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Discrimination on the Ground of Religion and Belief

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Seminar for Members of the Judiciary

UNIVERSIDAD COMPLUTENSE MADRID

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The EU’s commitment to Equality

The European Union is founded on shared values, with equality and non-discrimination forming critical pillars of its legal and social framework. This commitment extends to protecting individuals from discrimination based on religion or belief.

Founding values

The Treaties establish human dignity, freedom, and equality as core principles, guiding all EU action.

Legal mandate

Article 2 TEU and Article 10 TFEU explicitly oblige the Union to combat discrimination, including that based on religion or belief.

Harmonised protection

EU directives aim to set common standards, ensuring a high level of protection against discrimination across all Member States.

PART 1 — DIVERSITY & EQUALITY FRAMEWORK

The EU’s commitment to Equality

The EU motto *United in Diversity* (2000) frames equality not as uniform treatment but as recognition of distinct group identities. European integration was never conceived as cultural or religious homogenization but the coexistence of difference.

Article 2 TFEU

Equality as a shared value common to all Member States.

Article 3 TFEU

The Union shall combat social exclusion and discrimination, and promote social justice.

Article 8 TFEU

A positive and affirmative duty to eliminate inequalities — not merely a negative prohibition on discriminatory acts.

PART 1 — DIVERSITY & EQUALITY FRAMEWORK

Three Faces of Equality

Equality as Principle & Value

Equality of dignity, rooted in **Article 2 TFEU** — all human beings possess equal dignity irrespective of identity.

Equality of Opportunity

Article 7 of Directive 2000/78 permits (but does not require) Member States to adopt positive action measures to prevent disadvantages linked to religion or belief.

Equality of Outcomes

Also grounded in Article 7 — a more substantive, results-oriented conception that goes beyond formal opportunity.

From Market Right to Fundamental Rights

EU equality law evolved from a market right to a fundamental rights over fifty years.

Market Right

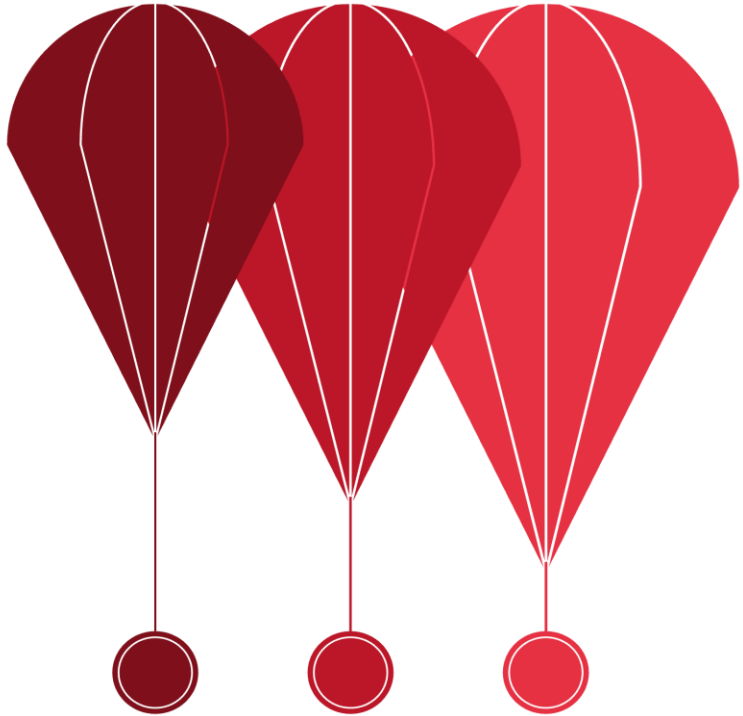
Equal pay principle begins

Legislative Empowerment

Article 13 EC (Amsterdam 1997)

Fundamental Right

Charter of Rights (Lisbon 2009)



The 1997 Treaty of Amsterdam (Art. 13 EC, now Art. 19 TFEU) gave rise to Directive 2000/43 and Directive 2000/78.

