muslim Women in Europe and the 'War on Terror'' in K Rygiel (ed) *(En)Gendering the War on Terror* (Routledge 2008) 169–90.

[91]D Choi et al, 'The Hijab Penalty: Feminist Backlash to Muslim Immigrants' 67 (2023) American Journal of Political Science 291, 13.

[92]Sjöholm (n 10) 636; See also YM Sidani, *Muslim Women at Work: Religious Discourses in Arab Society* (Springer 2017) 89; D Lyon and D Spini, 'Unveiling The Headscarf Debate' 12 (2004) Feminist Legal Studies 333; M Ardizzoni, 'Unveiling the Veil: Gendered Discourses and the (In)Visibility of the Female Body in France 33 (2004) Women's Studies 629; Howard, *Law and the Wearing of Religious Symbols in Europe* (n 11) 37.

[93]M Helbling, 'Opposing Muslims and the Muslim Headscarf in Western Europe' 30 (2014) European Sociological Review 242, 248; M Fernández-Reino et al, 'Discrimination Unveiled: A Field Experiment on the Barriers Faced by Muslim Women in Germany, the Netherlands, and Spain' 39 (2023) European Sociological Review 479.

[94]*WABE and Müller* (n 8), para 59.

[95]JHH Weiler, 'Je Suis Achbita!' 28 (2017) European Journal of International Law 989, 1001.

[96]See eg Howard, *Law and the Wearing of Religious Symbols in Europe* (n 11) 116 and 147; L Vickers, 'Achbita and Bougnaoui: One Step Forward and Two Steps Back for Religious Diversity in the Workplace' 8 (2017) European Labour Law Journal 254.

[97]See, eg, Evans (n 10) 20; Sjöholm (n 10) 646.

[98]Skeet (n 16) 280.

[99]Peroni (n 16) 204.

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symbols of the European Courts[100]: 30 ECtHR judgments (one of which covers two cases) issued between 2001 and 2018,[101] and five ECJ judgments issued between 2017 and 2023.[102]

The judgments in our sample concern different religious symbols. Relatively few cases relate to crucifixes (three ECtHR judgments, one of which covers two cases; two decisions are favourable to allowing the use of the crucifix),[103] symbols worn by Islamic or Sikh men (seven ECtHR judgments, three of which are favourable to the victims),[104] and full-face veils worn by Muslim women (three ECtHR judgments, all of which are unfavourable to the applicants).[105] Most European Courts's rulings concern Muslim women wearing headscarves (17 ECtHR judgments; five ECJ judgments); in all cases but three, the European Courts generally upheld the prohibition of the headscarves.[106] It is worth noting that the ECJ's judgments in our sample – all preliminary rulings – did not resolve the disputes at issue: in the context of preliminary ruling proceedings, that task falls to the referring tribunals.[107] Nonetheless, the ECJ effectively upheld employers' right to prohibit the wearing of religious symbols or, at the very least, granted national authorities considerable discretion in supporting such a right.[108] To ban religious symbols, in compliance with ECJ rulings, employers need only introduce a religious neutrality policy, apply it to all types of religious dress and apply it consistently; private employers should,

[100]Since this article focuses on *judicial* decisions, we did not analyse the decisions of the European Commission of Human Rights, the positions of individual members of the European Courts, or the opinions of ECJ Advocates General.

[101]*Dahlab v Switzerland* App no 42393/98 (ECtHR, 15 February 2001); *Şahin v Turkey* (Chamber) App no 44774/98 (ECtHR, 29 June 2004); *Phull v France* App no 35753/03 (ECtHR, 11 January 2005); *Şahin v Turkey* (Grand Chamber) App no 44774/98 (ECtHR, 10 November 2005); *Köse v Turkey* App no 26625/02 (ECtHR, 24 January 2006); *Kurtulmuş v Turkey* App no 65500/01 (ECtHR, 24 January 2006); *Araç v Turkey* (ECtHR, 19 September 2006); *Tandoğan v Turkey* App no 41298/04 (ECtHR, 2 April 2007); *El Morsli v France* App no 15585/06 (ECtHR, 4 March 2008); *Yilmaz v Turkey* App no 37829/05 (ECtHR, 20 September 2008); *Mann Singh v France* App no 24479/07 (ECtHR, 13 November 2008); *Dogru v France* App no 27058/05 (ECtHR, 4 December 2008); *Kervanci v France* App no 31645/04 (ECtHR, 4 December 2008); *Aktas v France* App no 43563/08 (ECtHR, 30 June 2009); *Bayrak v France* App no 14308/08 (ECtHR, 30 June 2009); *Gamalledyn v France App no* 18527/08 (ECtHR, 30 June 2009); *Ghazal v France App no* 29134/08 (ECtHR, 30 June 2009); *Singh J v France* App no 25463/08 (ECtHR, 30 June 2009); *Singh R v France* App no 27561/08 (ECtHR, 30 June 2009); *Lautsi v Italy* (Chamber) (ECtHR, 3 November 2009); *Arslan and Others v Turkey* App no 41135/98 (ECtHR, 23 February 2010); *Lautsi v Italy* (Grand Chamber) App no 30814/06 (ECtHR, 18 March 2011); *Eweida and others v UK*, App no 48420/10, 59842/10, 51671/10, and 36516/10 (ECtHR, 15 January 2013) (the *Eweida* judgment concerns the *Chaplin* case, too); *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014); *Ebrahimian v France* App no 64846/11 (ECtHR, 26 November 2015); *Sodan v Turkey* App no 18650/05 (ECtHR, 2 February 2016); *Belcacemi and Oussar v Belgium* App no 37798/13 (ECtHR, 11 July 2017); *Dakir v Belgium* App no 4619/12 (ECtHR, 11 July 2017); *Hamidovic v Bosnia & Herzegovina* App no 57792/15 (ECtHR, 5 December 2017); *Lachiri v Belgium* App no 3413/09 (ECtHR, 18 December 2018). We excluded two ECtHR cases from the analysis, as the applicants were ruled against on procedural grounds and, therefore, no discourse was produced about religious symbols: *Çağlayan v Turkey*, App no 1638/04 (ECtHR, 29 January 2008); *Edidi v Spain* App no 21780/13 (ECtHR, 26 April 2016).

[102]Case C-157/15 *Achbita* ECLI:EU:C:2017:203; Case C-188/15 *Bougnaoui* ECLI:EU:C:2017:204; *WABE and Müller* (n 8); Case C-344/20 *S.C.R.L.* ECLI:EU:C:2022:774; Case C-148/22 *Commune d'Ans* ECLI:EU:C:2023:378. The relatively low number of ECJ cases might be due to the limited scope of EU rules on non-discrimination on the grounds of religion, which are contained mainly in Directive 2000/78/EC; this Directive indeed applies to employees but not, for instance, to school pupils. See Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303/16.

[103]*Eweida and others* (n 101), concerning the case of *Chaplin*, too; *Lautsi* (Grand Chamber) (n 101).

[104]*Arslan* (n 101); *Hamidovic* (n 101); *Sodan* (n 101). The latter case is included in this category even though the applicant was a male who lamented a human rights violation motivated inter alia by the fact that his wife wore a *hijab.*

[105]*S.A.S* (n 101); *Belcacemi* (n 101); *Dakir* (n 101).

[106]See *Lachiri* (n 101); *Bougnaoui* (n 102); *Müller* (n 102).

[107]The relevant rules are summarised in ECJ, Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, OJ 2019/C 380/01, pp 8–11.

[108]E Howard, *Headscarves and the Court of Justice of the European Union: An Analysis of the Case Law* (Taylor & Francis 2023); see M Leal-Adorna, 'El Velo Islamico Como Causa de Despido En Empresas Privadas' 15 (2023) Cuadernos de Derecho Transnacional 709, 733–4. See *Achbita* (n 59) at 30–34; *WABE and Müller* (n 8), paras 52–55 and 60; *S.C.R.L* (n 8), paras 33–37; *Commune d'Ans* (n 59).

