## TABLE OF CONTENTS

Acknowledgements List of Abbreviations	vii
	xvii
Introduction	
Chapter 1 Introduction	
1.1 The Islamic Headscarf Controversy in Europe	3
1.2 European Supervision	5
1.3 Objective, Research Question and Delimitation	7
1.4 Methodology	14
1.5 A Legal Case Study: The Islamic Headscarf Case	17
1.5.1 The Purpose for using a Legal Case Study	17
1.5.2 The Islamic Headscarf Case	19
1.6 The European Regimes and their Terminology	20
1.6.1 The EU, the ECJ and the Preliminary Ruling Procedure	20
<ul><li>1.6.2 The CoE, the ECtHR and the Complaint Procedure</li><li>1.7 Structure and Sub-Questions</li></ul>	23
1.7 Structure and Sub-Questions	24
PART I EU NON-DISCRIMINATION LAW	
Chapter 2 The EU Protection against Discrimination on Grounds of Sex, Race and Religion	
2.1 Introduction	29
2.2 The Position of Non-Discrimination Law: European Social Policy	30
2.3 The Road to Directives 2006/54, 2000/43 and 2000/78	33
2.3.1 The Development of Protection against Sex Discrimination	33
2.3.2 The Development of Protection against Race Discrimination	35
2.3.3 The Development of Protection against Religious Discrimination	38
2.4 Some Features of Directives 2006/54, 2000/43 and 2000/78	39
2.4.1 A Specific Type of EU Legislation: Directives	39

	2.4.2	The Concepts of Discrimination: Direct and Indirect Discrimination	39
		2.4.2.1 Direct Discrimination	4(
		2.4.2.2 Indirect Discrimination	42
	2.4.3	The Scope of Application of the Directives	44
		2.4.3.1 Personal Scope of Application	44
		2.4.3.2 Material Scope of Application	4:
2.5	Concl	usion	40
Cha	apter 3	The ECJ's Assessment of Sex, Race and Religious Discrimination Public Employment	on
3.1	Introd	luction	49
3.2		CJ's Assessment Model: Direct or Indirect Discrimination?	50
		The Importance of the Point of Departure	50
		The ECJ's Approach	5
3.3		rent Treatment in Cases of Direct Discrimination	5.
		rent Treatment in Cases of Indirect Discrimination	5:
		The Disparate Impact Test of Directives 2006/54, 2000/43	
		and 2000/78	5
	3.4.2	A Statistical or Quantitative Approach	60
		3.4.2.1 The Issue of Data	60
		3.4.2.2 The Selection of the Pool of Comparators	6
		3.4.2.3 Determining Disparate Impact: Reading the Relevant	
		Statistics	6.
	3.4.3	A Non-Statistical or Qualitative Approach	6.
3.5		ication for Direct Discrimination	6
	3.5.1	The Genuine Occupational Requirement (GOR) Exception	68
	3.5.2	The Exception of Article 2(5): Necessary in a Democratic Society	70
3.6		ication for Indirect Discrimination	7.
		The Legitimate Aim Test	7.
		The Proportionality Test	7:
3.7	The I	ntensity of the ECJ's Assessment of Proportionality	7
		rinciple of Subsidiarity	80
3.9	Facto	rs that Influence the Intensity of the ECJ's Assessment	82
	3.9.1	The Formulation of the Preliminary Question	82
	3.9.2	The Field of Law or the Policy Field and the Aim of the Measure	8.
	3.9.3	Consensus in the EU Member States	8.
2 17		The Non-Discrimination Ground	8.
3.10	) Concl	usion	8.

4.1	Introduction	8
4.2	The Possible Legal Approaches of the ECJ: Religion, Sex and/or Race	9
4.3	The Question of Direct or Indirect Discrimination	9.
4.4		9
	4.4.1 Indirect Discrimination: the Disparate Impact Test	9
	4.4.2 Direct Discrimination: the Comparability Test	9
4.5		100
4.6		10
4.7		102
	4.7.1 The Aims of the Ban on Conspicuous Symbols in the Public	
	Workplace	102
	4.7.2 The Proportionality Question	104
	4.7.2.1 The ECJ's Strictness of Review in the Islamic	
	Headscarf Case	106
	4.7.2.2 Appropriateness	111
	4.7.2.3 Necessity	113
	4.7.2.4 Proportionality Stricto Sensu	114
	4.7.3 Is the Ban on Conspicuous Symbols Necessary in a Democratic	
	Society?	115
4.8	Conclusion	116
n .	RT II THE RIGHTS TO NON-DISCRIMINATION AND FREEDOM	
PA		
	RELIGION IN THE ECHR AND THE ECTHR'S ASSESSM	1ENT
Cha	apter 5 The Rights to Non-Discrimination and Freedom of Religion i	n the
	ECHR	
5.1	Introduction	121
5.2	The Open-Ended Structure of Article 14 ECHR	122
5.3	The Open-Ended List of Non-Discrimination Grounds	123
5.4		125
	5.4.1 The Accessory Character of Article 14 ECHR	126
	5.4.2 Protection against Discrimination in the Field of	
	Public Employment	128
5.5	Protocol no. 12: A General Non-Discrimination Clause	131
5.6	The Right to Freedom of Religion in the ECHR	135
	5.6.1 Forum Internum and Forum Externum	136
	5.6.2 The Demonstration of Interference	137