PART 1 — DIVERSITY & EQUALITY FRAMEWORK

The Charter of Fundamental Rights

Binding since the Lisbon Treaty (December 2009), the Charter frames the entire analysis through four key articles:

Article 10

Freedom of religion and belief.

Article 21

General prohibition of discrimination, including on grounds of religion.

Article 22

Mandate to respect cultural, religious, and linguistic diversity.

Articles 16 & 31

Freedom to conduct a business (invoked by employers) and every worker's right to dignified conditions.

Article 52(3) Charter requires that Charter rights corresponding to ECHR rights carry the same meaning and scope — meaning ECtHR case law necessarily informs CJEU interpretation of Directive 2000/78.

PART 2 — DEFINING RELIGION AND BELIEF

The Directive’s deliberate silence

> Before we can talk about discrimination, we need to ask a harder question: what exactly counts as religion or belief under EU law?

Directive 2000/78 **nowhere** defines "religion" or "belief," despite these being two of the five protected grounds. This interpretive gap has forced the Court (Advocate Generals) to build a definitional framework

Forum Internum

The inner fact of holding a belief — protected absolutely.

Forum Externum

The outward manifestation of that belief — subject to proportionate limitation. Both Article 10 Charter and Article 9 ECHR embrace this dual structure.

PART 2 — DEFINING RELIGION AND BELIEF

What qualifies as a "Belief"?

Not every conviction or opinion qualifies. The ECtHR in *Campbell and Cosans v United Kingdom* (1982) established that a religious or philosophical belief must:

Cogency, seriousness, cohesion, and importance

Attain a sufficient threshold — ordinary opinions or preferences do not qualify.

Worthy of respect in a democratic society

Not incompatible with human dignity or fundamental rights.

Relate to a weighty aspect of human life

The European Commission clarifies "belief" includes philosophical convictions but does not extend to political opinion as such.

PART 2 — DEFINING RELIGION AND BELIEF

L.F. v SCRL (C-344/20, 2022): An unified ground

> "The terms religion and belief must be analysed as two facets of the same single ground of discrimination"

This unification enhances comparative analysis by allowing courts to compare across the full spectrum of belief positions within one analytical frame:

Religious Belief	Philosophical Belief	Spiritual Belief
Traditional religious convictions and practices.	Non-religious worldviews and moral convictions.	Broader spiritual orientations beyond organised religion.

Directive 2011/95 demonstrates the EU can go beyond Strasbourg's minimum standard — it defines religion broadly enough to include theistic, non-theistic, and atheistic beliefs

PART 2 — DEFINING RELIGION AND BELIEF

Religious Identity at work

For many employees, religious identity is not a discardable "add-on" but part of **one's holistic self-conception: rejecting the binary of a "work self" and a "non-work self"**

The Mutability problem

Religion is popularly perceived as "controllable" and "concealable," leading some courts to import a problematic mutability logic: assuming religion deserves comparatively weaker protection because it can, in principle, be changed or hidden.

Manifestation at work

The **UN Special Rapporteur on Freedom of Religion or Belief (2014)** recognises the workplace as a central site where people manifest their convictions (sometimes triggering "resistance, confrontation and intolerance). Manifestation expressly includes religious clothing and symbols.

PART 3 — DIRECT/INDIRECT DISCRIMINATION & COMPARATORS

The Four wrongs under Directive 2000/78

Direct Discrimination

Less favourable treatment because of religion or belief — including discrimination by association and by assumption.

Indirect Discrimination

A neutral provision, criterion, or practice that puts persons of a particular religion at a particular disadvantage.

Harassment

Conduct related to religion that violates dignity and creates an intimidating, hostile, degrading, or offensive environment.

Victimisation

Adverse treatment in retaliation for a discrimination complaint or related legal proceedings (Article 11).

These definitions are formally identical across all grounds — but the comparator test operates very differently when applied to religion, because religious identity is frequently framed as a matter of choice and concealment.

