

Faces of Inequality: Discrimination on the Ground of Religion and Belief



Applying EU Anti-Discrimination Law Seminar for Legal Practitioners

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Why is inequality wrongful?

Sophia Moreau's groundbreaking work "Faces of Inequality" reveals that discrimination can be wrong for multiple, interconnected reasons that cannot be reduced to a single explanation.

Unfair Subordination

Structural accommodations favor privileged groups, making their interests seem normal while others appear exceptional.

Infringes Deliberative Freedom

Prohibited grounds prevent individuals from being seen as equals in society, affecting both immutable and mutable characteristics.

Denies Basic Goods

Access to essential goods like workplace participation is necessary for full and equal participation in society.

United in Diversity: The EU's Foundation

Coming together in pluralism: This principle calls for understanding and practicing equality that recognizes distinct needs, cultures, histories, and identities of different groups.



It represents a call to embrace the complexity of human society in pursuing justice and equity. By adapting legal frameworks to different groups' realities, societies can foster inclusion through deep commitment to understanding and valuing diversity at every level.



EU Legal Framework: From market rights to fundamental Rights

EU equality law has evolved significantly over fifty years, transforming from a market-focused right to a fundamental human right. This journey began with equal pay principles and expanded through the Amsterdam Treaty's Article 13 EC (now Article 19 TFEU).

1997 Amsterdam Treaty

1

Article 13 EC enabled Community adoption of non-discrimination legislation on sex, race, religion, disability, age, and sexual orientation.

2000 Employment Equality Directive

3

Directive 78/2000 prohibited discrimination on religion, belief, disability, age, and sexual orientation in employment.

2

2000 Race Equality Directive

Directive 43/2000 prohibited racial discrimination within and outside employment contexts.

4

2006 Recast Directive

Additional secondary legislation further strengthened equality protections across member states.

Charter of Fundamental Rights: The legal foundation

Since the Lisbon Treaty's entry into force in December 2009, the Charter of Fundamental Rights has gained binding legal value equal to the Treaties, establishing crucial protections for religious freedom and equality.

Article 21

Prohibits discrimination based on multiple grounds including religion and belief.

Article 22

Mandates respect for "cultural, religious, and linguistic diversity" throughout the EU.

Article 16

Covers freedom to conduct business, balancing employer rights with equality obligations.

Article 31

Guarantees workers' rights to conditions respecting health, safety, and dignity.



Three Faces of Equality in EU Law

Equality as Principle and Value

Article 2 TFEU establishes equality of dignity - "equal dignity of all human beings" - recognizing the fundamental importance of identity.

Equality of Opportunity

Article 7 Directive 2000/78/EC enables positive action to prevent or compensate for disadvantages linked to religion or belief.

Equality of Outcomes

Also covered by Article 7, ensuring full equality in practice through specific measures addressing systemic barriers.

Defining Religion and Belief: The Challenge

The Employment Equality Directive provides **no definition** of "religion" or "belief," creating interpretive challenges. The CJEU's 2022 decision in *L.F. v. SCRL* established that "religion and belief" constitute a single ground of discrimination with two complementary facets.

Religion (Forum Internum & Externum)

Includes both having a belief and manifesting religious faith in public through worship, teaching, practice, and observance.

Belief Requirements (ECtHR Standards)

Must attain cogency, seriousness, cohesion, and importance; be worthy of respect; not conflict with human dignity or fundamental rights.

Religious Identity in the Workplace

1. For many employees, religious identity forms **an integral part of their self-conception at work** ("work" and "non-work" selves)
2. Include religious identification as part of their holistic identity.
3. Religious identity **differs significantly from** race and sex discrimination grounds because religion is often viewed as "*controllable*" and "*concealable*," leading to employer confusion between preferences and genuine religious requirements. This perception undermines effective protection of religious freedom.



What constitutes a manifestation of religion?

The manifestation of religion or belief extends beyond internal convictions to include outward expressions, particularly within the workplace (2014 Report Special Rapporteur on Freedom of Religion or Belief)

Broad Interpretation of Practice

The terms 'observance' and 'practice' are broadly applied, encompassing actions such as wearing religious clothing and symbols as expressions of faith.

