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Contesting Neutrality Dress Codes in Europe

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About this Paper

The wish to achieve "neutrality" or portray an "image of neutrality" to customers is an increasingly common justification used by employers to introduce religious dress restrictions, which has also been recognised by the Court of Justice of the European Union. This briefing paper aims to support Muslim women, campaigners, litigators, and other stakeholders challenging discriminatory and exclusionary religious dress bans by deconstructing the concept of neutrality and analysing its treatment by various courts as well as its use in public and political discourse. The paper presents avenues for reclaiming neutrality to achieve equality and freedom, and for further legal action. It includes a legal Annex and is complemented by a separate factsheet.

S.P.E.A.K.

S.P.E.A.K. is a platform of Muslim womxn from various backgrounds committed to eradicating racism, Islamophobia, sexism, and other forms of exclusion, founded in 2019 in the Netherlands. S.P.E.A.K. operates from an intersectional perspective and understanding that the struggle of Muslim womxn is inextricably linked with all forms of institutional and social exclusions based on race, gender, sexuality, and religion. As a collective, S.P.E.A.K. offers Muslim womxn the space to work together, support and strengthen each other in their common pursuit of claiming their own voice, leading with the rallying cry: "Our bodies are not a battleground, and we do not need saving".

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1. Introduction

Muslim women in Europe increasingly face prohibitions that curtail their right to express their religion at work, school, or even in public. Examples of these prohibitions include the French headscarf ban in public education (2004), the Dutch "lifestyle neutrality codes" for police officers (2011), the Walloon government's prohibition of people using "ostentatious signs and behaviors that express their political, philosophical or religious convictions" for its employees (2014) and similar bans in public schools across Belgium, as well as the recent German headscarf ban for certain categories of civil servants (2021).[1] These restrictions are increasingly justified as necessary for "preserving neutrality." Civil servants, such as judges and police officers, but also teachers and hospital workers, are increasingly required to "dress neutrally," meaning that they must refrain from the visible wearing of political, philosophical, and religious signs and symbols on the job. Following the example set by various governments and state actors, private corporations in various sectors have introduced similar codes, claiming that they are necessary to protect a "neutral corporate image."

This briefing paper focuses on the implications of neutrality dress codes for Muslim women. In practice, such dress codes disproportionately affect Muslim women and discriminate against them.[2] Neutrality dress codes are not neutral but, as argued in this paper, rely on Islamophobic discourses that portray Islamic dress as incompatible with neutrality. While neutrality, in its conception, aims to achieve equality and preserve freedom, the way it is understood and implemented today inherently discriminates against certain groups by determining the boundaries of what one should look like to be considered "neutral". While some groups are assumed to be neutral, other groups are cast as different, suspect, and face the task of constantly having to prove their "neutrality."

[1] For a detailed overview of religious dress restrictions across Europe, see: Open Society Justice Initiative, *Restrictions on Muslim Women's Dress in the 27 EU Member States and the United Kingdom*, 21 March 2022.

[2] This disproportionate effect is commonly accepted by judicial institutions. See, for example, the recent judgment of the Grand Chamber of the CJEU in the Joined Cases *IX v WABE eV* and *MH Müller Handels GmbH v MJ* of 15 July 2021, para. 59, where the Court pointed out that the neutrality dress code in question, concerns statistically almost exclusively female workers who wear a headscarf because of their Muslim faith.

The vagueness and flexibility of the concept of neutrality raise questions about the legitimacy of neutrality dress codes. If both the state and private businesses can justify such dress codes by simply invoking "neutrality," against the backdrop of widespread Islamophobia, the risk that neutrality is abused to justify the exclusion of "visible" Muslim women, or other groups for that matter, is real. As will be shown in the following sections, while both European and national courts have imposed certain conditions on employers who wish to adopt a neutrality policy, they have in most cases failed to set transparent and fair standards to ensure the freedom of religion and the prohibition of discrimination. In this way, neutrality dress codes may function as a legally sanctioned form of discrimination, which can be used to justify interference with the religious liberty of individuals. **Because of a lack of critical interrogation of the concept of neutrality in both the legal and political sphere, stakeholders struggle to effectively challenge neutrality dress codes in practice.**