PART 3 — DIRECT/INDIRECT DISCRIMINATION & COMPARATORS

Achbita & Bougnaoui: A Foundational Split (2017)

The CJEU's first two religion-discrimination judgments both concerned Muslim women dismissed for refusing to remove an Islamic headscarf. Their Advocate Generals reached **opposite conclusions**

Achbita (C-157/15)

G4S invoked an unwritten "neutrality" policy banning all visible political, philosophical, or religious signs. AG Kokott characterised this as, at most, **indirect discrimination**, capable of justification. The Court agreed.

Bougnaoui (C-188/15)

Micropole dismissed Ms Bougnaoui after a client complained. AG Sharpston concluded this was direct discrimination: a specific, individualised customer preference rather than a general, neutrally-applied policy. The Court rejected customer preference as a genuine occupational requirement.

PART 3 — DIRECT/INDIRECT DISCRIMINATION & COMPARATORS

The Comparator problem in Achbita

The Court's comparator in *Achbita* draws the line between "employees who wish to give active expression to a particular belief… and their colleagues who do not feel the same compulsion or need." **Since the rule burdens all symbol-wearers equally, the Court found no direct discrimination.**

⚠ A sharper analysis: the correct comparator should be "believers who need to manifest their religion externally vs believers who do not." A hijab-wearing Muslim woman faces an overwhelmingly greater practical burden than a Christian colleague whose faith requires no visible manifestation. This is formally equal treatment of substantively unlike situations — itself a recognised form of discrimination.

Two provocative comparisons:

Would a "sex-neutral clothing" policy banning gendered dress survive scrutiny?

Would a "hair-neutral" policy banning cornrows survive a racial-discrimination analysis?

The Mutability argument and its reply

Because a person can choose a religion (unlike sex or race), it is considered fair to restrict protection for its manifestation so the argument goes.

Reply 1: Psychological cost

The cost of renouncing or concealing a core aspect of one's identity is extremely high — comparable to concealing other protected characteristics.

Reply 2: Doctrinal inconsistency

EU law already protects other partially "chosen" characteristics without demanding their suppression. Pregnancy involves an element of choice, yet no court accepts that pregnancy discrimination is less serious because the pregnancy was "chosen."

Reply 3: Selective application

Mutability is invoked selectively against religion but not against other grounds where analogous logic could apply — a structural weak point in *Achbita* reasoning.

PART 3 — DIRECT/INDIRECT DISCRIMINATION & COMPARATORS

The 2022 Breakthrough: Intragroup Comparison

L.F. v SCRL (C-344/20, 2022) introduces the most significant conceptual innovation in this case law

Intergroup Comparison

The traditional default: compares members of one protected group against a different group or those with no protected characteristic. Treats each group as internally homogeneous. Promotes uniformity and assimilation as the measure of equal treatment.

Intragroup Comparison

Assesses discrimination *within* a group sharing the same protected characteristic: Are Muslim women treated worse than Muslim men, both sharing the same religion but manifesting it differently because of gender? Promotes diversity and accommodation

The Brussels Labour Court proposed comparing a headscarf-wearing woman to a bearded man of the same faith — holding religion constant and isolating the effect of gender.

PART 3 — DIRECT/INDIRECT DISCRIMINATION & COMPARATORS

Why Intragroup Comparison Matters

Extends Directive 2000/78's Reach

Disadvantage invisible under an intergroup lens becomes visible. A neutrality rule neutral at the intergroup level (Muslims vs non-Muslims) may reveal a sharper harm at the intragroup level (Muslim women vs Muslim men).

Reclassifies Discrimination

Disadvantage currently classified as indirect discrimination — subject to employer justification — can be reclassified as direct discrimination which admits far more limited justifications.

Opens the Door to Intersectionality

Makes visible the compounding effect of multiple protected characteristics (religion + gender + ethnicity) operating simultaneously — a dimension the Court has so far declined to formally adopt despite AG-level invitations.