Workplace as a Site for Expression

Many individuals wish to manifest their convictions at work. While sometimes appreciated as diversity, this can also lead to resistance and confrontation.

Forms of religious discrimination

Direct Discrimination

Less favorable treatment than another person in comparable situation on grounds of religion or belief. Includes discrimination by association and assumption.

Harassment

Conduct violating dignity and creating intimidating, hostile, degrading, humiliating, or offensive environment.

Indirect Discrimination

Apparently neutral provisions that put persons of particular religion at disadvantage, unless objectively justified by legitimate aim.

Victimization

Protection against dismissal or adverse treatment for complaints or legal proceedings enforcing equal treatment.

The Headscarf cases: A turning point

In 2017, the CJEU delivered its first judgments on religious discrimination under the Employment Equality Directive, both concerning Muslim women dismissed for wearing Islamic headscarves at work.

Achbita v. G4S (C-157/15)

Belgian receptionist dismissed under company's unwritten neutrality policy. CJEU found **no direct discrimination** when general rules prohibit **all visible religious, philosophical, and political symbols**.

Bougnaoui v. Micropole (C-188/15)

French engineer dismissed after customer complaint about her headscarf. CJEU **rejected customer preferences** as genuine occupational requirements.



The comparator problem in Direct Discrimination

The definition of direct discrimination requires comparison with "another person in a comparable situation." The choice of comparator can determine case outcomes, raising critical questions about equality protection.

1

CJEU's Approach

Compares employees wishing to express beliefs actively with colleagues who don't feel the same compulsion.

2

Alternative View

Should compare believers who need external manifestation with those who do not

3

Broader Question

Does religious manifestation deserve less protection than immutable characteristics like race or sex?



L.F. v. SCRL (2022): Internship Discrimination

In **Case C-344/20 (L.F. v. SCRL)**, the CJEU ruled that neutrality provisions prohibiting workers from manifesting religious or philosophical beliefs **do not constitute direct discrimination**, provided they are applied **generally and undifferentiated**.

Case Details

1

A Muslim student, LF, was denied an unpaid internship at SCRL due to her refusal to comply with the company's internal neutrality rule, which prohibited any head covering, including her headscarf.

Judicial Questions

2

The Brussels Labour Court posed critical questions of direct vs. indirect discrimination, the use of comparators (including for intersectional religious and gender discrimination), and the broader impact of neutrality rules.

Unaddressed Concerns

3

Advocate General Sharpston highlighted a "legal black hole," arguing that general neutrality rules can lead to direct discrimination for non-Christian religions requiring mandated attire. The CJEU missed an opportunity to broaden the definition of direct discrimination to cover such situations.

Intergroup vs. Intragroup Comparison

Recent CJEU developments show potential shift from traditional intergroup comparison (between different protected groups) toward intragroup comparison (within same protected characteristic), with significant implications for diversity protection (AG Medina in L.F. v S.C.L.R)

Intergroup Comparison

Widens circle of possible comparators, promotes uniformity and assimilation. Traditional approach comparing different protected groups.

Intragroup Comparison

Reduces circle of comparators, promotes diversity and accommodation. Assesses discrimination within same protected characteristic.

Intragroup comparison brings the Court **closer to acknowledging intersectional discrimination**, particularly affecting Muslim women who face discrimination based on religion, gender, and often ethnicity simultaneously.

Case Analysis: Achbita v. G4S (2017)

Ms. Samira Achbita, a Muslim receptionist at G4S Secure Solutions, was dismissed in 2006 for refusing to remove her Islamic headscarf. The company maintained an unwritten neutrality rule prohibiting visible political, philosophical, or religious signs.

01

Employment Context

Receptionist role at private security company serving public and private sectors since February 2003.

02

Policy Development

Unwritten neutrality rule formalized on May 29, 2006, after Achbita's headscarf request.

03

CJEU Decision

No direct discrimination when general rules prohibit all visible belief manifestations uniformly. No indirect discrimination: freedom to conduct business as legitimate aim (consistently and systematically with restrictions limited to strict necessity).

Case Analysis: Bougnaoui v. Micropole (2017)

Ms. Bougnaoui, a design engineer, was dismissed after a customer complained about her Islamic headscarf "upsetting employees" and requesting "no veil next time." The company cited business development necessities.