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in addition, apply their ban only to front-office employees and should consider whether such employees could be transferred to a back-office job.[109]

Our analysis focused on the courts' argumentation: the section 'The Law' in the case of the ECtHR cases; the section 'Consideration of the questions referred' for the ECJ judgements.[110] We analysed the texts in the English version when a European Court published an official judgement in that language; for other cases, we used the official French version. The ECtHR decided its cases primarily based on Article 9 of the ECHR (freedom of religion or belief)[111]; the ECJ applied mostly the right to non-discrimination set out in Directive 2000/78/EC.[112] The tests applied by the two courts are different but comparable: as noted by Howard, they all 'include a proportionality test where the means used to achieve a legitimate and pressing aim must be proportionate and necessary'.[113] In other words, the European Courts ascertained, in each case, whether the prohibition (or imposition) of religious symbols pursued a legitimate objective (such as protecting security, public order, or the rights of others) and was proportionate and necessary.[114] Since the two European Courts applied similar legal standards in analogous cases, they potentially used similar discourses and narratives, which can be usefully compared for our purposes.

While traditional doctrinal analyses can occasionally reveal the presence of bias in judicial decisions (see above, Section 3), they are not meant to emphasise this issue and may fail to highlight bias that is well hidden in the 'subtext' of a judgment. This risk particularly concerns judgments of courts, such as the ECJ, that employ a 'formalistic' and 'abstract' style.[115] In the context of preliminary rulings, the ECJ must indeed answer 'abstract' questions of interpretation.[116] Moreover, the ECJ operates under the 'principle of collegiality' and, consequently, its decisions are unlikely to reveal the value judgments of individual judges.[117]

To better unearth the biased discourses used by the European Courts, we employed Critical Discourse Analysis. This approach may be defined as an analysis of texts aimed at highlighting aspects that contribute to support and legitimise 'dominance', intended as 'the exercise of social power by elites, institutions, or groups, that results in social inequality'.[118] While the dominant

[109]See Brems et al (n 11) 907. In *WABE and Müller*, the ECJ held that employers must demonstrate a genuine need to introduce restrictions regarding the use of religious signs, see *WABE and Müller* (n 8), para 64; *S.C.R.L* (n 102), para 40, see E Howard, 'LF v SCRL and the CJEU's Failure to Engage with the Reality of Muslim Women in the Labour Market' 52 (2023) Industrial Law Journal 997, 998; however, to demonstrate such a need, employers may simply allege the generic intention to accommodate the 'wishes of customers or users' see *WABE and Müller* (n 8), paras 65–67. National law may introduce more stringent requirements (Ibid., paras 79–90); this issue, at any rate, falls beyond the scope of this article.

[110]Although a court's description of facts may be relevant for its narrative, we did not analyse the factual parts of the judgments of the European Courts because they do not necessarily contain discourses created by them. The ECJ, in particular, cannot assess facts on its own when it deals with preliminary references; consequently, it may describe them by using the words of the referring tribunals. Therefore, a discourse analysis of the factual part of the ECJ judgments may lead one to appraise, not the discourses of the ECJ, but those of the referring tribunals; for an example, see below, n 136. As noted by Papke, at any rate, even a court's assessment of the *law* is 'laden with narrative vignettes designed to capture, among other things, precedents, different cases, hypothetical scenarios, and even expanded versions of the restatement of facts for the case at hand', DR Papke, 'Discharge As Denouement: Appreciating the Storytelling of Appellate Opinions' 40 (1990) Journal of Legal Education 145, 207.

[111]In some cases, the ECtHR applied also Art 6, 8, and 14 ECHR, and/or Art 2 of the First Protocol to the ECHR.

[112]The ECJ also applied Art 10 and 21 of the EU Charter of Fundamental Rights.

[113]Howard, *Law and the Wearing of Religious Symbols in Europe* (n 11) 149, 151, 163, and 203–6.

[114]Since the proportionality doctrine 'tends to collapse, as many have noted, into unstated a priori value-choices ... rooted in unexamined value preferences' (J Garcia Blesa, 'Proportionality Rhetoric and Neoliberal Rationality in the "Fundamental Social Rights" Adjudication of the Court of Justice of the European Union' 11 (2023) London Review of International Law 159, 161) one may expect the European Courts' discourses to refer to values (revealing ideological bias) in the application of proportionality.

[115]Skrbic (n 27) 568–9.

[116]V Passalacqua and F Costamagna, 'The Law and Facts of the Preliminary Reference Procedure: A Critical Assessment of the EU Court of Justice's Source of Knowledge' 2 (2023) European Law Open 322, 343.

[117]Ćapeta (n 27) 101–2.

[118]TA van Dijk, 'Principles of Critical Discourse Analysis' 4 (1993) Discourse & Society 249, 249–50.

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ideas in a society may reflect different values and interests, our analysis focuses on discursive strategies aimed at maintaining social inequality,[119] eg, through the stereotyping of minorities.

Critical Discourse Analysis focuses on language, taking into account lexical choices, sentence structures, and elements that are implicit or purposefully left unsaid. It is routinely employed in various disciplines and is increasingly applied to legal texts.[120] While Critical Discourse Analysis and legal doctrine share a common interest in language, they have different approaches: one may consider a particular sentence to be sound from a doctrinal perspective and yet problematic because of its ideological assumptions.[121] For instance, from a doctrinal perspective, a court may arguably hold that religious signs can be prohibited to prevent 'tensions' within schools and workplaces. However, from a discourse analysis standpoint, it is problematic if the court's language suggests that a headscarf, per se, causes such 'tensions' (as discussed in Section 9 below).[122]

It should be noted that while judges have a degree of discretion, this discretion applies to the application of the law, not to the language used in judgments. Arguably, judges should avoid stereotyping in their reasoning.[123] For example, in *Dahlab*, the ECtHR may have deemed Switzerland compliant with the ECHR within its discretion. However, its characterisation of Islamic precepts as 'hard to square with the principle of gender equality' reveals a bias (see Section 5 below).

Critical Discourse Analysis can be used to challenge 'generally accepted interpretations of law by critically analysing and revealing their underlying concepts and taken-for-granted assumptions'.[124] Such assumptions, from the perspective of the legal practitioner, may indeed 'appear as natural' because they are interwoven in the legal system and correspond to the prevailing discourses in their society.[125]

Since this article employs Critical Discourse Analysis, it does not focus on the application of the law in doctrinal terms but rather on the *language* used by the European Courts to justify their interpretation and application of the law. For instance, we do not analyse how the ECtHR applied the 'margin of appreciation' in *Eweida* (a doctrinal issue). Instead, we focus on the language the Court used to describe Ms. Eweida and her actions, and how this description shapes the Court's narrative. We adopt this approach by combining our expertise: the first author is an EU law scholar, while the second author is a social scientist with extensive experience in Critical Discourse Analysis.

By applying Critical Discourse Analysis to the judgments on religious symbols, we sought to reveal the 'subtext' underlying the discourse of the European Courts and thus explore their narrative strategies (see above, Section 2). The research began by identifying recurrent

[119]See Ibid., 250.

[120]See, in particular, L Cheng and D Machin, 'The Law and Critical Discourse Studies' 20 (2023) Critical Discourse Studies 243; Z Godzimirska, 'The Legitimation of International Adjudication' 15 (2024) Journal of International Dispute Settlement 35; Stoppioni (n 51); A Potts and AL Kjær, 'Constructing Achievement in the International Criminal Tribunal for the Former Yugoslavia (ICTY): A Corpus-Based Critical Discourse Analysis' 29 (2016) International Journal for the Semiotics of Law – Revue internationale de Sémiotique juridique 525; Peroni (n 16); J Niemi-Kiesiläinen et al, 'Legal Texts as Discourses' in Å Gunnarsson et al (eds), *Exploiting the Limits of Law* (Ashgate 2007) 69–88; K Peruzzo, '"Trans", "Transgender" and "Transsexual" in Case Law: A Corpus- Assisted Analysis of ECtHR Judgments' in EL Jiménez-Navarro and LM Martínez Serrano (eds), *Where Gender and Corpora Meet: New Insights into Discourse Analysis* (Peter Lang 2024) 157–80.

[121]Niemi-Kiesiläinen et al (n 120).

[122]It has been argued that the prevention of social conflicts cannot justify prohibiting an Islamic headscarf because 'a Muslim woman wearing a headscarf observes her religious beliefs; she is not proselytizing for them', M van Den Brink, 'The Protected Grounds of Religion and Belief: Lessons for EU Non-Discrimination Law' 24 (2023) German Law Journal 855, 879. At any rate, even if the European Courts had assumed that women wearing headscarves did *not* engage in proselytism, they could have concluded that they generated social 'tensions', by postulating – as they did – that headscarves cause 'disturbances' (see, eg, the ECtHR case *Dogru*, discussed below, in Section 9).

[123]See, eg, *J.L. v Italy* (n 14), para 141.

[124]Niemi-Kiesiläinen et al (n 120); see also Potts and Kjær (n 120) 529.