This briefing paper responds to this situation by zooming in on the current use of neutrality dress codes in EU Member States. It provides a critical analysis by interrogating the common justifications for neutrality dress codes and relating them to wider political discourses. Neutrality dress codes, it will be argued, should be understood as intimately linked to practices of Islamophobia, sexism, and racism in Europe and should be challenged on this basis. **The claim of "neutrality" disguises a contemporary form of racism, whereby certain religious minorities are racialized and excluded in the name of a principle that may have once been adopted for their protection.** In this way, the adoption of allegedly neutral dress codes exacerbates the widespread discrimination of Muslim women in European societies in general, and in the European labor market in particular.

This briefing paper has three interrelated aims:

- Providing readers with a critical analysis of neutrality regulations, as well as a practical overview of the common justifications and how to contest them;
- Informing readers about the way European courts have ruled on neutrality dress codes; and
- Offering avenues to reclaim the principle of neutrality as a principle that protects, instead of oppresses, Muslim women.

The primary audience for this paper is Muslim women who are affected by neutrality dress codes, as well as actors who campaign on their behalf and

stakeholders who would like to understand neutrality dress codes from the experience and reality of the Muslim women targeted or disproportionately affected by them. The overarching goal is to provide an effective tool that includes powerful and authoritative arguments and evidence to challenge neutrality dress codes in practice.

The paper focuses on the Muslim headscarf, commonly referred to as hijab, as this garment is at the center of neutrality policies. A ban on the headscarf implicitly bans other forms of religious dress such as face veils (whether the niqab or burqa). It is acknowledged that face veils are even more vigorously restricted than headscarves by various EU Member States.[3] However, these restrictions are not based on neutrality-reasoning and therefore fall outside of the scope of this paper. While other types of religious dress may also be affected by neutrality dress codes, this briefing paper is concerned with the effects of such bans on Muslim women because this group forms the primary target of these prohibitions.

2. What Is a Neutrality Dress Code?

In this briefing paper, **neutrality dress codes are understood as restrictions on the rights of individuals to dress according to their religious convictions, where neutrality is used as an official justification for that restriction.** "Neutrality" is only one of many justifications used for regulations that affect the rights of Muslim women in Europe to dress according to their religion. Other common justifications include the need for integration and assimilation, the need to counter terrorism and extremism, the promotion of gender equality and the need for homogeneity.[4]

Official justifications for *face veil bans* tend to focus on the need for security, open communication, gender equality, and integration.[5] Here, the neutrality justification does not play a prominent role, most probably because these bans do not specifically relate to employment. It is mostly in employment (public and

[3] Open Society Justice Initiative, *Restrictions on Muslim Women's Dress in the 27 EU Member States and the United Kingdom*, 21 March 2022.

[4] *Ibid.*

[5] In *S.A.S. v France*, the ECtHR debunked both the aim of gender equality and the aim of human dignity as a justification for a face veil ban. Instead, the ECtHR accepted the aim of open communication as legitimate for the purpose of "living together," *S.A.S. v France*, Judgment of the Grand Chamber of the ECtHR of 1 July 2014.

private) that persons are expected to be "neutral" by "dressing neutrally," because employees act on behalf of their employer in relation to citizens/customers. Neutral dress, assumed to be achieved by banning religious, political, and philosophical signs, is then presumed to reflect the religious, political, or philosophical neutrality of the (public or private) employer.

2.1 State neutrality and corporate neutrality

We can currently distinguish two types of neutrality dress codes: codes from the state and codes from private businesses. Where state neutrality codes are typically justified by an appeal to secularism and the separation of church and state, businesses mostly seek to justify corporate neutrality codes on the basis that they wish to present a neutral corporate image.