Key Legal Principle

Customer preferences cannot constitute genuine and determining occupational requirements under Article 4(1).

Objective Standards

Genuine occupational requirements must be objectively dictated by job nature or context, not subjective considerations.

Business Necessity Rejected

Customer wishes cannot justify differential treatment even when expressed as business necessity.



WABE and MH Müller Cases (2021)

These joined cases addressed neutrality policies in educational services and retail contexts, refining the distinction between comprehensive and selective prohibitions of religious symbols.

WABE (C-804/18)

Childcare center employee IX suspended for wearing Islamic headscarf. WABE's neutrality policy applied to all employees in contact with children, exempting back-office workers.

MH Müller (C-341/19)

Sales assistant MJ dismissed for headscarf after company implemented directive prohibiting **"conspicuous, large-sized signs" of beliefs.**

The Court distinguished **comprehensive prohibitions** (generally permissible) from **selective prohibitions targeting** only conspicuous signs (potentially discriminatory).

L.F. v. SCRL (2022): Internship Discrimination

This case addressed neutrality policies in educational internships, where Muslim student L.F. was denied an unpaid internship for refusing to remove her headscarf despite offering alternative head coverings.

“

Single Ground Principle

"Religion or belief" constitutes single discrimination ground covering both religious belief and philosophical or spiritual belief.

”

“

Comprehensive Neutrality

General and undifferentiated application prevents differential treatment allegations when covering all manifestations equally.

”

The case highlighted potential for **intersectional discrimination analysis**, comparing female Muslim headscarf wearers with male Muslim beard wearers, though **the Court avoided explicit intersectional recognition**.

Commune d'Ans (2023): Public Sector Neutrality

This case examined public sector neutrality requirements for back-office functions, where employee OP was prohibited from wearing a headscarf despite having no direct public contact.

Public Administration Discretion

Member States possess margin of discretion in determining public service neutrality scope.

Exclusive Neutrality Policies

Entirely neutral administrative environments accepted as potentially legitimate aims.

Consistent Application

Inconsistent implementation might constitute direct discrimination if some belief manifestations receive differential treatment.

Enhanced Scrutiny Framework

Recent CJEU jurisprudence demonstrates increasingly sophisticated scrutiny of employer justifications for neutrality policies, moving beyond abstract preferences toward evidence-based requirements.



Genuine Need Demonstration

Employers must show actual adverse consequences rather than hypothetical concerns or abstract neutrality preferences.



Proportionality Analysis

Restrictions must be strictly necessary for achieving stated objectives with consideration of alternative accommodations.



Systematic Implementation

Consistent and systematic policy implementation required; ad hoc applications undermine legitimacy.

Cross-comparative analysis: Direct Discrimination

The CJEU's jurisprudence demonstrates a refined approach to direct discrimination, focusing on the genuine neutrality and systematic application of internal rules.

Neutral Application Test Development

Initially, **Achbita** affirmed that uniformly applied neutrality rules avoid direct discrimination. However, **WABE/MH Müller** refined this by distinguishing comprehensive prohibitions (permissible) from selective bans targeting "conspicuous, large-sized signs" (potentially discriminatory), revealing that seemingly neutral criteria can mask targeted restrictions.

Inextricable Link Doctrine Sophistication

Achbita established the basic principle that rules without inextricable links to specific religions are not direct discrimination. **WABE/MH Müller Handel** expanded this by showing that size-specific prohibitions might create inextricable links. **Commune d'Ans** further complicated this, noting that inconsistent implementation of general rules can also constitute direct discrimination.

Cross-comparative analysis: Indirect Discrimination

The CJEU applies a consistent three-stage framework for indirect discrimination, but jurisprudential evolution shows increasingly sophisticated scrutiny of employer justifications and proportionality.

Jurisprudential Evolution

From **Achbita**'s basic framework, scrutiny evolved. **Bougnaoui** rejected customer preferences. **WABE/MH Müller Handel** introduced a "genuine need" requirement, demanding evidence of actual adverse consequences over hypothetical concerns. **L.F.** reinforced the need for evidence-based justification.

