

Religious discrimination at the workplace and the CJEU case law concerning headscarves

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Pr. Sophie Robin-Olivier
La Sorbonne school of Law
University Paris 1 Panthéon-Sorbonne



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Wearing an Islamic veil at work has become a major source of litigation in Europe

- *Employees challenge infringements upon their religious freedom and request protection against discrimination on religion*
- *Employers object to religious symbols at work, and claim the right to a "neutral" company, to meet customer or public demand*

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Conflicts on these matters have only (rather) recently been referred to the CJEU, but it is more and more often the case

- CJUE, *Bougnaoui*, C-188/15 & *Achbita*, C-157/15 (2017)
- **CJUE, *WABE and Müller Handels*, C- 804/18 et C-341/19 (2021)**
 - CJEU, *SCRL*, C-344/20 (2022)
 - CJEU, *Commune d'Ans*, C-148/22 (2023)

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Other cases concern other aspects of discrimination on religion, indicating that religious discrimination has become more litigious in the EU, in recent times

- CJUE, *Egenberger*, C-414/16 (2018)
 - CJUE, *IR*, C-68/17 (2018)
- CJUE, *Cresco Investigation*, C-193/17 (2019)
 - CJEU, *MIUR*, C-282/19 (2022)

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The WABE case

WABE is a non-profit organization that operates day care centers in Germany
600+ employees, 3500+ children

It is « non-partisan and non-denominational »

While the employee, a specialized educator, was on parental leave, WABE adopted "service instructions for the respect of the principle of neutrality"

Upon returning to work, the employee was asked to remove the veil covering her hair

She refused and was temporarily suspended from work

When she returned to work, she was still wearing a veil and was given a warning, and asked to remove her veil in the future

The employee again refused to remove her veil, was temporarily suspended and received a second warning

During this same period, WABE required another employee, wearing a cross, to remove it

The employee challenged the two warnings issued by the company before the Hamburg labour court

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The Müller Handels case

MH Müller Handels operates a chain of drugstores in Germany

MJ, a Muslim, had been a sales consultant and cashier since 2002

When she returned from parental leave in 2014, she wore an Islamic headscarf

Her employer asked her to remove it, and stopped employing her when she refused

The employee subsequently took up another activity in the company, for which she was allowed to keep her headscarf

In June 2016, she was ordered to remove her scarf. She refused to do so and was sent home

During the month of July 2016, she was instructed to come to work without large conspicuous signs of political, philosophical or religious beliefs

Beginning in July 2016, an internal directive prohibited the use of conspicuous, large-sized political, philosophical or religious signs in the workplace applied in all stores

MJ brought an action before national courts seeking a declaration that that instruction was invalid and compensation for the damage suffered due to the violation of her freedom of religion protected by the German Constitution

Her action before lower courts was upheld, and MH subsequently brought an appeal to the Federal Labour Court

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The SCRL case

LF is of the Muslim faith and wears the Islamic headscarf

She made an unsolicited application to SCRL with a view to completing a six-week unpaid internship

SCRL is a Belgian cooperative limited liability company whose main activity consists of the letting and operating of social housing

At the end of her interview with the managers of SCRL, they stated that they had a positive opinion of her application and asked her if she could agree to comply with the neutrality rule* promoted within SCRL - LF refused

She later offered to wear another type of head covering but SCRL replied that no type of head covering was permitted on its premises, be it a cap, a hat, or a headscarf

* « workers undertake to respect the company's strict policy of neutrality » and « will therefore make sure not to manifest in any way, either by word or through clothing or any other way, their religious, philosophical or political beliefs, whatever those beliefs may be »

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The case *Commune d'Ans*

An employee of the municipality of Ans (Belgium), who performs her duties as head of office primarily without being in contact with users of the public service (2016-2021), was prohibited from wearing an Islamic headscarf at work

In the wake of that decision, the municipality amended its terms of employment, now requiring its employees to observe strict neutrality (« exclusive neutrality »)

=> Any form of proselytising is prohibited and the wearing of overt signs of ideological or religious affiliation is prohibited for any worker, including those who are not in contact with the public