2.2 From neutrality of the state to neutrality of the individual

In public debates on state neutrality, two competing concepts are at play. The first of these is often referred to as **"open" or "inclusive" state neutrality** and assumes that freedom of religion can only be ensured if the state remains neutral or indifferent in matters of religion. This means that the state does not identify with a particular religion and treats its citizens equally, regardless of their religious affiliation. **This concept of state neutrality is recognized by the European Court of Human Rights (ECtHR). According to the Court, European states have a duty of neutrality and impartiality towards religion.**[6] **This duty not only entails that the state should refrain from actively coercing a specific religion on its citizens, but also that it must refrain from promoting a specific religion in practice and must actively ensure that all religions in society are treated equally.** "Open" or "inclusive" neutrality is linked to the prohibition of discrimination.

As a component of antidiscrimination, this principle constitutes an important achievement for religious freedom and diversity in Europe. In theory, states may not interfere with the organization of religious minorities nor the content and

[6] See, *Hasan and Chaush v Bulgaria*, Judgment of the ECtHR of 26 October 2000; *Jehovah's Witnesses of Moscow and Others v Russia*, Judgment of the ECtHR of 10 June 2010; *Svyato-Mykhaylivska Parafiya v Ukraine*, Judgment of the ECtHR of 14 June 2007. See also the Annex for further information.

practice of religions.[7] States and religions, in principle, function independently from each other. **The principle of state neutrality, interpreted in this way, forms a strong argument against state-imposed neutrality dress codes, as they entail the state interfering with the rights of religious groups to express their religion in public, and indirectly favoring religions and beliefs that do not require or include such visible expressions.** Such a neutrality dress code, therefore, effectively undermines the freedom of religion, instead of securing it.

In contrast, **"exclusive," or "strict" state neutrality interprets the separation of church and state in a strict sense, and actively excludes the visibility of religion from politics, the civil service, or even the entire public sphere.** A commonly advanced argument by proponents of neutrality dress codes is that employees act as agents of the state: when they are working, they represent the state. As the state is required to be neutral regarding religion, its employees should also refrain from expressing their religion when they are working. This line of reasoning has been used to justify neutrality codes for professions such as public school teachers, hospital workers, and civil servants, as well as judges, police officers and armed forces. **Strict neutrality, in this sense, demands not only the neutrality of the state regarding religion, but also the embodiment of that neutrality by its employees.** The neutrality of the state is interpreted as requiring its expression in the neutrality of the individual and relies upon a number of assumptions: (1) a direct link between the secular/neutral state and the individual employee; (2) that an employee's religious dress affects the state's neutrality; and (3) the very possibility that one could indeed dress "neutrally." These assumptions will be further explored in section 5.

2.3 Corporate neutrality

For private employers, religious dress bans are generally not justified on the basis of secularism or other matters falling within the realm of the state, such as pursuing gender equality, integration, or assimilation, although related prejudices and wishes can serve as underlying motives. **Private employers' official justifications tend to be (1) the wish to present a neutral corporate image, (2)**

[7] It can be debated to what extent this principle is followed in practice. Many states, including strictly secularist states such as France, finance religious schools and associations, as well as the maintenance of religious buildings. See Yolande Jansen, "Secularism and Religious (In-)security: Reinterpreting the French Headscarf Debates," *Krisis,* 2011, 2, 2-19.

the need to avoid conflicts and tensions in the workspace, or (3) the economic interests of the company.

Because private employers lack political accountability and rarely have to justify their policies in public, it can be difficult to identify what other factors motivate corporate neutrality codes. Legal proceedings have revealed a background of discrimination, racism, or Islamophobia.[8] As will be explained later, aside from what aims a neutrality dress code is said to serve, the very concept of "neutrality" and what it entails in practice is at the core of the public debate.

2.4 Overlap between state and corporate neutrality?

In some cases, the distinction between public and private employment is not clear-cut**. While state and corporate neutrality policies have different aims, there is quite some overlap in the official justifications given for these policies.** Both state and private employers implement neutrality dress codes for reasons of external communication, respectively, towards citizens, clients, or customers. Both states and businesses argue that they do not want to be identified with a particular religion or political ideology, and neutrality codes are justified as necessary to preserve the employers' neutrality in that regard. Further, both states and corporations often argue that neutrality codes help to avoid conflicts and tensions among employees or with customers. Lastly, both state and private employers are involved in the public debate around the notion of neutrality itself.