Legitimate Aim Refinement

Employer neutrality (**Achbita**) requires genuine need (**WABE/MH Müller**). Customer preferences are definitively rejected (**Bougnaoui**). Public service neutrality (**Commune d'Ans**) has enhanced discretion but still faces proportionality. Social conflict prevention is a legitimate aim if evidence-supported.

Proportionality Enhancement

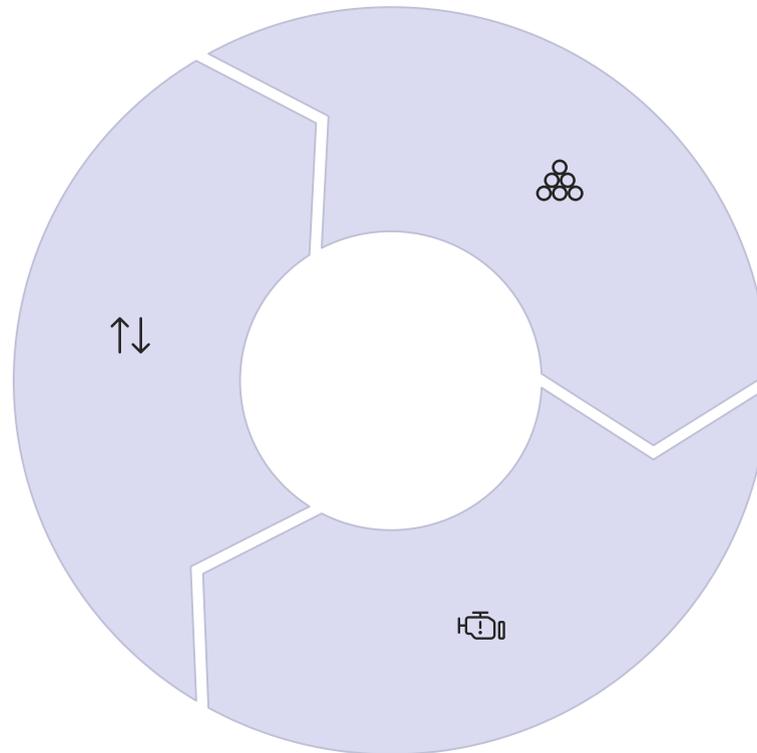
All restrictions **must be strictly necessary**. Alternative accommodations must be thoroughly considered (**Achbita**, **WABE/MH Müller**). Policies demand **consistent and systematic implementation**; ad hoc application undermines legitimacy and risks direct discrimination.

Jurisprudential evolution patterns

Analysis of CJEU religious discrimination cases reveals **three key development patterns** that demonstrate both progress and concerning limitations in protecting religious freedom.

Enhanced Employer Justification

Evolution from accepting abstract neutrality preferences toward requiring genuine need demonstrations with factual evidence.



Fundamental Rights Balancing

Sophisticated balancing of religious freedom, business freedom, parental rights, and children's developmental needs.

Critical Gaps

Absence of intersectional analysis, limited dignity considerations, and insufficient attention to social cohesion impacts.

Religious Organizations and Occupational Requirements

Article 4 of the Employment Equality Directive provides exceptions for religious organizations, balancing organizational autonomy with non-discrimination principles through two distinct provisions.

Article 4(1): General Exception

Genuine and determining occupational requirement for all grounds. Must be:

- Job requirement
- Due to **job nature or context**
- **Proportionate** means to legitimate aim

Article 4(2): Religious Organizations

Broader exception for organizations with religious ethos. Requirements need not be "determining" but must be:

- **Genuine, legitimate, and justified**
- Linked to **job nature or context**
- Cannot justify discrimination on other grounds

Egenberger Case: Balancing Religious Autonomy

Vera Egenberger applied for a position preparing a UN racial discrimination report with a Protestant Church auxiliary organization. Despite the secular nature of the work, the job required Protestant church membership.

1

Fundamental Rights Recognition

Religious organizations' autonomy and self-determination constitute fundamental rights under EU law.

2

Proportionality Analysis

Requirements must be appropriately adapted to protect organizational autonomy while being suitable for this objective.

3

Proximity Test

Assessment requires analysis of activities' proximity to the organization's proclamatory mission.

4

Judicial Review

Courts must balance organizational autonomy against prohibition on discrimination through proportionality analysis.