The employee sought a declaration that her freedom of religion has been infringed, and that she has been the victim of discrimination

The tribunal du travail de Liège wondered whether the rule of strict neutrality imposed by the municipality gives rise to discrimination contrary to EU law

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Directive 2000/78 establishing a general framework for equal treatment in employment and occupation

Article 1

Purpose

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

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Objective of anti-discrimination law (EU law) Recital 11 of the directive

Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular

- the attainment of a high level of employment and social protection
 - raising the standard of living and the quality of life
 - economic and social cohesion and solidarity
 - the free movement of persons

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In its case law, the CJEU answered a series of questions, and progressively refined its reasoning

- Notion of religion
 - Notion of direct /indirect discrimination
 - How can employers justify a policy of « neutrality »?
- Is intersectional discrimination (religion+gender) prohibited?

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I- The notion of religion

The concept of "religion" within the meaning of Article 1 of Directive 2000/78 must be interpreted as covering both the **forum internum**, i.e. the fact of having religious beliefs, and the **forum externum**, i.e. the public manifestation of religious faith

CJEU, *Achbita*, § 28

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The very content of religious precepts rests on an assessment that is not for the Court to make

CJEU, *Achbita & WABE*

Member States and their authorities, in particular judicial authorities, must, except in very exceptional cases, refrain from assessing the legitimacy of the very ethics of the church or organization concerned

CJEU, *Egenberger* (referring to ECtHR, *Fernández Martínez v. Spain*, 2014)

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II- Direct and indirect discrimination

- Direct discrimination is reviewed in the framework of religious discrimination
- The concept of indirect discrimination is toned down

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➤ Direct discrimination, in the framework of religious discrimination

A strict interpretation of the concept of direct discrimination

This is clearly visible when comparing the question asked by the French Court of Cassation in the *Bougnaoui* case and its reformulation by the Court of Justice

- The use of a criterion "inextricably linked" to the prohibited ground, which can only affect members of the protected group, should be considered direct discrimination

Cf. previously: CJEU, *Dekker*, C-177/88, 1990; *Maruko*, C-267/06, 2008

- Impact of the comparison method - compared groups
CJEU, *Achbita & SCRL*

- What about the intention to discriminate?
CJEU, *CHEZ*, C-83/14, 2015

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An internal rule of a private undertaking prohibiting the wearing of any visible sign of political, philosophical or religious beliefs in the workplace does not constitute discrimination ... provided that it covers any manifestation of such beliefs without distinction and ***treats all workers of the undertaking in the same way*** by requiring them, in a general and undifferentiated way to dress neutrally, which precludes the wearing of such signs

Since ***every person*** may have a religion or belief, such a rule, provided that it is applied in a general and undifferentiated way, does not establish a difference of treatment based on a criterion that is ***inextricably linked*** to religion or belief

CJEU, *WABE* § 52-53

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WABE also demanded and obtained the removal of a religious cross from an employee

- **Formally**, the application of the internal rule was made without any differentiation between workers, based on their particular religion
- No difference in treatment directly based on religious beliefs

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But this solution does not apply if ***only the wearing of large ostentatious signs of political, philosophical or religious convictions is prohibited***

« unequal treatment resulting from a rule or practice which is based on a criterion that is inextricably linked to a protected ground, in the present case religion or belief, must be regarded as being directly based on that ground.

... where the criterion of wearing conspicuous, large-sized signs of political, philosophical or religious beliefs is inextricably linked to one or more specific religions or beliefs, the prohibition imposed by an employer on its employees on wearing those signs on the basis of that criterion will mean that some workers will be treated less favourably than others on the basis of their religion or belief

⇒ **direct discrimination may therefore be established**

CJEU, *Müller Handels* (2021) § 73

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The option of distinguishing religion and other beliefs is rejected

The degree of discretion afforded to the Member States cannot go so far as to enable those States or their national courts to split one of the grounds of discrimination exhaustively listed in Article 1 of Directive 2000/78 into several grounds without calling into question the wording, the context and the intended purpose of that ground and undermining the effectiveness of the general framework for equal treatment in employment and occupation introduced by that directive