Chapter 4 The ECJ and the Islamic Headscarf Case

Table of Contents

	<ul><li>5.6.3 Justifications for Limiting Religious Manifestations</li><li>5.6.3.1 Prescribed by Law</li><li>5.6.3.2 A Legitimate Aim</li></ul>	138 139 140
5.7	5.6.3.3 Necessary in a Democratic Society Conclusion	140 142
5.7	Conclusion	
Cha	npter 6 The ECtHR's Assessment of Sex, Race and Religious Discrimination	
6.1	Introduction	143
6.2	The General Assessment Model	144
6.3	The Development of the Concepts of Discrimination	145
6.4	The Test to Establish a Difference in Treatment	147
	6.4.1 Direct Discrimination: A Comparability Test	147
	6.4.2 Indirect Discrimination: A Disparate Impact Test	151
6.5	The Test to Establish an Objective and Reasonable Justification	154
	6.5.1 The Assessment of the Legitimate Aim(s)	155
	6.5.2 The Assessment of Proportionality	157
	The Intensity of the ECtHR's Assessment of Proportionality	160
	The Role of the Doctrine of the Margin of Appreciation	162
6.8	The Isolation of Factors that Influence the Intensity of the Assessment	166
	6.8.1 The Ground of Distinction: Suspect and Non-Suspect Categories	167
	6.8.2 The Absence or Presence of a European Consensus	171
	6.8.3 Active or Passive Discrimination	173
	6.8.4 The Field where the Difference in Treatment took place	173
	6.8.5 The Weight of the Affected Right	174
6.9	Conclusion	174
Ch	apter 7 The ECtHR and the Islamic Headscarf Case	
7.1	Introduction	177
7.2	The Islamic Headscarf Case and the Right to Freedom of Religion	178
	7.2.1 Interference in Religious Manifestations	178
	7.2.2 The Limitation Clause	179
	7.2.2.1 The Legitimacy of the Aims of the Ban on Wearing Conspicuous Symbols	179
	7.2.2.2 The Interest of Wearing an Islamic Headscarf v. the	1 / .
	Need in a Democratic Society	180
7.3	The Islamic Headscarf Case and the Right not to be Discriminated Against	184
	7.3.1 A Difference in Treatment	183

	7.3.2	The Objective Justification Test	187
		7.3.2.1 The Intensity of the ECtHR's Assessment in the Islamic	
		Headscarf Case	188
		7.3.2.2 Proportionality	189
7.4	Conc	lusion	189
n			
PA	RT III	A Comparison of two European Regimes and	
		THEIR LEGAL APPROACH TO DISCRIMINATION IN PUBLIC	··••
		EMPLOYMENT	
Ch	apter 8	B A Comparison of European Non-Discrimination Law	
CII	apter o	71 Comparison of European 110n Discrimination Law	
8.1	Introd	duction	193
8.2	Simil	arities and Differences in Structure	194
		Detailed Framework v. General Framework	194
	8.2.2	Non-Discrimination Grounds: Closed List v. Open-Ended List	195
	8.2.3	Specific Exceptions v. the Objective Justification Clause	196
8.3	The C	Concepts of Discrimination	197
	8.3.1	i i	197
	8.3.2	The Point of Departure of the Courts: Direct or Indirect	
		Discrimination?	198
		8.3.2.1 Direct Discrimination (EU) v. (Direct) Discrimination	100
		(ECHR)	199
		8.3.2.2 Indirect Discrimination (EU) v. Indirect Discrimination	200
		(ECHR)	200
		8.3.2.3 Indirect Discrimination (EU) v. (Direct) Discrimination	201
		(ECHR)	201
8.4		paring Test I: Demonstrating a Difference in Treatment	203
	8.4.1	Cases of Direct Discrimination	203 203
		8.4.1.1 The Comparison of the Comparability Tests	203
		8.4.1.2 A Different Test applied by the ECtHR: the Test of	208
	0.40	Disadvantage	210
	8.4.2	Cases of Indirect Discrimination	210
		8.4.2.1 The Disparate Impact Tests Compared	211
	0.42	8.4.2.2 The Issue of Proof  Grant Discrimination (ELI) and Cases of Direct	411
	8.4.3	Cases of Indirect Discrimination (EU) and Cases of Direct	217
		Discrimination (ECHR)	217
0.5	0.	8.4.3.1 The Disparate Impact Test v. the Comparability Test	219
8.5	Comp	paring Test II: Demonstrating Justification	219
	8.5.1	Cases of Direct Discrimination	,