Cresco Investigation: Direct Discrimination Found

In this Austrian case, Good Friday constituted a paid public holiday exclusively for members of four minority Christian churches. Mr. Achatzi, not a member of these churches, worked on Good Friday without receiving public holiday pay.



Direct Discrimination

Austrian legislation treated comparable situations differently based on religion, focusing on economic benefits rather than religious observance.



Horizontal Direct Effect

Article 21 Charter creates enforceable private law obligations, extending EU fundamental rights into private relationships.



Minority Protection Limits

Religion-based privileges, even those protecting minorities, cannot create discriminatory employment conditions.

Critical gaps in current jurisprudence

Despite positive developments in enhanced scrutiny, significant gaps remain in CJEU's approach to religious discrimination that undermine comprehensive equality protection.

1

Intersectional Analysis Absence

No specific discussion of gender equality impacts, avoiding intersectional approach despite clear evidence of disproportionate effects on Muslim women.

2

Limited Dignity Considerations

Insufficient consideration of primary EU law beyond Charter, avoiding underlying dignity as fundamental equality value.

3

Social Cohesion Neglect

No consideration of minority participation in society, workplace access, or structural labor market repercussions.



Structural implications for social cohesion

The CJEU's current direction risks seriously **compromising non-discrimination principles and equality values**. Discrimination restricting professional access for certain groups creates structural labor market repercussions affecting social cohesion.

EU law is founded on pluralism, non-discrimination, tolerance, justice, solidarity, and equality. If current jurisprudential trends continue, these foundational values face significant erosion, particularly **affecting religious minorities' full participation in European society**.

The Path Forward: Rethinking Equality

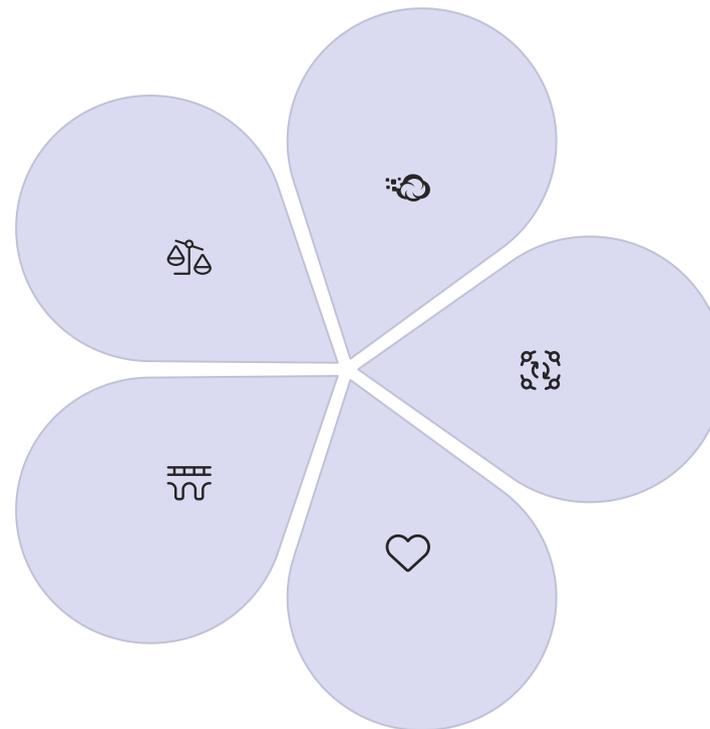
Addressing religious discrimination requires rethinking equality in our increasingly diverse global society. We must examine traditional paradigms of formal and substantive equality and their efficacy in accommodating societal differences in multicultural contexts.

Enhanced Scrutiny

Strengthen evidence-based justification requirements for neutrality policies.

Accommodation Principles

Promote diversity and accommodation over uniformity and assimilation.



Intersectional Recognition

Acknowledge multiple discrimination grounds affecting religious minorities.

Social Cohesion Focus

Consider structural impacts on minority participation and workplace access.

Dignity-Centered Approach

Emphasize human dignity as fundamental equality value in all decisions.

This shift requires **deep commitment to understanding and valuing diversity** at every level of the legal process, from legislative drafting to **judicial interpretation**, fostering a truly inclusive European society.

Thank you for your attention

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