A segmented approach to that ground, according to the aim pursued by the rule concerned, would have the result of **creating subgroups of workers and thus of undermining the general framework for equal treatment in employment and occupation introduced by Directive 2000/78**

SCRL, § 54-58

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But distinction within the category of religion and belief can be discriminatory

The existence of a single criterion, encompassing religion and belief, does not prevent **comparisons between workers motivated by religious belief, on the one hand, and those motivated by other beliefs, on the other**; nor does it prevent **comparisons between workers motivated by different religious beliefs**

SCRL, § 59

The Court refers to CJUE *VL*, C-16/19 (2021), concerning discriminations on disability

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➤ An attenuated version of the concept of indirect discrimination

CJEU, *Achbita* (§ 34)

Indirect discrimination can be established if the apparently neutral obligation ... results, in fact, in persons adhering to a particular religion or belief « **being put** at a particular disadvantage »

Directive 2000/78, art. 2(2) b)

« indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice **would put** persons having a particular religion or belief ... at a particular disadvantage »

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According to the referring court: the internal rule prohibiting WABE employees from wearing visible signs of political, philosophical or religious beliefs when they are in contact with parents or children, **in practice concerns certain religions more than others...**

...it should be noted that, according to the findings of the referring court, « the rule at issue ... concerns, statistically, almost exclusively **female workers who wear a headscarf because of their Muslim faith**, and the Court therefore starts from the premiss that that rule constitutes a difference of treatment indirectly based on religion »

CJEU, *WABE*, § 59

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III- Justification of neutrality policies

- A genuine and determining occupational requirement?
- Pursuing neutrality as an « objective justification » for indirect discriminations
 - Proportionality

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➤ Genuine and determining occupational requirement

The concept of a 'genuine and determining occupational requirement' (...) refers to a requirement that is **objectively** dictated by the nature of the occupational activities concerned or of the context in which they are carried out.

It cannot, however, cover **subjective considerations**, such as the willingness of the employer to take account of the particular wishes of the customer

CJEU, *Bougnaoui*, § 40

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Unanswered questions

- Is national **legislation** required? What should be the source of an essential requirement?
- How is the removal of the Islamic veil an "occupational" requirement?
- ...

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➤ Pursuing neutrality as an objective justification for indirect discriminations

« The desire to display, in relations with both public and private sector customers, a policy of political, philosophical or religious neutrality must be considered legitimate »

An employer's wish to project an image of neutrality towards customers relates to the freedom to conduct a business that is recognised *in Article 16 of the Charter* and is, in principle, legitimate, **notably where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer's customers »**

CJEU, *Achbita*, § 37-38

CJEU, *WABE*, § 63

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Since *WABE & Müller Handels*, employers face a heavier burden concerning evidence that neutrality is needed...

« ... the mere desire of an employer to pursue a policy of neutrality – while in itself a legitimate aim – is not sufficient, as such, to justify objectively a difference of treatment indirectly based on religion or belief, since such a justification can be regarded as being objective only where there is **a genuine need on the part of that employer**, which it is for that employer to demonstrate»

CJEU, *WABE*, § 64

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The Court later added that the burden concerning evidence is justified to foster tolerance and respect, and diversity...

That interpretation is inspired by the concern to encourage, as a matter of principle, tolerance and respect, as well as acceptance of a greater degree of diversity, and to avoid abuse of a policy of neutrality established within an undertaking to the detriment of workers who observe religious precepts requiring the wearing of certain items of clothing

CJUE, *SCRL*, § 41

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- « account may be taken, in the first place, of the **rights and legitimate wishes of customers or users** »

EX: parents' right to ensure the education and teaching of their children in accordance with their religious, philosophical and teaching beliefs recognised in Article 14 of the Charter or their 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, inter alia, of 'guaranteeing the free and personal development of children as regards religion, belief and policy'

