

Formal Neutrality, Religious Expression and Equality in European Employment Law

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Abstract

This article examines whether formal neutrality protects the religious expression and equality of Muslim women who wear a hijab under European law. Through a doctrinal analysis of Article 9 ECHR, Directive 2000/78/EC and the relevant case law of the Court of Justice of the European Union, it assesses the extent to which formally neutral workplace policies safeguard both freedom of religion and equality in employment. It concludes that such policies, although framed as neutral, may disproportionately affect Muslim women who wear a hijab and may therefore limit their equal access to employment.

Key words: Workplace Neutrality, Religious Expression, Article 9 ECHR, Equality

Introduction

Workplace neutrality policies continue to raise questions about the balance between freedom of religion and equality in European law. Employers may adopt policies in the name of neutrality, such as rules prohibiting employees from wearing a hijab or other religious signs, while employees seek to manifest their religion in the workplace. The Court of Justice of the European Union (CJEU) has considered this issue in several cases concerning the wearing of religious clothing at work. Although the Court recognises neutrality as a legitimate aim, policies that apply equally to all employees may not affect everyone in the same way. Such policies may affect both the religious expression of Muslim women who wear a hijab and their equal access to employment.

This article therefore examines the following question: *To what extent do formally neutral workplace policies protect the religious expression and equality of Muslim women who wear a hijab under European law?* It begins by examining the protection of freedom of religion under Article 9 of the European Convention on Human Rights (ECHR). It then turns to Directive 2000/78/EC and the relevant European case law on workplace neutrality. Finally, it considers

whether formally neutral workplace policies produce equal outcomes for Muslim women who wear a hijab.

Freedom of Religion under European Human Rights Law

The starting point to understand the legal debate surrounding neutrality is the protection of freedom of religion under European human rights law. Freedom of religion is protected under Article 9 of the European Convention on Human Rights (ECHR). This provision guarantees freedom of thought, conscience and religion, including the freedom to manifest one's religion or belief in worship, teaching, practice and observance.¹ The protection afforded by Article 9 ECHR has two dimensions: the *forum internum*, which protects the freedom to hold a belief, and the *forum externum*, which concerns the manifestation of religious faith in public.² The *forum internum* is absolute. By contrast, the *forum externum* may be restricted under Article 9(2) ECHR.³ The circumstances in which this freedom to manifest one's religion may be limited are narrowly defined. A limitation must be prescribed by law and necessary in a democratic society in the interests of public safety, the protection of public order, health or morals, or the protection of the rights and freedoms of others.⁴

Neutrality and non-discrimination

Directive 2000/78/EC establishes a general framework for equal treatment in employment and occupation. It prohibits discrimination on several grounds, including religion or belief.⁵ Under Article 2 of the Directive, the principle of equal treatment means that there shall be no direct or indirect discrimination, including on the grounds of religion.⁶ Whereas direct discrimination refers to less favourable treatment in a comparable situation, indirect discrimination results from an apparently neutral provision, criterion or practice that would put persons with a particular religion at a particular disadvantage compared with others.⁷ Nevertheless, indirect discrimination may still be justified when the measure pursues a legitimate aim and the means of achieving that aim are appropriate and necessary.⁸

¹ Art. 9(1) European Convention on Human Rights.

² Erica Howard, *Religious Clothing and Symbols in Employment: A Legal Analysis of the Situation in the EU Member States* (European Commission, Directorate-General for Justice and Consumers 2017) 30.

³ Erica Howard, *Religious Clothing and Symbols in Employment: A Legal Analysis of the Situation in the EU Member States* (European Commission, Directorate-General for Justice and Consumers 2017) 30.

⁴ European Convention on Human Rights, art 9(2).

⁵ Art. 1 Directive 2000/78/EC.

⁶ Art. 2 (1) Directive 2000/78/EC.

⁷ Art. 2 (1)-(2) Directive 2000/78/EC.

⁸ Art. 2 (2)(b)(i) Directive 2000/78/EC.