Despite AG Medina's Opinion urging intersectional recognition in *L.F. v SCRL*, the Court's own judgment did not adopt this reasoning — revealing persistent institutional caution.

PART 3 — SUMMARY

Part 3 Takeaways

1

Comparator choice is outcome-determinative

Not a mere technicality — who the comparator is can determine the entire case.

2

Intragroup comparison is the key doctrinal tool

Explicit in *L.F. v SCRL*, it is the single most promising tool for exposing intersectional religious discrimination.

3

The Court has not yet walked through the door

Intragroup comparison remains an emerging tool but not yet consolidated feature of EU religious discrimination law — the gap between AG and Court is itself diagnostic.

PART 4 — READING THE TABLE

Three Cross-Cutting Patterns

Two families of cases

The **neutrality/headscarf family** (Achbita, Bougnaoui, WABE/Müller, L.F. v SCRL, Commune d'Ans) and the **religious ethos family** (Egenberger, IR, Cresco, Katholische Schwangerschaftsberatung) both converge on the same constitutional architecture: Article 21 Charter, Directive 2000/78, and Article 17 TFEU.

Evolving comparator Methodology

A slow shift from purely intergroup analysis toward partial intragroup or structural analysis — confirming that intragroup comparison is emerging but not yet consolidated

Court vs Advocate General

The Court tends to **depart from** its AG on horizontal direct effect and intersectionality (Egenberger, IR, Cresco, L.F. v SCRL), while alinging more closely on occupational-requirement analysis and proportionality.

PART 5 — HEADSCARF CASE LINE

Deep Dive: The Neutrality-Rule Cases

Across five rulings, the Court has tightened the **evidentiary burden on employers** while preserving the principle that uniformly-applied neutrality rules are not directly discriminatory.

Bougnaoui

Customer preference excluded as justification.

WABE / Müller

Genuine, evidenced occupational need required.



Achbita

Abstract neutrality preference accepted.

L.F. v SCRL / Commune d'Ans

Tighter evidence-based proportionality trajectory.

Two structural blind spots persist: the Court's continuing avoidance of gender-intersectional analysis and its shallow engagement with human dignity as a foundational value.

PART 5 — HEADSCARF CASE LINE

The Three-Stage Indirect Discrimination Test

1

Stage 1: Particular Disadvantage

Establish a particular disadvantage suffered by the protected group as a result of the provision, criterion, or practice.

2

Stage 2: Legitimate Aim

Identify a legitimate aim pursued by the employer or public body. The standard has tightened *from abstract preference (Achbita) to genuine, evidenced need (WABE/Müller).*

3

Stage 3: Proportionality

Appropriateness and necessity. Inconsistent implementation can itself constitute direct discrimination even under a facially general rule (Commune d'Ans).

AG Sharpston described the resulting situation as a "**legal black hole**" for individuals who consider mandated religious apparel obligatory — unable to access direct-discrimination protection and facing uncertain indirect-discrimination justification analysis.

PART 6 — CHURCH AUTONOMY & ETHOS

Deep Dive: The Collective Dimension

The Court has *progressively narrowed the deference given to religious organisations' self-defined ethos*, while never fully resolving the collective, associative dimension of religious freedom.

Article 17 TFEU (respect for churches' national status) and the two limbs of the Article 4(2) Directive derogation:

Occupational-Requirement Limb

Religion as a "genuine, legitimate, justified" requirement given the organisation's ethos — all three criteria are cumulative.

Loyalty Limb

The duty of good faith and loyalty to the organisation's ethos — extended to loyalty-clause dismissals in *IR v JQ*, regardless of the organisation's commercial character.

PART 6 — CHURCH AUTONOMY & ETHOS

The Ethos Cases: Egenberger to Katholische

Egenberger (C-414/16, 2018)

Atheist candidate rejected for Protestant charity post. Germany's deferential "plausibility check" rejected — full independent judicial review mandated. The Court's departure from AG Tanchev on horizontal direct effect (Art. 21 + Art. 47 Charter) is the doctrinal foundation for everything that follows.