- Other « relevant » evidence that the employer must provide: that « in the absence of such a policy of political, philosophical and religious neutrality, its freedom to conduct a business, recognised in Article 16 of the Charter, would be undermined in that, **given the nature of its activities or the context in which they are carried out, it would suffer adverse consequences** »

CJEU, WABE, § 65-67

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« it is for the employer not only to establish that it is pursuing a legitimate aim capable of justifying indirect discrimination on the grounds of religion or belief, but also to demonstrate that ***there was, at the time when the internal rule in question was introduced, or that there is currently, a sufficiently specific risk of that aim being undermined, such as the risk of specific disturbances within the undertaking or the specific risk of a loss of income*** »

CJUE, Müller Handels, § 85

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Exclusive neutrality can be imposed by public administration

In this case, Art. 16 CFREU cannot serve as a reference

« Neutrality of the public service »

States, infra-State bodies and other public administration, in compliance with the powers conferred on them, must be afforded a margin of discretion in designing the neutrality of the public service which it intends to promote in the workplace

Thus, the policy of 'exclusive neutrality' which a public administration, or municipal administration, intends to impose on its employees, depending on its own context and within the framework of its competences, with a view to establishing within it **an entirely neutral administrative environment may be regarded as being objectively justified by a legitimate aim**

CJUE, *Commune d'Ans*, § 33

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➤ Proportionality test

- Margin of discretion for Member states
 - Consistency
 - Appropriateness
 - Necessity
- Balance of interests

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Margin of discretion granted to Member states

Directive 2000/78 establishes a general framework for equal treatment in employment and occupation, which leaves **a margin of discretion to the Member States, in particular as regards reconciling the different rights and interests concerned, taking into account the diversity of the approaches of the Member States as regards the place accorded to religion or belief within their respective systems**

The margin of discretion thus afforded to the Member States in the absence of a consensus at EU level must go hand in hand with supervision, by the EU judicature, consisting in determining whether the measures taken at national level were justified in principle and proportionate

CJUE, *WABE and MH Müller Handel*, § 86
CJUE, *SCRL*, § 48

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Consistency

The policy must be « genuinely pursued in a consistent and systematic manner »

⇒ Evidence must be provided of a « **general and undifferentiated policy** of prohibiting the visible wearing of signs of political, philosophical or religious beliefs in respect of members of its staff who come into contact with its customers »

CJEU, *Achbita*, § 40-41

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Consistency and appropriateness

When the aim of the measure is to maintain neutrality within the undertaking and thus to prevent conflicts between employees, such conflicts, arising from the different religions and cultures represented in the undertaking, having already occurred several times in the past...

...coherence requires that no visible manifestation of political, philosophical or religious beliefs is allowed when workers are in contact with customers or with other workers « since ***the wearing of any sign, even a small-sized one, undermines the ability of that measure to achieve the aim allegedly pursued and therefore calls into question the consistency of that policy of neutrality*** »

CJUE, *Müller Handels*, § 77

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Freedom of religion is taken into account to assess appropriateness

National constitutional provisions protecting the freedom of religion may be taken into account as more favourable provisions (Article 8(1) of the directive) in examining the appropriateness of a difference in treatment indirectly based on religion or belief

CJUE, *WABE and MH Müller Handel*, § 90

CJUE, *SCRL*, § 47

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Necessity

Necessity requires that the prohibition on the visible wearing of any sign or clothing capable of being associated with a religious faith or a political or philosophical belief covers *only workers who interact with customers*

CJEU, *Achbita*, § 42

Is reasonable accommodation required?