[125]Cheng and Machin (n 120) 248.

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(bias-related) themes and organising them through the data analysis software Atlas.ti. Then, we performed a Critical Discourse Analysis to understand how themes were discursively framed and connected to the dominant values in Europe and, thus, to social inequality. Finally, we identified the narratives created from these discourses and elucidated their role in justifying the judgements of the European Courts.

5. Agency of women wearing symbols

The most evident bias in the case law of the European Courts concerns the *agency* of women wearing Islamic symbols; this constitutes the first theme we identified in the case law.[126] Consistently with mainstream discourses about Islam (see above, Section 3), the judgments of the European Courts tended to reproduce the stereotype of Muslim women as passive subjects and victims.

This stigmatisation is *explicit* in the early ECtHR case law. In *Dahlab* (2001), the ECtHR affirmed that the headscarf is 'imposed' on women by a religious precept, which is 'hard to square with the principle of gender equality'.[127] This statement or similar formulas were reproduced in subsequent ECtHR judgments (*Şahin*, 2005, *Köse*, 2006, *Dogru*, 2008, and *Kervanci*, 2008).[128] In more recent judgments (post-2008), the ECtHR refrained from expressly stigmatising the Islamic headscarf.[129] This change in the ECtHR's approach might be explained, at least in part, by the criticism received on its early case law[130]: arguably, the early ECtHR judgments did not adequately 'conceal' biased discourses and did not appear sufficiently 'neutral' to the jurists in the Court's audience.

The ECJ, which issued its first judgment in this area in 2017, avoided any express stigmatisation of headscarves. Unlike the ECtHR, which criticised the Islamic 'imposition' of headscarves, the ECJ expressly refrained from assessing the 'content of religious precepts'.[131]

While explicit stigmatisation of headscarves appears only in relatively few (and old) ECtHR judgments, numerous judgments of both European Courts *implicitly* undermined the agency of Muslim women. According to Peroni, *Dahlab* and *Şahin* de-emphasised the perspective of Muslim women through nominalisation and passivisation.[132] Our analysis suggests that the ECtHR used these techniques throughout its case law. For instance, in *Aktas*, *Bayrak*, *Gamaleddyn*, and *Ghazal* (2009), the ECtHR held that 'the fact of wearing a headscarf' is, in itself, an ostensible manifestation of religion (an instance of nominalisation).[133] Later, in *Ebrahimian* (2015), the ECtHR upheld a headscarf ban because the fact of wearing a veil 'was perceived' as an ostentatious manifestation of religion (a case of passivisation).[134] Having de-emphasised the viewpoint of women wearing headscarves, the ECtHR focused its discourse on the perspective of their alleged 'victims': a headscarf ban may be necessary to protect fragile individuals from 'any risk of influence or partiality, in the name of *their* right to freedom of conscience' (in the absence of any evidence regarding such an influence).[135]

[126] See above, Section 4.

[127] *Dahlab* (n 101).

[128] *Şahin* (Chamber) (n 101), para 98; *Şahin* (Grand Chamber) (n 101), para 111; *Köse* (n 101), pp 10–11; *Dogru* (n 101), para 64; *Kervanci* (n 101), para 64.

[129] Brems et al (n 11) 902.

[130] On the relevance of the views of courts' audiences, see above, Section 2.

[131] *WABE and Müller* (n 8), para 46.

[132] See, above, text to n 67–n 70.

[133] *Ghazal* (n 101), p 8 (translation by the authors); see also *Aktas, Bayrak*, and *Gamaleddyn* (n 101); ECtHR, *Ebrahimian* (n 101), paras 62 and 69.

[134] *Ebrahimian* (n 101), para 62.

[135] Ibid., para 63 (italics added).

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ECJ judgments are characterised by comparable (though not identical) patterns. The ECJ never referred to the intentions of Muslim women.[136] It rather emphasised the intentions of their employers. A municipal administration '*intend[ed]* to impose on its employees' a policy of neutrality.[137] Private employers prohibited religious symbols out of a legitimate '*desire* to display … a policy of political, philosophical or religious neutrality'.[138] Employers '*wish[ed]* to project an image of neutrality'[139]; they could take account of the 'legitimate *wishes*' of their customers, who could '*wish* to have their children supervised by persons who do not manifest their religion'.[140] In other words, employers and customers are central to the ECJ discourse: they are active subjects (and they are indeed the subjects of verbs in the active form). By contrast, the wishes of Muslim workers – and, consequently, their agency – are left in the background.

The tendency of both European Courts to background Muslim women contrasts with the emphasis the ECtHR placed on the agency of Christian women. In *Eweida* and *Chaplin*, the ECtHR did not use nominalisation when referring to the use of crucifixes (but it curiously employed this technique when discussing 'the wearing of other … items of religious clothing, such as turbans and hijabs, by other employees').[141] The Court explicitly acknowledged the personal value of religious symbols for Ms Eweida, an individual 'who has made religion a central tenet' of her life.[142] Additionally, the Court noted Ms. Chaplin's 'determination' to wear the crucifix and emphasised that Ms. Eweida 'decided' to arrive at work displaying her cross due to her 'desire' to bear witness to her faith and her 'desire' to manifest her beliefs.[143] This language contrasts, for instance, with *Ebrahimian*, where the ECtHR referenced neither the applicant's 'decision' nor her 'desire' to wear a headscarf (see above).[144] Furthermore, in *Ebrahimian*, the ECtHR stated that the applicant's '*religious beliefs meant* that it was important for her to manifest her religion by visibly wearing a veil' – positioning the importance of religion not as a personal choice (as in *Eweida*), but as a consequence of beliefs themselves.[145] The ECtHR thus implicitly set Christianity aside from a minority religion, such as Islam, consistently with the approach that we termed 'Christian secularism' (see above, Section 3).

The European Courts' approach to women wearing headscarves contrasts not only with the ECtHR case law on Christian applicants but also with ECtHR judgments regarding other individuals. The ECtHR never questioned the agency of *men*.[146] This can be appreciated by comparing *Hamidovic* (2017)[147] to *Lachiri* (2018).[148] The cases have similar factual patterns and outcomes: both applicants were excluded from courtrooms because they wore religious symbols

[136]In *Achbita*, the ECJ noted that Ms. Achbita 'persisted in *wishing* to manifest that faith, visibly' (para 18, italics added). However, this consideration is part of the factual assessment of the case ('The dispute in the main proceedings and the question referred for a preliminary ruling'), a section of the judgment outside the scope of our analysis (see *supra*, Section 4). It should be noted, at any rate, that, in this part of the judgment, the ECJ quotes the referring court, which had found that Ms. Achbita was dismissed because of her 'intention' ('*voornemen*') to 'express visibly her faith' ('*zichtbaar uiting te geven aan die geloofsovertuiging*'), see Belgian Higher Court, decision of 9 March 2015, <https://bib.kuleuven.be/rbib/collectie/archieven/arrcass/2015/03.pdf>, accessed 14 March 2024, p 656). According to Weiler (n 95) 990, the ECJ cited the referring court 'approvingly'. However, it cannot be excluded *a priori* that the ECJ quoted the referring court simply because it was summarising the appraisal of facts performed by that court; see, further, *supra*, n 110.

[137]*Commune d'Ans* (n 102), para 33 (italics added).

[138]*Achbita* (n 102), para 37 (italics added); see also *WABE and Müller* (n 8), paras 63–64; *S.C.R.L* (n 102), paras 39–40.

[139]*Achbita* (n 102), para 38 (italics added); *WABE and Müller* (n 8), para 63; *S.C.R.L* (n 102), para 39.

[140]*WABE and Müller* (n 8), para 65 (italics added); see also paras 60 and 70.

[141]*Eweida and others* (n 101), para 94.

[142]Ibid., para 94.

[143]Ibid., paras 89, 93, 94, and 97.

[144]*Ebrahimian* (n 101). See also n 133.

[145]Ibid., para 70 (italics added).

[146]See, eg, *Mann Singh* (n 101), para 5; the exceptions being *Singh J* and *Singh R* (n 101), which are almost identical to other judgments, concerning headscarves, adopted the same day (*Aktas, Bayrak, Gamaleddyn*, and *Ghazal* (n 101)).

[147]*Hamidovic* (n 101).

[148]*Lachiri* (n 101).