The interpretation of these concepts has been further developed in the case law of the CJEU, beginning with *Achbita* and *Bouagnaoui*.⁹ *Achbita* concerned a Muslim employee who informed her employer that she wished to wear a hijab at work despite an internal neutrality rule prohibiting the visible wearing of political, philosophical and religious signs.¹⁰ She was subsequently dismissed because she continued to insist on wearing the hijab.¹¹ The Court held that the internal rule treated all employees in a general and undifferentiated manner by prohibiting the visible wearing of political, philosophical and religious signs.¹² It therefore concluded that such a rule did not constitute direct discrimination on grounds of religion or belief.¹³

The Court further held that an internal rule may constitute indirect discrimination where the apparently neutral obligation results in persons adhering to a particular religion or belief being put at a particular disadvantage.¹⁴ In *Bouagnaoui*, an employee was dismissed after refusing to remove her hijab following a customer's complaint about her wearing it.¹⁵ The Court held that such a requirement must be objectively dictated by the nature of the occupational activities or the context in which they are carried out.¹⁶ The Court concluded that a customer's wish could not constitute such a requirement.¹⁷ Together, *Achbita* and *Bouagnaoui* established the legal framework for workplace neutrality under Directive 2000/78/EC. *Achbita* recognised that neutrality policies may pursue a legitimate aim. *Bouagnaoui* clarified that such policies cannot be justified only by customer preferences.

The principles established in *Achbita* and *Bouagnaoui* were further developed in *WABE and MH Müller Handels*. The Court held that an employer's desire to display a policy of political,

⁹ A Swarte and JP Loof, 'Ontslag vanwege een hoofddoek; de arresten *Achbita* en *Bouagnaoui* en de Nederlandse rechtspraak' (2017) 23 *Nederlands Tijdschrift voor Europees Recht* 118.

¹⁰ Case C-157/15 *Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions* NVEU:C:2017:203, paras 11-14.

¹¹ Case C-157/15 *Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions* NVEU:C:2017:203, para 16.

¹² Case C-157/15 *Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions* NVEU:C:2017:203, para 30.

¹³ Case C-157/15 *Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions* NVEU:C:2017:203, para 32.

¹⁴ Case C-157/15 *Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions* NVEU:C:2017:203, para 34.

¹⁵ Case C-188/15 *Bouagnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA* EU:C:2017:204, paras 14.

¹⁶ Case C-188/15 *Bouagnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA* EU:C:2017:204, para 40.

¹⁷ Case C-188/15 *Bouagnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA* EU:C:2017:204, para 41.

philosophical or religious neutrality may be regarded as a legitimate aim.¹⁸ It further held that the mere desire of an employer to pursue such a policy is not sufficient, since there must be a genuine need on the part of that employer, which it is for that employer to demonstrate.¹⁹ The Court also emphasised that the policy must be pursued in a consistent and systematic manner and that the prohibition on wearing any visible sign of political, philosophical or religious beliefs must be limited to what is strictly necessary.²⁰ The Court confirmed this in *LF v SCRL*.

In this case, the Court held that an internal neutrality policy prohibiting employees from manifesting their religious beliefs does not constitute direct discrimination, provided that it is applied in a general and undifferentiated manner.²¹ The Court further held that such a policy may nevertheless constitute indirect discrimination where it places persons with a particular religion or belief at a particular disadvantage.²² The Court further addressed workplace neutrality in *Commune d'Ans*. In this case, the Court held that Member States have a margin of discretion in designing the neutrality of the public service. A policy of exclusive neutrality may be regarded as being objectively justified by a legitimate aim.²³ The Court further held that the national court must weigh the interests at stake, taking into account the right to freedom of thought, conscience and religion and the principle of neutrality.²⁴ The CJEU has therefore clarified when neutrality policies may be justified under Directive 2000/78/EC.

The consequences of formal neutrality

This raises a further question: do formally neutral policies produce equal effects in practice? This section explores that question through the distinction between formal and substantive equality. While formal equality requires that similar cases be treated alike, it may fail to account for the institutionalised marginalisation of certain groups.²⁵ An intersectional approach based on individualised and lived experience may therefore contribute to the

¹⁸ Joined Cases C-804/18 and C-341/19 *IX v WABE eV and MH Müller Handels GmbH v MJ* EU:C:2021:594, para 63.