The employer must, if possible, offer a post not involving any visual contact with customers, instead of dismissing the worker
«inherent constraints to which the undertaking is subject » must be taken into account
No additional burden for the company

CJEU, *Achbita*, § 43

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In the context of public administration

The legitimate objective of ensuring, through a policy of 'exclusive neutrality' an entirely neutral administrative environment **can be effectively pursued only if no visible manifestation of beliefs – philosophical or religious in particular – is allowed when employees are in contact with users of the public service or with other employees**, since the wearing of any sign, even a small-sized one, undermines the ability of that measure to achieve the aim allegedly pursued and therefore calls into question the consistency of that policy

Such a rule is therefore necessary

CJUE, *Commune d'Ans*, § 39

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Balance of interests

Non-discrimination on ground of religion and religious freedom - Protection of religious freedom

Freedom to conduct a business

CJEU, *WABE & Müller Handels*

It is for the national courts, having regard to all the material in the file in question, to take into account the interests involved in the case and to limit the restrictions 'on the freedoms concerned to what is strictly necessary'

CJUE, *WABE and MH Müller Handel*, § 83

CJUE, *SCRL*, § 51

Directive 2000/78 does not preclude a national court from ascribing, in the context of balancing diverging interests, **greater importance to those relating to religion or belief than to those resulting from, inter alia, the freedom to conduct a business**, provided that such an approach stems from its domestic law

The freedom of conscience and religion may be afforded greater protection than other freedoms, such as the freedom to conduct a business recognised in Article 16 of the Charter, with that protection producing its effects at the stage of the assessment of whether there is justification for indirect discrimination

CJUE, *SCRL*, § 52

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National provisions protecting freedom of thought, belief and religion, as a value to which modern democratic societies have attached great importance for many years, may be taken into account as provisions more favourable to the protection of the principle of equal treatment, within the meaning of Article 8(1) of Directive 2000/78, when examining what constitutes a difference of treatment based on religion or belief.

For example, national provisions making the justification of a difference of treatment indirectly based on religion or belief subject to higher requirements than those set out in Article 2(2)(b)(i) of Directive 2000/78 would fall within the scope of the possibility offered by Article 8(1)

CJEU, *WABE & Müller Handels*, § 89-90

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In the context of public administration

The national court, in the light of all the factors characteristic of the context in which that rule was adopted must weigh up the interests at stake, taking into account,

on the one hand, the fundamental rights and principles at issue, namely, in this case, the **right to freedom of thought, conscience and religion** guaranteed by Article 10 of the Charter of Fundamental Rights, the corollary of which is the prohibition of any discrimination based on religion enshrined in Article 21 thereof and,

on the other hand, **the principle of neutrality pursuant to which the public administration concerned seeks to guarantee**, by means of the said rule limited to the workplace, the users of its services and the members of its staff an administrative environment devoid of visible manifestations of beliefs, philosophical or religious in particular

CJUE, *Commune d'Ans*, § 40

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➤ What about intersectional discrimination?

- Recital 3 of Directive 2000/78 prohibiting discrimination on religion
« in implementing the principle of equal treatment, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote **equality between men and women**, especially since women are often the victims of multiple discrimination »
- According to the national court in *WABE* and *Commune d'Ans* the policy at stake affects, in practice, more women than men...

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No recognition of intersectional discrimination

The ECHR refuses to address this issue

« as regards the existence of indirect discrimination on the grounds of gender (...) that ground of discrimination does not fall within the scope of Directive 2000/78, which is the only EU law measure to which the question relates. It is not therefore necessary to examine whether there is such discrimination »

CJEU, *WABE*, § 58

CJEU, *Commune d'Ans*, § 42-...

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An evolution is possible

- Directive 2023/970 on Pay transparency of 10 May 2023

« For the first time, intersectional discrimination, i.e. discrimination based on a combination of multiple forms of unfairness or inequality, where the employee belongs to one or more groups protected against discrimination based on gender, on one hand, ethnic origin, religion or belief, disability, age or sexual orientation on the other, has been included in the field of application of the new rules »

- Procedural issue: National court should explicitly refer to sex discrimination and not only religious discrimination?

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Conclusion

- The CJEU has devised a framework for reconciling non-discrimination on the basis of religion with the freedom of companies/public administration to pursue a policy of (exclusive) "neutrality"
 - No broad conception of religious discrimination but rather a regressive approach
 - Recent evolution of case law requiring a stricter and more concrete proportionality test (for private employers), involving reference to religious freedom (*WABE*, *Müller Handels*, *SCRL*)
 - No recognition of intersectional discrimination (but this could change)