IR v JQ (C-68/17, 2018)

Catholic hospital dismissed its head of internal medicine for civil remarriage. Egenberger's scrutiny standard extended to loyalty-clause dismissals. AG Wathelet's proposed secular-equivalence threshold test rejected as unnecessary.

Cresco Investigation (C-193/17, 2019)

Austrian legislation privileged four small Christian churches with a paid Good Friday holiday. Direct discrimination found; Article 17 TFEU rejected as a shield for State-created privilege; Article 21 Charter alone held horizontally directly effective — going further than AG Bobek.

Katholische Schwangerschaftsberatung (C-258/24, 2026)

Employee dismissed for leaving the Catholic Church despite no membership requirement for her role. Court closely followed AG Medina: no membership requirement means no genuine occupational requirement — the "genuine" criterion sharpened.

PART 6 — CHURCH AUTONOMY & ETHOS

Three Converging Trends in the Ethos Line

Expanding Judicial Review

Moving from deferential plausibility review (pre-Egenberger) to full substantive scrutiny of **all three cumulative criteria:** genuine, legitimate, and justified.

Crystallising Horizontal Direct Effect

Strengthening from Egenberger's combined Article 21/47 approach to Cresco's standalone Article 21 Charter holding — directly effective between private parties.

Narrow Reading of Article 17 TFEU

Confined to protecting the formal status of church-state relationships — not a shield for discriminatory outcomes.

UNRESOLVED GAP: the Court has never engaged with the collective, associative interest of religious communities in self-definition — most visible in Cresco, and mirroring the intersectionality gap in the individual strand.

Cross-Comparative Table: Nine major CJEU rulings

Case	Respondent Context	Discrimination Issue	Comparator Type	Key Holding	AG/CJEU
Achbita (C-157/15, 2017)	G4S Secure Solutions (private security firm)	Neutrality dress-code ban on headscarf	Intergroup (symbol-wearers vs non-wearers)	General, uniform ban on all religious/political/philosophical signs is not direct discrimination; may be indirect discrimination,	Followed AG Kokott's indirect-discrimination framing
Bougnaoui (C-188/15, 2017)	Micropole SA (IT consultancy)	Dismissal after customer complaint about headscarf	Intergroup	Customer preference cannot constitute a 'genuine and determining occupational requirement' under Art. 4(1)	Aligned with AG 's direct-discrim.regarding customer-driven dismissals
Egenberger (C-(C-414/16, 2018)	Evangelisches Werk (Protestant charity)	Refusal to interview atheist applicant for church-affiliated post	Intergroup (church-affiliated vs non-affiliated)	National courts must conduct effective judicial review of 'genuine, legitimate, justified' criteria	Departed from AG Tanchev on horizontal direct effect

Cross-Comparative Table (continued)

Case	Respondent Context	Discrimination Issue	Comparator Type	Key Holding	AG/CJEU
IR v JQ (C-68/17, 2018)	Catholic hospital (IR)	Dismissal of doctor for civil remarriage after divorce	Intergroup (Catholic employee vs non-Catholic colleagues in same role)	Same judicial-review standard extends to loyalty-clause dismissals, regardless of the organisation's commercial character	Departed from AG Wathelet's proposed secular-equivalence threshold test
Cresco Investigation 193/17, 2019)	Austrian State legislation / private employer	Good Friday paid holiday granted only to members of four churches	Structural / intragroup signal (members vs non-members, regardless of belief)	Direct discrimination; Art. 17 TFEU does not shield State-created religious privilege; Art. 21 Charter alone horizontally directly effective	Went beyond AG Bobek's more cautious view on horizontal effect
WABE / MH Müller (C-804/18 & C-341/19, 2021)	Childcare association (WABE) and retail employer (Müller)	Neutrality policy covering visible religious, philosophical, political signs	Intergroup, with early intragroup signalling (size/visibility of symbol)	Confirms 'religion or belief' as single ground; requires genuine need evidence, not abstract preference; 'large-sized' symbol bans may create inextricable link to specific religions	AG Sharpston's shadow opinion flagged a 'legal black hole' for mandated apparel