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and both judgments favoured the applicants. However, Hamidovic was a Muslim *man* wearing a skullcap, while Lachiri was a *woman* wearing a headscarf. In *Hamidovic*, the ECtHR held that the applicant's decision to wear a skullcap was 'inspired' by his 'sincere' religious belief.[149] Although *Lachiri* quoted *Hamidovic* in many respects, it did not refer to the 'inspiration' of the (female) applicant or the 'sincerity' of her beliefs. Through this seemingly deliberate omission, the ECtHR seems to de-emphasise the agency of a Muslim woman wearing a headscarf.

Perhaps counterintuitively, the ECtHR's stressed the agency of women wearing full-face veils: 'a State Party cannot invoke gender equality in order to ban a practice that is defended by women' (*S.A.S.*, 2014).[150] Wearing a full-face veil, the ECtHR noted, may be a way for women to express their 'personality' and their 'convictions' (*Belcacemi*, 2017).[151] Such statements are absent from prior or successive judgments on Islamic headscarves. This apparent inconsistency in the case law may be explained, at least in part, by the ECtHR's argumentative strategy. Since the ECtHR assumed that covering one's face could inherently infringe a 'principle of interaction between individuals'[152] (as discussed below)[153] it did not need to question whether the women concerned voluntarily covered their faces. In other words, to rule against the full-face veil, the Court did not need to downplay Muslim women's perspectives. It could even highlight their autonomy, thus appealing to another segment of the ECtHR's audience, ie, the commentators who had criticised the Court's 'paternalism'.[154]

One may wonder why the ECtHR emphasised the agency of Christians, men, and women wearing full-face veils, while neither the ECtHR nor the ECJ stressed the agency of women wearing headscarves. For instance, the Courts could have acknowledged Muslim women's *determination* to wear the headscarf (see *Chaplin*), driven by a *desire* to manifest their religion, given that they have *made religion a central tenet* of their lives (see *Eweida*) and are *inspired* by *sincere* beliefs (see *Hamidovic*). Wearing the headscarf may indeed be described as a way for women to express their *personality* and *convictions* (see *Belcacemi*). Such a discourse would have been consistent with the intentions expressed by the women concerned. For example, Ebrahimian alleged that she 'wore a simple head covering, which was anodyne in appearance' and was 'intended to hide her hair'.[155]

Admittedly, focusing on the perspectives of individuals wearing religious symbols may not have been essential from a strictly legal standpoint. However, it is significant that the ECtHR considered such perspectives in cases involving Christians, men, and even women wearing full-face veils, but not in cases involving women wearing hijabs. Likewise, it is noteworthy that the ECJ placed considerable emphasis on the 'wishes' of employers and customers, while making no mention of the 'wishes' of Muslim women.

A possible explanation for the limited attention to the perspectives of women wearing headscarves lies in the narrative strategy of the European Courts. To justify headscarf bans, the Courts needed to argue that these symbols had negative effects on others. Emphasising the perspectives of women wearing headscarves would have undermined the Courts' frequent assumptions that these women were ostentatious in their religiosity, proselytised to children, or caused tensions and conflicts. For instance, the ECtHR's argument would have been unconvincing if it had characterised Ebrahimian's 'simple head covering' as an *ostentatious* manifestation of her religion.

Since there was no evidence that women wearing headscarves affected others, the European Courts justified their decisions by narrating 'stories' that ignored the women's views. For instance,

[149] *Hamidovic* (n 101), para 41.

[150] *S.A.S* (n 101), para 119.

[151] *Belcacemi* (n 101), para 52; *Dakir* (n 101), para 55; see also *S.A.S* (n 101), para 119.

[152] *S.A.S* (n 101), para 153.

[153] See below, Section 8.

[154] On the ECtHR's paternalism, see, eg, Dissenting opinion of Judge Tulkens in ECtHR, *Şahin* (Grand Chamber) (n 101), para 98.

[155] *Ebrahimian* (n 101), para 38.

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the ECtHR assumed that Ebrahimian's head covering was 'ostentatious' by focusing on the alleged perceptions of others (as shown below, in Section 7).

The European Courts thus appear to have engaged in 'narrative banalisation': they adopted a socially conventional discourse, characterising Muslim women as passive subjects, and implicitly presented it as a 'fact' that underpinned their narrative. By placing the women's views out of focus, the European Courts were able to develop assumptions about the purpose and impact of the hijabs, as discussed in the following sections.

6. Purpose of religious symbols

Since the European Courts de-emphasised the viewpoint of women, as seen in the previous section, they could integrate several stereotypes in their narration, particularly about the *purpose* of Islamic headscarves (this constitutes the second theme we identified in the case law). These symbols are often regarded as problematic due to their visibility.[156] In the European public discourse, it is often assumed that 'the proper place for religion is the private domain – not the public, which belongs to "the secular"'.[157] The public use of garments associated with a religion, therefore, is frequently presented as an 'ostentation' of religious affiliation.[158]

Consistently with this trope, the ECtHR systematically assumed that Muslim women using the headscarf intended to manifest their religious belonging. For instance, in *Ebrahimian*, the ECtHR held that public authorities could prohibit 'the wearing of a sign *intended to indicate* ... adherence to a religion'.[159] Yet, nothing suggests that the applicants wore a headscarf to express religious affiliation; in some cases, they even tried to make their religious affiliation *less* evident by wearing head covers not commonly associated with Islam. For example, Bayrak, Dogru, and Ebrahimian replaced their headscarves with hats ('*bonnets*' or '*coiffes*') which, according to them, 'did not have any religious connotation'.[160] In *Ebrahimian*, the ECtHR even postulated, with no explanation, that the applicant's head cover 'resemble[d] a scarf or an Islamic veil' and referred to the *coiffe* as a 'veil' throughout its decision.[161] Defining both *coiffes* and headscarves as 'veils' is a rhetorical stratagem: by so doing, the ECtHR stressed the commonality between these objects (their abstract ability to express religious affiliation) and concealed their difference (the wearer's intention to express or conceal religious affiliation).[162] This stratagem is enabled by a narrative banalisation: the ECtHR's approach may seem reasonable, at first sight, since there is a tendency, in the European public discourse, to label all Islamic head covers as 'veils'.[163]These rhetorical stratagems contribute to justify argumentatively the ECtHR's assumption: a simple hat, in the ECtHR's narrative, is inevitably intended to indicate one's religious affiliation.

The ECtHR further disregarded the applicants' views by assuming that they wore headscarves to express religious affiliation *inappropriately*. In its early case law, the ECtHR argued that the 'wearing of a headscarf might have some kind of proselytising effect' (*Dahlab*), thus implying that the headscarf is meant to convert others (a view reiterated in *Şahin* and *Dogru*).[164] Subsequently,

[156]See above, Section 3.

[157]Jeldtoft (n 86) 25–6.

[158]See, eg, *Circulaire* of 20 September 1994 (*circulaire Bayrou*), Bulletin official de l'Education nationale n° 35, 29 September 1994; see, further, Ardizzoni (n 92); for an example, see 'Voile des assesseuses, burkini: faut-il interdire le port de signes religieux ostentatoires dans l'espace public?' (*Le Figaro*, 2 July 2021).

[159]*Ebrahimian* (n 101), paras 51 and 64; see also, eg, *Kurtulmuş* (n 101), p 6; *Aktas* (n 101), p 9.

[160]*Bayrak* (n 101), pp 5 and 8 (translation by the authors); *Dogru* (n 101), para 75; *Ebrahimian* (n 101), paras 46 and 64; *Aktas* (n 101), p 9; *Ghazal* (n 101), pp 7–8; *Gamaleddyn* (n 101), p 9. The ECtHR made a similar assumption about the head coverings of Sikh applicants, see *Singh J* (n 101), p 8; *Singh R* (n 101), p 8.

[161]*Ebrahimian* (n 101), para 46.

[162]On this rhetorical stratagem, see Perelman, *The New Rhetoric and the Humanities* (n 37) 210.

[163]See, eg, 'Niqab, Hidjab, Burqa: Des Voiles et Beaucoup de Confusions' (*Le Monde*, 10 June 2015).

[164]*Dogru* (n 101), para 63; *Şahin* (Chamber) (n 101), para 98; *Şahin* (Grand Chamber) (n 101), para 111.

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the ECtHR referred to the wearing of a headscarf as an 'ostentatious' manifestation of religion (*Köse*, 2006),[165] an 'ostentatious act' (*Dogru*, 2008)[166] or a 'conspicuous manifestation' of religion (*Aktas*, 2009).[167] The ECtHR did not motivate the description of the headscarf as an ostentatious symbol. Nonetheless, it had an 'ostentatious nature',[168] apparently, because it was '*perceived* as an ostentatious manifestation of [...] religion' (*Ebrahimian*).[169] In other words, the ECtHR determined the purpose of the headscarf by ignoring the perspective of Muslim women and focusing on the purported views of hypothetical third parties that endorsed widespread prejudices about the Islamic headscarf.