	8.5.2 Cases of Indirect Discrimination: the Objective Justification Tests		
	0.0.2	Compared	222
	8.5.3	The Comparison of the Proportionality Tests of the Courts	224
	854	The Intensity of Assessment and the Variation of the	
	0.5	Proportionality Tests	229
		8.5.4.1 The Comparison of a Marginal Assessment	230
		8.5.4.2 The Comparison of a Full Assessment	236
	8.5.5	The Comparison of the Margins of Appreciation and Discretion	241
		8.5.5.1 A Common Root: the Principle of Subsidiarity	242
		8.5.5.2 Clarity and Consistency	243
		8.5.5.3 The Practical Application in the Proportionality Test	245
		8.5.5.4 A Tool to Balance Uniformity and Diversity	249
		8.5.5.5 Supervisory Court v. Interpretative Court	251
		8.5.5.6 The Courts' Objective of Self-Preservation	254
		8.5.5.7 The Decisiveness of the Margins of Appreciation and	
		Discretion	259
	8.5.6	The Comparison of Triggering Factors	260
		8.5.6.1 The European Consensus Argument	260
		8.5.6.2 The Ground of Discrimination	262
		8.5.6.3 The Field of Law or the Policy Field and the Better	
		Placed Argument	268
Cha	apter 9	A Comparison of Non-Discrimination Law (EU) and the Rig Freedom of Religion (ECHR)	ht to
9.1	lntro	duction	271
		Discrimination (EU) and the Freedom of Religion (ECHR)	272
	(==, ===,		
		e Freedom of Religion	273
		The Concept of Religion in the European Systems	274
		Disadvantage v. Interference	276
	9.3.3	The Element of Comparison	279
9.4	Test	Il: A Comparison of the Justifications for Differential Treatment	
	and I	nterference	281
	9.4.1	Article 2(5) of Directive 2000/78 v. Article 9(2) ECHR	282
		9.4.1.1 Prescribed by Law	282
		9.4.1.2 The List of Legitimate Aims	283
		9.4.1.3 Necessary in a Democratic Society	284
	9.4.2		286
	9.4.3	j	
		the Limitation Clause of the Right to Freedom of Religion	287

Cha	apter 10 The Proof of the Pudding: The Islamic Headscarf Case	
10.1	Introduction	289
10.2	2 A Comparison of the Possible Legal Bases	289
10.3	The Islamic Headscarf Case: Non-Discrimination (EU) v. Freedom of	
	Religion (ECHR)	291
	<ul><li>10.3.1 Deciding on the Framework: Direct or Indirect Discrimination</li><li>10.3.2 Different Treatment of Muslim Immigrant Women v. Interference</li></ul>	291
	with Religious Manifestation 10.3.3 Justifications for the Ban on Conspicuous Symbols in Public	292
	Employment	294
	10.3.3.1 Comparing the Legitimate Aim Tests	294
	10.3.3.2 The Islamic Headscarf Case and the Comparison of	
	Proportionality	294
	10.3.4 Special Exceptions to Religious Discrimination (EU) v.	~
10.4	The Limitation Clause (ECHR)  The John Handson Coses New Discouring at the CEU and Committee (EU) and Commit	297
10.4	The Islamic Headscarf Case: Non-Discrimination (EU) v. Non-Discrimination (ECHR)	207
	Non Discrimination (ECTIV)	297
	NCLUSIONS  pter 11 Conclusions: A Discrepancy Between the Courts?	
11.1	Introduction	301
	The Discrimination Approach of the EU and CoE	302
	11.2.1 Structure and Consequences	302
	11.2.2 Test I: Establishing a Difference in Treatment	303
	11.2.3 Test II: Demonstrating a Justification	308
	11.2.4 The Discrimination Approach of the EU and CoE in Charts	315
11.3	A Comparison of the Approach to Religious Discrimination	319
	11.3.1 Test I: Different Treatment and Interference	319
	11.3.2 Test II: Article 2(5) of Directive 2000/78 and the Limitation	
	Clause of Article 9(2) ECHR	321
11.4	The Islamic Headscarf Issue: A Discrepancy between the Courts?	322
	11.4.1 The Difference between the Legal Frameworks of the Courts in	
	the Islamic Headscarf Case	322
	11.4.2 The Difference in the Burden of Proof for the Applicants	323
	11.4.3 The Difference in the Burden of Proof for the States	325
	The Best of Both Worlds	326
11.6	The European Non-Discrimination Regimes: Same Same, but Different	329

## Table of Contents

Samenvatting (Summary in Dutch)	331
Bibliography	347
Table of Cases	361
Index	369
Curriculum Vitae	375