¹⁹ Joined Cases C-804/18 and C-341/19 *IX v WABE eV and MH Müller Handels GmbH v MJ* EU:C:2021:594, para 64.

²⁰ Joined Cases C-804/18 and C-341/19 *IX v WABE eV and MH Müller Handels GmbH v MJ* EU:C:2021:594, para 68.

²¹ *LF v SCRL* (C-344/20) EU:C:2022:774, para 33.

²² *LF v SCRL* (C-344/20) EU:C:2022:774, para 37.

²³ *OP v Commune d'Ans* (C-148/22) EU:C:2023:924, para 33.

²⁴ *OP v Commune d'Ans* (C-148/22) EU:C:2023:924, para 40.

²⁵ Cara Donegan, 'Thinly Veiled Discrimination: Muslim Women, Intersectionality and the Hybrid Solution of Reasonable Accommodation and Proactive Measures' (2020) 12(2) *European Journal of Legal Studies* 150.

achievement of substantive equality.²⁶ Formal equality does not lead to substantive equality automatically. Rules that appear neutral may still affect particular groups differently.

Although facially neutral rules do not explicitly target religion, their application may impose a substantial burden on the manifestation of religion, in particular on the religious practices of minority religions.²⁷ Neutrality policies may also limit the ability to practise one's religion in the workplace. This also relates to Article 9 ECHR. This can have consequences for Muslim women whose religious beliefs require them to wear a hijab. Neutrality policies may limit both their religious expression and their access to employment. It is therefore important to look at the effects in practice.

According to the European Union Agency for Fundamental Rights, Muslim women who usually wear a hijab outside the home are in paid employment less often than women who do not wear a hijab. The employment rate is 29% for women who wear a hijab, compared with 40% for those who do not.²⁸ According to ENAR, restrictions on wearing religious symbols in the private sector that are justified by neutrality, customer relations or a specific corporate image may structurally disadvantage Muslim women.²⁹ Such restrictions can significantly limit women's access to employment, decreasing their economic opportunities and increasing gender inequality.³⁰

Applying neutrality policies equally to all employees does not mean that everyone is affected in the same way. They may affect Muslim women who wear a hijab more than other employees. Taken together, these findings show that workplace neutrality may promote formal equality whilst limiting substantive equality.

Conclusion

²⁶ Cara Donegan, 'Thinly Veiled Discrimination: Muslim Women, Intersectionality and the Hybrid Solution of Reasonable Accommodation and Proactive Measures' (2020) 12(2) *European Journal of Legal Studies* 150.

²⁷ John Witte Jr and Andrea Pin, 'Sacrificing Religious Freedom in Europe: Why the Pan-European Courts Need Douglas Laycock' (2026) *Journal of Law and Religion* 13.

²⁸ European Union Agency for Fundamental Rights, *Second European Union Minorities and Discrimination Survey: Muslims – Selected Findings* (Publications Office of the European Union 2017) 30.

²⁹ European Network Against Racism (ENAR), *Forgotten Women: The Impact of Islamophobia on Muslim Women* (2016) 33.

³⁰ OSCE Office for Democratic Institutions and Human Rights (ODIHR), *Free and Equal Series: Employment – The Right to Freedom of Thought, Conscience, Religion or Belief of Women at Work* (OSCE/ODIHR 2024) 1.



Neutrality policies may pursue a legitimate aim, and the CJEU has clarified the circumstances in which such policies may be justified under Directive 2000/78/EC. However, formal equality does not automatically lead to substantive equality. Applying neutrality policies equally to all employees does not mean that everyone is affected in the same way. Such policies may affect Muslim women who wear a hijab more than other employees and may limit their equal access to employment. Workplace neutrality may therefore promote formal equality while limiting substantive equality. Accordingly, it is important to assess not only the wording of neutrality policies but also their practical effects. This analysis shows that formally neutral policies do not necessarily protect the religious expression and equality of Muslim women who wear a hijab.

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