The ECtHR's assumptions about the purpose of headscarves can be contrasted with its depiction of other symbols. The ECtHR never described men's symbols as 'ostentatious'. For instance, in *Arslan*, the ECtHR simply spoke of the applicants' 'clothing' ('*tenue vestimentaire*'),[170] although said clothing – including a black turban, black tunic, black trousers, and staff – is not less conspicuous than a woman's headscarf.[171] The ECtHR did not employ the adjective 'ostentatious' in respect of the full-face veil, either (even if this object is certainly more visible than a headscarf); the ECtHR acknowledged that the full-face veil 'is the expression of a cultural identity', even though it 'is perceived as strange by many'.[172] This approach contrasts with the ECtHR's approach to the headscarf, which it labelled as 'ostentatious' because it was 'perceived' as such (*Ebrahimian*, see above).

The ECtHR's judgements about Christian symbols are even more remarkable. In *Eweida* and *Chaplin*, the applicants insisted 'on wearing a cross visibly at work'[173] and refused to conceal it under their clothing.[174] Nonetheless, according to the ECtHR, Eweida's cross was 'discreet' and was simply intended to 'communicate' her belief to others.[175] It would seem that, according to the ECtHR, a Muslim woman 'ostentatiously' displays her religion, even if she makes it *less* visible by wearing a hat instead of a *hijab;* a Christian woman 'communicates' her religion in a 'discreet' way, even if she makes her symbol *more* visible by refusing to wear it under her clothing.

There are several ways to explain the inconsistency in the ECtHR's assessment of the symbols' purposes. The ECtHR might have perceived the headscarves worn by women as more 'ostentatious' than the symbols worn by men because the former are more visible in European societies. The applicants in *Hamidovic* and *Arslan*, in fact, belong to small Islamic movements, which, in the eyes of national authorities, are a 'curiosity' more than a threat.[176] Similar considerations apply to the full-face veil, which, as noted by the ECtHR, only affects 'a small number of women' in France.[177] The ECtHR's even friendlier attitude towards the crucifix might be motivated by what we termed as 'Christian secularism', ie, considering Christianity compatible with secularism (unlike Islam). A complementary explanation relates to the narrative of the ECtHR, and is presented at the end of this section, after discussing the ECJ case law.

[165] *Köse* (n 101), p 14: 'un acte ostentatoire' (translation by the authors).

[166] *Dogru* (n 101), para 71; *Aktas* (n 101), p 8.

[167] *Aktas* (n 101), p 8: 'manifestation ostensible' (translation by the authors).

[168] *Ebrahimian* (n 101), para 69; see also para 62. In *Kurtulmuş*, the ECtHR used a partially different language, by affirming that the use of a headscarf may violate a public servant's duty of discretion, officially translated as 'a duty to refrain from any *ostentation*' (italics added), *Kurtulmuş* (n 101), p 5.

[169] *Ebrahimian* (n 101), para 62.

[170] *Arslan* (n 101), para 46 (translation by the authors); see also paras 33, 35, and 49.

[171] Ibid., para 7.

[172] *S.A.S* (n 101), para 120; see also paras 76–7 and 79.

[173] *Eweida and others* (n 101), para 89.

[174] Ibid., paras 12 and 98.

[175] Ibid., para 94. See also Opinion of Advocate General Rantos in Joined cases C-804/18 and C-341/19 *WABE and Müller* ECLI:EU:C:2021:144, para 73.

[176] *Arslan* (n 101), para 51 (translation by the authors).

[177] *S.A.S* (n 101), para 145.

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Unlike the ECtHR, the ECJ did not make any explicit assumptions about the purpose of the headscarf and employed more neutral language. While the ECtHR labelled the headscarf as 'conspicuous', the ECJ refrained from distinguishing between conspicuous and non-conspicuous signs[178]: the wearing of 'any' religious sign, according to the ECJ, may impact neutrality (see below, Section 7).[179] The ECJ did not even use the word 'symbol' to describe headscarves, preferring the more neutral words 'sign' or 'clothing'. In addition, the ECJ acknowledged that a person may use headscarves to observe 'a precept', rather than manifest religion (*WABE and Müller* and *S.C.R.L.*).[180] Possibly, the ECJ was cautious because it sought to avert the criticisms previously received by the ECtHR.

However, the subtext of ECJ judgements suggests some similarities with the approach of the ECtHR. In *WABE and Müller*, the ECJ assumed that workers with a headscarf engaged in proselytism or other untoward behaviour: employers may prohibit religious symbols, notably headscarves, because they need to guarantee 'the free and personal development of children'[181] and avoid 'social conflicts'.[182] More generally, the ECJ appears to have presumed that Muslim women wore head coverings to 'manifest their religion or belief'.[183] In *S.C.R.L.*, in particular, the worker offered to wear 'another type of head covering', different from the *hijab*, but the employer prohibited it.[184] The Court did not address the issue directly but seemingly postulated that, regardless of the specifics, the employer's measure was aimed at prohibiting any visible sign of 'belief'.[185] It thus appears that even a head covering that does not have any religious connotation, when worn by a Muslim woman, expresses religious beliefs, consistent with the ECtHR's approach in *Bayrak*, *Dogru*, and *Ebrahimian*.

The attribution of 'ostentatious' purposes to the headscarf – as made, to varying extents, by both the ECtHR and the ECJ – could be explained from a narrative perspective. As anticipated in Section 3, a significant part of the European Court's audiences (states and public opinion) expected them to uphold headscarf bans. To fulfil such expectations and preserve the formal coherence of their decisions (as expected by the legal community), the European Courts needed to demonstrate that headscarf bans were proportional and pursued legitimate aims. It was, therefore, necessary to show that the headscarf had a negative impact on others, although such an impact was far from evident.

Nothing suggests that the women concerned by the European Courts' judgments intended to ostentatiously display religion or proselytise. In fact, an object, such as a headscarf, is unlikely to influence others as much as an improper manifestation of religion.[186] To justify headscarf bans, the European Courts narrated 'stories' where these objects were presented as dangerous. Ignoring the actual intentions of the women concerned (as discussed in the previous section), the European Courts characterised any head covering worn by Muslim women as inherently capable of manifesting beliefs, and even as ostentatious or proselytising per se (as discussed in this section). This narrative is effective because it is consistent with widespread stereotypes: it is, in other words, a narrative banalisation.[187] Once they assumed that headscarves are ostentatious, the European Courts could easily stigmatise the headscarf's impact on the neutrality of state authorities and employers (see the next section), the rights of others (Section 8), and public order (Section 9).

[178]See A Djelassi et al, 'Principe de neutralité dans les entreprises privées: la Cour de Justice étoffe sa jurisprudence relative à l'interdiction des signes religieux' 32 (2022) Revue trimestrielle des droits de l'homme 373, 391.

[179]*WABE and Müller* (n 8), para 77.

[180]Ibid., para 69; *S.C.R.L* (n 102), para 41.

[181]Ibid.

[182]*WABE and Müller* (n 8), para 75.

[183]*WABE and Müller* (n 8), para 65.

[184]*S.C.R.L.* (n 102), para 18.

[185]Ibid., para 32.

[186]See *Lautsi* (Grand Chamber) (n 101), para 72.

[187]See above, Section 2.

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7. Impact on neutrality of state authorities and private employers

Because the European public space is often presented, in the dominant discourse, as 'secular', the public use of garments associated with religion can be construed as an affront to neutrality in religious affairs. Accordingly, both European Courts affirmed that the headscarf has a negative impact on religious *neutrality* (this constitutes the third theme we identified in the case law).

In the first place, the ECtHR argued that the headscarves worn by *any woman in public establishments* may threaten State neutrality. This is, in particular, the case of students. According to the ECtHR, a headscarf ban targeted at students might be necessary to preserve the 'neutrality of secondary education' (*Köse*).[188] This finding seems to apply to any person in 'public establishments' (eg, tribunals): in these places, the 'respect for neutrality regarding beliefs may prevail on freedom of expression of religion' (*Lachiri*).[189] Apparently, other religious symbols worn by private citizens do not affect the neutrality of public establishments. In cases concerning men's symbols, the ECtHR held that, unlike public officials, 'private citizens' are normally not under a duty of neutrality in either public streets (*Arslan*) or public establishments (*Hamidovic*).[190] Remarkably, despite the factual similarity between *Hamidovic* and *Lachiri* (see above, Section 5), the ECtHR mentions a potential impact on State neutrality only in the latter case.[191] A woman's headscarf potentially threatens the neutrality of a tribunal but a man's head cover does not.