Cross-Comparative Table (concluded)

Case	Respondent Context	Discrimination Issue	Comparator Type	Key Holding	AG/CJEU
L.F. v SCRL (C-344/20, 2022)	SCRL (internship host organisation)	Refusal of internship over headscarf; alternative covering also refused	Intragroup (headscarf-wearing woman vs bearded man, same faith)	General, undifferentiated neutrality rules remain non-discriminatory directly; Court declines intersectional/intragroup framing	Departed from AG Medina's intersectional and intragroup reasoning
Commune (C-148/22, 2023)	Belgian municipal public administration	'Exclusive neutrality' rule applied to back-office employee	Intergroup	Public administrations may impose comprehensive neutrality provided consistently implemented	Consistent with AG Opinion on public-sector discretion
Katholische Schwangerschaftsberatung (C-(C-258/24, 2026)	Catholic pregnancy-counselling association	Dismissal for leaving the Catholic Church despite no membership requirement for the role	Intergroup (Catholic employees vs non-Catholic colleagues in same role)	Confirms cumulative nature of 'genuine, legitimate, justified' criteria; sharpens 'genuine' criterion — no membership requirement means no genuine occupational requirement	Closely followed AG Medina's reasoning throughout

PART 7 — REFLECTIONS & RECOMMENDATIONS

A Values-Practice Gap

> The EU's founding commitment to pluralism and non-discrimination is not yet fully reflected in adjudicative outcomes.



Major CJEU Rulings

Mapped across two doctrinal families.



Recommendations

Targeted reforms across both individual and collective strands.



Persistent Gaps

Intersectionality, mutability, collective autonomy, and monitoring.

Enhanced justification requirements and evidence-based standards mark real progress, but intersectionality, intragroup comparison, and the collective dimension of religious freedom remain persistently unresolved.

PART 7 — RECOMMENDATIONS 1–3

Recommendations: Strengthening Individual Protection

1 Structured Proportionality with Mandatory Accommodation Review

Employers must document a structured proportionality analysis — including evidence of the specific risk, feasible accommodations, and periodic policy review.

2 Holistic Definition of Religious Identity in Soft-Law Guidance

EU-level guidance should explicitly recognise religious identity as integral to personal identity, countering the mutability reasoning in *Achbita* and closing the asymmetry with other Charter Article 21 grounds.

3 Mainstream Intersectional Analysis into the CJEU's Method

The Court should acknowledge that neutrality bans disproportionately affect religious women of specific ethnic backgrounds and factor this compounded disadvantage into both discrimination and justification stages.

PART 7 — RECOMMENDATIONS 4–6

Recommendations: Doctrinal & Institutional Reform

4. Institutionalise Intragroup Comparison

Make intragroup comparison the **primary comparator framework** in religious discrimination cases, converting indirect discrimination claims into direct ones requiring stricter justification.

5. Commission a Labour-Market Impact Assessment

The European Commission and Fundamental Rights Agency should commission empirical research quantifying the **labour-market exclusion effects** of policies on religious minorities, particularly Muslim women.

6. Close the Gap Between EU Values and Adjudicative Outcomes

A coherence review should assess whether the CJEU's headscarf jurisprudence aligns with Articles 2, 3, and 8 TFEU, with legislative clarification of Directive 2000/78 where outcomes undercut founding commitments.