Secondly, both the ECtHR and the ECJ held that the headscarves worn by *public servants* threaten State neutrality. The ECtHR argued that school teachers wearing a headscarf question 'denominational neutrality in schools' (*Dahlab*[192]; *Kurtulmuş*[193]) and 'neutrality of teaching' (*Tandoğan*).[194] Headscarves also threaten neutrality in public service at large: public servants are 'representatives of the state' and, consequently, are bound 'by a duty of discretion in the public expression of their religious beliefs' (*Arslan*).[195] The ECJ implicitly followed this approach in *Commune d'Ans*, by holding that the 'wearing of any sign' by public employees may undermine the provisions of 'an entirely neutral administrative environment'.[196] However, one may wonder *why* a public employee who wears a religious sign – in most cases, a headscarf – should automatically threaten State neutrality. The ECJ did not provide any explanation in *Commune d'Ans*. The ECtHR did, in *Ebrahimian*, by finding that patients 'cannot harbour any doubts as to the *impartiality* of those treating them'; in other words, citizens may legitimately doubt the impartiality of public servants who wear a headscarf.[197] Once more, the ECtHR (and, possibly, the ECJ) shifted attention away from the perspective of the women who wore a headscarf[198] and concentrated on the (hypothetical) views of their (prejudiced) 'victims': since public opinion allegedly sees the headscarf as incompatible with state neutrality, the state can assume that the

[188] *Köse* (n 101), p 12; *Dogru* (n 101), para 67. In *Şahin*, the ECtHR held that preventing students from wearing a headscarf might be necessary to 'preserve the secular character of educational institutions' (*Şahin* (Chamber) (n 101), para 98; *Şahin* (Grand Chamber) (n 101), para 158). The concepts of secularism and neutrality are linked in the case law of the ECtHR but a discussion of this linkage is beyond the scope of this article.

[189] *Lachiri* (n 101), para 45 (translation by the authors).

[190] *Hamidovic* (n 101), para 40.

[191] See also above, Section 5.

[192] *Dahlab* (n 101), p 4.

[193] *Kurtulmuş* (n 101), p 7, mentioning 'neutrality in the public service'.

[194] *Tandoğan* (n 101), p 4 (translation by the authors). Here the ECtHR summarises approvingly *Dahlab* (n 101) and *Kurtulmuş* (n 101) but adopts slightly different phrasing.

[195] *Arslan* (n 101), para 48 (translation by the authors); *Ebrahimian* (n 101), para 64.

[196] *Commune d'Ans*, paras 39 and 33.

[197] See A Licastro, 'Principio europeo di non discriminazione religiosa e approcci nazionali alla "neutralità" del pubblico dipendente' 16 (2023) Stato, Chiese e pluralismo confessionale 38.

[198] See, above, Section 5.

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wearing of this sign threatens neutrality and, therefore, may prohibit it.[199] By contrast, the crucifix does not seem to impact State neutrality, at least according to the ECtHR: in *Lautsi* (Grand Chamber), the ECtHR held that a crucifix on a wall is 'an essentially passive symbol [. . .] having regard to the principle of neutrality'.[200] It would thus seem that 'passive' Muslims (who do not intend to ostentatiously display religion) have 'active' religious symbols, while 'active' Christians (or Christian-oriented institutions) have 'passive' symbols.[201]

Thirdly, both the ECtHR and the ECJ affirmed that the religious symbols worn by *private sector employees* question the neutrality of their employers. According to the ECtHR, employers may, in theory, 'wish to project a certain corporate image', which might be threatened by a religious symbol[202]; however, the ban in *Eweida* was unjustified because there was 'no evidence' that the applicant's *crucifix* 'had any negative impact' on the employer's image.[203] Similarly, the ECJ recognised that employers may desire to display a policy of 'religious neutrality'[204] and may prevent employees 'who interact with customers' from using religious signs, such as a *headscarf*.[205] Unlike the ECtHR in *Eweida*, the ECJ did not mention the need for evidence of the impact on the employer's neutrality[206]; yet, it is hard to believe that anyone thinks that the beliefs of an employee reflect the official position of a company.[207]

The European Courts' discourse on neutrality reveals that they allocated the argumentative burden of proof to support a specific narrative. Both the ECtHR and the ECJ argued that *headscarves* can impact the neutrality of the State and private employers, providing little explanation for this argument (eg, ECtHR, *Ebrahimian*) or no explanation at all (eg, ECtHR, *Lachiri;* ECJ, *Commune d'Ans*, *Achbita*). By contrast, it seems that, according to the ECtHR, the impact of the *crucifix* on neutrality cannot be presumed (*Eweida*) and that it may even be excluded *a priori* (*Lautsi* Grand Chamber). A crucifix does not question the neutrality of a State's school, but a woman who wears a headscarf threatens neutrality in public and private environments because *others* might associate her with Islam. The use of different narratives for Christian and Islamic symbols seems consistent with the approach that we termed 'Christian secularism' (see above, Section 3) and appears grounded on a narrative banalisation: the European Courts presented the headscarves' impact on neutrality as a fact – without discussing it – thus reproducing a widespread trope about the incompatibility between the public use of Islamic symbols and secularism in Europe.

8 Impact on the rights of others

In the narration of the European Courts, the attribution of 'proselyting' or 'ostentatious' purposes[208] to the Islamic headscarf means not only that they impact neutrality,[209] as seen above,

[199]See J Ringelheim, 'State Religious Neutrality as a Common European Standard? Reappraising the European Court of Human Rights Approach' 6 (2017) Oxford Journal of Law and Religion 24, 64.

[200]*Lautsi* (Grand Chamber) (n 101), para 72. In *Lautsi* (Chamber), the ECtHR acknowledged that a crucifix hung in a public classroom had 'preponderant visibility in the school environment'; therefore, the crucifix was 'incompatible with the State's duty to respect neutrality', see *Lautsi* (Chamber) (n 101), paras 54 and 57. The Chamber was, however, overruled by the Grand Chamber.

[201]We thank an anonymous reviewer for bringing this to our attention.

[202]*Eweida and others* (n 101), para 94.

[203]Ibid., para 94.

[204]*Achbita* (n 102), para 37.

[205]As long as the policy is undifferentiated, see Ibid., paras 41 and 42. *WABE and Müller* (n 8), paras 63 and 68.

[206]See *Achbita* (n 102), particularly at paras 39–43: *S.C.R.L* (n 102), para 40; see *WABE and Müller* (n 8), para 64.

[207]Gareth Davies, 'Achbita v G4S: Religious Equality Squeezed between Profit and Prejudice' (European Law Blog, 2017) <https://europeanlawblog.eu/2017/04/06/achbita-v-g4s-religious-equality-squeezed-between-profit-and-prejudice/> accessed 16 February 2024.

[208]See above, Section 6.

[209]See above, Section 7.

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but also that they might affect *others' rights*, particularly in the case of vulnerable persons (this constitutes the fourth theme we found in the case law).

In *Dahlab*, the ECtHR held that 'it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect'.[210] Since assessing the actual impact of the headscarf would be 'difficult',[211] the ECtHR assumed that a 'powerful external symbol' such as the wearing of a headscarf may impinge on the freedom of religion of young children.[212] However, the applicant was never accused of proselytism: apparently, she never even talked to her pupils about her beliefs.[213]

Dahlab was cited approvingly in *Şahin* and *Dogru* (2008); subsequently, the ECtHR changed its phrasing but maintained the same premise: the ostentatious character of headscarves means that they can impinge on the freedom of religion of vulnerable persons. The ECtHR argued that headscarves can be prohibited because the use of religious symbols by students should 'not become ostentatious and thus a source of pressure and exclusion' vis-à-vis other students (*Köse*, 2006).[214] The ECtHR also stigmatised the impact of headscarves on the freedom of religion of patients: bans against religious symbols in hospitals may serve to protect them 'from any risk of influence or partiality, in the name of their right to freedom of conscience' (*Ebrahimian*, 2015).[215] Of course, these assumptions were unsupported by any evidence.[216]

The ECJ apparently embraced this rhetoric, albeit implicitly: employers can take account of parents' 'wish to have their children supervised by persons who do not manifest their religion or belief when they are in contact with the children', with the aim of 'guaranteeing the free and personal development of children as regards religion'. (*WABE and Müller*, 2021).[217] In other words, parents can expect schools not to hire women using headscarves because these symbols might per se impinge on the 'free development' of children, ie, their freedom of religion. While the ECJ does not employ the scathing language of *Dahlab*, it endorses the same postulate, twenty years later. And, like *Dahlab*, *WABE and Müller* is unsupported by any evidence: nothing suggests that the worker was ever accused of proselytising at work.

The ECtHR described only one other religious sign – the full-face veil – as a threat to others' rights. In *S.A.S.*, the ECtHR held that a ban against the full-face veil may ensure 'the preservation of the conditions of "living together"', which are an element of the 'protection of the rights and freedoms of others'.[218] Indeed, 'individuals who are present in places open to all *may not wish* to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships'.[219] Like the ECtHR case law on headscarves, the judgments on full-face veils justify the prohibition of an object based on the hypothetical, and unsubstantiated, views of third parties.[220]

[210] Ibid. See also *Şahin* (Chamber) (n 101), para 98; *Şahin* (Grand Chamber) (n 101), para 111; *Dogru* (n 101), para 64. The ECtHR does not expressly refer to the interference with children's rights in *Kurtulmuş*, but it arguably does so implicitly, by citing *Dahlab*, see *Kurtulmuş* (n 101), p 7; see also *Dahlab* (n 101), p 7.

[211] *Dahlab* (n 101), p 13.

[212] Ibid.

[213] This issue is mentioned by a national court, cited in the facts of the case, but is not addressed by the ECtHR's arguments, see *Dahlab* (n 101), p 6. See, further, Lyon and Spini (n 92) 388; Evans (n 10) 10; P Cumper and T Lewis, '"Taking Religion Seriously"? Human Rights and Hijab in Europe – Some Problems of Adjudication' 24 (2008) Journal of Law and Religion 599.

[214] *Köse* (n 101), p 14. See also *Dogru* (n 101), and *Aktas* (n 101).

[215] *Ebrahimian* (n 101), para 63.

[216] See, eg, N Gibson, 'Faith in the Courts: Religious Dress and Human Rights' 66 (2007) The Cambridge Law Journal 657, 672.

[217] *WABE and Müller* (n 8), para 65.

[218] *S.A.S* (n 101), para 157; see also, inter alia, paras 121, 141 and 142.

[219] Ibid., para 122.

[220] Empirical evidence suggests that women wearing a full-face veil do not necessarily 'experience any inhibitions to engage socially in the public sphere', see Human Rights Centre of Ghent University, Written submission to the ECtHR in case *Dakir v Belgium*, <https://hrc.ugent.be/wp-content/uploads/2019/10/Dakir_hrc.pdf>, accessed 15 February 2024, p 8.

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In contrast to Islamic symbols, the crucifix does not appear to affect the rights of others. In *Eweida*, the ECtHR held that there was 'no evidence of any real encroachment on the interests of others'.[221] The crucifix does not even affect vulnerable persons. According to the ECtHR Grand Chamber, the crucifix on the wall of a classroom, being a 'passive symbol', does not necessarily 'have an effect' on young persons.[222] And there was 'no evidence before the Court' that demonstrated the offensiveness of the crucifix.[223]

The European Courts' narration about religious symbols' impact on others' rights rests, once more, on shifting the argumentative burden of proof. While both European Courts presumed that Islamic symbols affected others' rights, the ECtHR assumed that the impact of crucifixes must be proven. This rhetorical stratagem is supported by a narrative banalisation: arguably, the European Courts implicitly or explicitly echoed the widespread trope of Islam as alien to European values and, therefore, incompatible with human rights and dangerous for individuals' rights (see above, Section 2). The European Courts embraced this trope to the point of alleging that headscarves threaten not only the rights of others but also public safety and public order.

9. Impact on public safety and public order

According to the European Courts, headscarves have such a forceful impact on society that they threaten, besides the rights of others, *public safety and public order*. This constitutes the fifth and last theme we identified in the case law.

The ECtHR repeatedly argued that headscarves may threaten security, public order, and safety (in the ECtHR case law, these legitimate aims are often taken together).[224] In *Şahin* (2005), the ECtHR linked the Islamic headscarf to extremism and thus, to a threat to public order. According to Turkish authorities, approvingly cited by the ECtHR, the headscarf had taken on political significance in this country, where 'extremist political movements' sought to impose on society 'their religious symbols'.[225] The ECtHR did not speak of extremism in subsequent cases,[226] but unquestioningly accepted the arguments of the defendant State (France) about security and public order. In *Dogru*, in particular, the ECtHR acknowledged that the applicant's refusal to comply with the headscarf ban had led to a 'general atmosphere of tension' within the applicant's school.[227]

The ECtHR disregarded the perspective of the women wearing headscarves, reiterating the gender and religious stereotypes discussed above (see Section 5). Arguably, the threats to public order came, not from women wearing headscarves, but from other subjects: supposed 'extremist political movements' (*Şahin*) or national authorities themselves (*Köse*, *Dogru*). It is indeed the headscarf bans that created 'unrest' and 'tension', not the people that resisted such bans by invoking their rights: a State can hardly justify a ban by arguing that the (otherwise legitimate) resistance to the ban causes 'disturbances'. Strikingly, the ECtHR blamed the applicants for the

[221] *Eweida and others* (n 101), para 95.

[222] *Lautsi* (Grand Chamber) (n 101), paras 66 and 72.

[223] Ibid., para 66.

[224] Howard, *Law and the Wearing of Religious Symbols in Europe* (n 11) 138.

[225] *Şahin* (Chamber) (n 101), paras 109–10; *Şahin* (Grand Chamber) (n 101), para 115.

[226] See, however, *Dogru* (n 101), para 66.

[227] *Dogru* (n 101), para 74. in *Köse*, the ECtHR considered the request for permission to wear the headscarf in schools 'liable to lead to unrest and disturbances', see *Köse* (n 101), p 12. In *Aktas* (n 101), and *Ebrahimian* (n 101), decisions regarding a student and a nurse, respectively, the ECtHR did not connect the headscarf to specific threats to public order but generally admitted that a headscarf ban might be necessary for the protection of public order. The ECtHR mentions public order also in *Bayrak, Gamaleddyn, Ghazal, Singh J,* and *Singh R* (n 101). The Court did not identify the threats to public order with precision, but made extensive references to *Dogru*; therefore, one may hypothesise that, according to the ECtHR, the attitude of the applicants constitutes a threat to public order.

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'disturbances' even when they agreed to compromise,[228] eg, by wearing a hat instead of a headscarf; by contrast, it praised national authorities for their attempts 'to enter into dialogue' with the applicants, even when the authorities refused to consider any compromise.[229] The ECtHR's judgments arguably reflect a widespread stereotype, which forms the basis of another narrative banalisation: in the ECtHR's narration, the headscarf is a symbol of extremism and is connected to violence[230]; therefore, its symbols can be prohibited.

It should not be surprising, at this point, that the ECtHR did not describe other religious symbols as a threat to public order and security.[231] For instance, the full-face veil cannot be presumed to constitute a 'general threat to public safety': France had 'not shown' the existence of this threat.[232] Similarly, the objects worn by male applicants were not presumed to threaten public security: in *Arslan*, 'the file [did] not show' that the conduct of the applicants 'constituted a threat to public order'[233]; Hamidovic was not a threat to public order because 'there [was] no indication' that he had a 'disrespectful' attitude towards a tribunal.[234] It seems, therefore, that the ECtHR made, once more, a strategic use of the argumentative burden of proof: headscarves can be presumed to impact public safety and public order, but such an impact must always be demonstrated in respect of other religious symbols.

Unlike the ECtHR, the ECJ did not expressly characterise headscarves as a threat to security and public order; nonetheless, the ECJ arguably implied such a characterisation. In *WABE and Müller*, the ECJ held that, by prohibiting 'large' religious symbols (viz. headscarves), the employer sought the legitimate objective of avoiding 'social conflicts', particularly because of '*tensions* which occurred in the past in relation to political, philosophical or religious beliefs'.[235] In other words, the ECJ assumed that headscarves were per se capable of causing 'tensions' and could, at least in principle, be banned, thus echoing the ECtHR in *Dogru* (see above).[236] Like the ECtHR, the ECJ disregarded the conduct of women wearing headscarves: nothing suggests that they engaged in any disrespectful or aggressive conduct. One may surmise that tensions arose, not because of headscarves, but because of the employer's intolerance: as recognised by the very ECJ, the employer had introduced a discriminatory policy, by prohibiting the use of 'conspicuous, large-sized' symbols,[237] which targeted headscarves de facto if not *de jure*.