PART 7 — RECOMMENDATIONS 7–8

Recommendations: Collective Dimension & Monitoring

7. Clarify the Collective/Associative Dimension

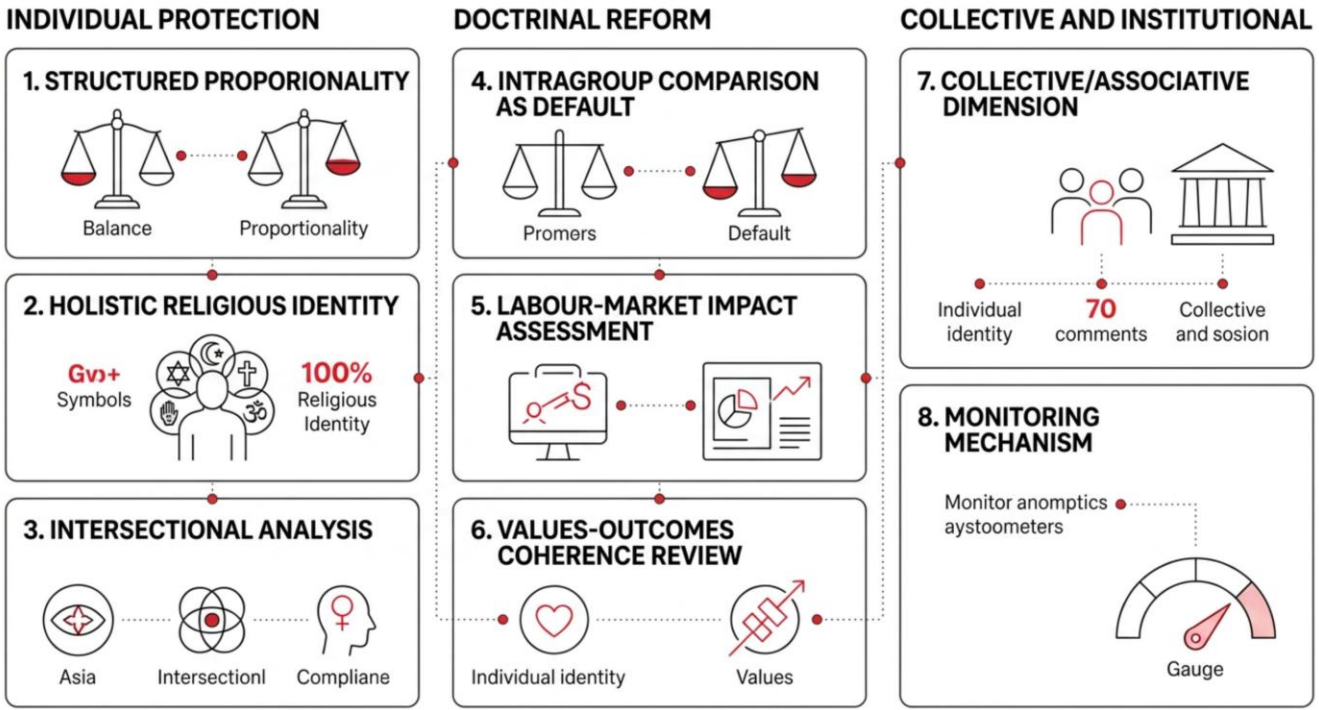
Guidance should clarify whether a religious organisation's collective right to self-definition under Article 10 Charter and Article 17 TFEU can be asserted independently of the occupational-link test (the collective dimension risks being reduced to a residual category).

8. Establish a monitoring and reporting mechanism at Member State level

Data on religion-based dismissals, neutrality-policy litigation reduced to a residual category; comparative data analysis.

PART 7 — SYNTHESIS

The Doctrinal Agenda Ahead



CLOSING

United in Diversity — The Road Ahead

> Article 8 TFEU imposes a positive duty to eliminate inequalities: the jurisprudence shows how far EU law has come, and how far it still must travel.

What the case law has achieved

Enhanced justification requirements, evidence-based proportionality, and full judicial review of ethos-based derogations.

What remains unfinished

Intersectionality, intragroup comparison, collective religious freedom, and labour-market monitoring remain unresolved.

The path forward

Legislative clarification of Directive 2000/78, Commission guidance, and a future ruling institutionalising intragroup comparison.

Questions & Discussion

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