This European Courts' approach to security and public order is, once more, explained by their narrative strategy. In the cases concerning Muslim men, the ECtHR focused on the coherence of its reasoning (as expected by the legal community), since States and public opinion were unlikely to be invested in the outcome of these cases. By contrast, States and public opinion strongly expected the European Courts to rule in favour of the prohibition of headscarves; to justify such prohibitions, while maintaining an appearance of logical coherence, the European Courts had to

[228]See *Dogru* (n 101), para 75.

[229]*Dogru* (n 101), para 74.

[230]See above, Section 3.

[231]Except for cases related to road safety and security checks; these cases, however, are not particularly relevant, since the ECtHR was bound to mention security and public order. For instance, in *Mann Singh*, the ECtHR held that requiring a bare-headed picture for a driving licence was necessary for 'public security and the protection of public order', *Mann Singh* (n 101), p 7. See also *Phull* (n 101), and *El Morsli* (n 101).

[232]*S.A.S* (n 101), para 139.

[233]*Arslan* (n 101), para 50 (translation by the authors).

[234]*Hamidovic* (n 101), para 42.

[235]*WABE and Müller* (n 8), para 75.

[236]As Azoulai suggests, it is possible, at least in principle, that the ECJ is implicitly treating *any* religious practice as 'a factor of social disorder', L Azoulai, "Living Together" in Europe's Polarised Societies: Navigating the ECtHR and CJEU Case Law, Working Paper EUI/Law 2024/18. However, the fact remains that, in *WABE* and *Müller*, the ECJ postulates that *headscarves* may cause 'tensions'. It is also notable that this case law echoes the language used by the ECtHR in relation to headscarves (but not in relation to signs of other religions).

[237]Ibid., paras 73–4.

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'narrate' a presumed impact on security and public order. Since there was no evidence of any such impact, the European Courts centred their narration on the headscarf's *presumed* effects ('tensions', 'conflicts', and 'disturbances'). The European Courts possibly expected such a presumption to convince a part of their audiences because it constituted a banalisation of widespread tropes about the alleged violent nature of Islam (see above, Section 3).

10. Conclusion

The use of religious symbols is one of the most controversial issues in European societies. The prohibition of certain symbols (notably, the Islamic headscarf) has formed the object of several disputes before the ECtHR and the ECJ. By employing a linguistic and social science approach – Critical Discourse Analysis – we assessed the language used by the European Courts regarding religious symbols to identify biased discourses and determine how they have influenced adjudication.

Our analysis addressed two research questions. In the first place, *which biases are reflected in the European Courts' judgements about religious symbols?* The article demonstrated that the judgments of the ECtHR and the ECJ often reflected religious and gender biases, as demonstrated by the themes discussed in Sections 5–9. These results confirm Lajoie's intuition and the results she reached in another context[238]: the 'dominant values' that inspire judicial decisions are not expressly acknowledged in their text but remain present in their 'subtext'. The European Courts used biased language about the agency of Muslim women, their intentions, and the impact of their headscarves on other persons and society at large. Biased arguments are particularly evident in the early ECtHR case law (2001–2008). Subsequently, the ECtHR changed its approach, perhaps to avoid criticism. Nonetheless, biased discourses did not disappear from the ECtHR case law but were better hidden in the 'subtext'.

The language employed by the ECJ was apparently more 'neutral'. The ostensible neutrality of the ECJ is not surprising, given its 'formalistic' style.[239] It is possible that the ECJ – whose judgments are more recent than most ECtHR decisions – recognised the criticisms directed at the ECtHR and intentionally avoided the overtly biased language of the Strasbourg Court. However, the application of Critical Discourse Analysis to ECJ judgements reveals that, despite their appearance of neutrality, they reproduce at least some of the biased discourses developed by the ECtHR. For instance, in *WABE and Müller* (2021), the ECJ assumed that headscarves might proselytise children, an idea originally introduced by the ECtHR in *Dahlab* (2001). In other words, biased discourses characterise, not only the early case law of the ECtHR – as the literature has shown,[240] but also most judgements of *both* European Courts.

This article also addressed a second research question: *what role do biased discourses play in the European Courts' narrative about religious symbols?* Our analysis suggests that both European Courts, consciously or unconsciously, used biased discourses to better persuade their audiences. They employed biased discourses to narrate 'stories' where the Islamic headscarf improperly displayed religious belonging, threatened state and employers' neutrality, proselytised children, and disturbed public order. This narrative suggests that headscarf bans are necessary to achieve legitimate aims, such as the protection of children's religious freedom. This argument is persuasive to a certain extent, as it relies on a 'narrative banalisation': it employs 'socially conventional' discourses that most readers are likely to accept as given.[241] The credibility of this narrative is further increased by recourse to other rhetorical stratagems, such as shifting the argumentative

[238]See above, Section 2.
[239]Skrbic (n 27) pp 568–9. See, further, above, Section 4.
[240]See above, Section 2.
[241]Ibid.

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burden of proof or de-emphasising the perspective of social actors: the European Courts were able to presume the purpose and effects of headscarves because they ignored Muslim women's opinions. It is to be noted that *both* European Courts used this technique: the ECJ's biased discourses are less obvious than those of the ECtHR, but they were nonetheless effective in developing narratives that justified its decisions.

Thanks to their narrative strategies, the European Courts issued judgments in line with the desires of States and public opinion, justifying them in a seemingly coherent manner, as expected by the legal community.[242] These findings suggest that biased discourses play a relevant role in judicial adjudication because they contribute to justifying decisions consistent with dominant values. Courts do not necessarily use biased discourses in a deliberate manner, in a conscious attempt to convince their audiences; they simply select the (biased) arguments that they consider more persuasive – and they may find them persuasive precisely because they are based on biased premises. Had the European Courts fully acknowledged the existence of these biases, they might have considered different solutions for the cases before them. They might have emphasised, in particular, the perspective of women wearing headscarves, showing that they did not intend to ostentatiously display religion or to threaten the rights of others. This might have suggested imposing further limits to the prohibition of religious symbols. For instance, in *WABE* and *Müller*, the ECJ might have held that private employers could prohibit educators from wearing a headscarf, provided they *proved* that the use of this garment impacted the 'free development' of children, instead of implicitly assuming that such an impact was inevitable.[243]

The findings of this study suggest that integrating Critical Discourse Analysis with traditional legal approaches can enhance both types of inquiry. Considering the legal perspective can aid discourse analysts in assessing the rationale and impact of discourses used by courts. It is probable that a discourse analyst without specific legal training may identify discourses in legal texts.[244] Nonetheless, insight into the legal reasoning that underpins the interpretation of the law can be useful for understanding the role that discourses play in justifying a court's argumentation.

Conversely, Critical Discourse Analysis can serve as a complement to legal doctrinal analysis. To be sure, some judicial discourses are overtly biased and can be detected through a traditional doctrinal approach, as seen in early ECtHR judgements such as *Dahlab* or *Şahin*. In other cases, however, biased discourses are concealed beneath seemingly neutral language, as in later ECtHR judgments and, especially, ECJ case law. In such instances, Critical Discourse Analysis may assist in identifying biased discourses within the subtext of judicial decisions. For example, Critical Discourse Analysis has proven effective in highlighting the differences in language used by the ECtHR when describing a man and a woman in *Hamidovic* and *Lachiri*,[245] the ECJ's subtle framing of headscarves as problematic for public order and the rights of others,[246] and the assumption, apparently shared by both European Courts, that any head covering worn by Muslim women has proselytising purposes.[247]

Even subtle biases can influence judicial reasoning and reinforce societal prejudices. Critical Discourse Analysis offers judges and jurists at large a tool to better recognise and challenge such discourses, fostering a reassessment of judicial narratives and promoting more balanced decisions.

Data availability. The data that support the findings of this study are openly available in curia.europa.eu and HUDOC.echr.coe.int

[242]Ibid.
[243]See above, Section 8.
[244]Cheng and Machin (n 120) p 245.
[245]Compare *Hamidovic* and *Lachiri*, text to n 147–149, and n 189–191.
[246]See above, Sections 8 and 9, text to n 217, and n 235–n 237.
[247]See above, Section 6, text to n 159–169, and n 181–n 185.

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