In occupations such as early childhood and secondary education, employers can be both public and private. In such cases, private employers sometimes invoke secularist arguments as well. This, for example, occurs in cases concerning education or professions involving children, which can be provided both publicly and privately. In such cases, the freedom of religion is often invoked in a negative sense, meaning the freedom not to be affected, indoctrinated, or confronted with another's religious beliefs and convictions. A famous example is the French *Baby Loup* case, where a private child day care center dismissed a Muslim employee for wearing a headscarf. The French Court of Cassation found that, even though neutrality and secularity do not apply

[8] See, for example, *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA*, Judgment of the Grand Chamber of the CJEU of 14 March 2017, where an employee was fired because her hijab had "offended" a customer.

beyond the public sector, employees who have contact with minor children must ensure the general obligation of religious neutrality for the children's freedom of conscience.[9] The premise that children enjoy the *negative* freedom of religion, i.e., to be free from religious influences, is seen more widely in European jurisprudence (see Annex).

Even in private employment, public officials may try to intervene invoking secularist arguments. For example, Henri Leroy, the mayor of the French city Mandelieu-la-Napoule, wrote a letter to private commercial enterprises, such as clothing retailer *H&M*, encouraging them to prohibit sales staff from wearing headscarves in order to preserve the republican identity and religious neutrality of the city.[10]

This demonstrates that the distinction between state and corporate neutrality is not as clear-cut as it is sometimes presented. Acceptance of state neutrality dress codes in practice opens the door for similar dress codes in private businesses and public and private schools with new debates arising constantly about how such restrictions can be extended to other forms of employment or areas of public life. As will be argued later, this is because strict neutrality dress codes are based on an underlying assumption that (Muslim) religious dress is suspicious and unwanted. Given that such suspicions are not limited to specific areas, it is not surprising they also come up in areas that are, in fact, completely unrelated to the religious neutrality of the state.

3. Neutrality Dress Codes and Models of Secularism in Europe

In 2022, the Open Society Justice Initiative found that 10 out of 27 EU Member States and the UK have legal restrictions on religious dress, and that 15 countries have institutional or private restrictions on religious dress, be it on the grounds of

[9] In 2018, the UN Human Rights Committee ruled on the same case and found that the applicant was a victim of a violation of her freedom to manifest her religion as well as intersectional discrimination on the basis of her gender and religion. The Committee held that France had not adequately shown why it was necessary to insist that the employee not cover her hair at work nor that it was proportionate to dismiss her without severance in response to her decision to continue wearing a headscarf. It argued that the childcare center's policy might lead to "stigmatization of a religious community;" UN Human Rights Committee, *F.A. v France*, 16 July 2018, para. 8.9.

[10] European Commission, "Religious Clothing and Symbols in Employment: A Legal Analysis of the Situation in the EU Member States," Erica Howard, November 2017, p. 89.

neutrality or for other reasons.[11] Thus, the majority of Member States do not legally restrict the freedom to dress according to one's religion. However, most countries did have legislative proposals for such regulations. Only 5 Member States have never had any proposals or restrictions.[12]

The significance of "neutrality" in these codes strongly varies per Member State. While some states use neutrality to justify dress code restrictions in a wide array of occupations, in other states, neutrality reasoning is absent. **Neutrality policies are primarily found in Austria, Belgium, France, Germany, and the Netherlands.[13]**

3.1 Variations among Member States

Both the European Commission (November 2017) and the Open Society Justice Initiative (OSJI, March 2022) have comprehensively analyzed the regulations on religious dress in all EU Member States and the UK. This paragraph builds upon their findings and aims to give a general overview of the current state of play in Belgium, France, Germany, and the Netherlands. This briefing paper focuses on these Member States because they have invoked neutrality most systematically as a justification for restrictions on religious dress. Standards that have been set by European courts are discussed in the next section.

Member States that legally regulate religious clothing do so in different ways, related to:

1. what kinds of garments are regulated;
2. what occupations or situations are covered by the regulations;
3. where the regulations apply (across the entire country or a specific region); and

[11] Austria, Belgium, Bulgaria, Denmark, France, Germany, Italy, Luxembourg, the Netherlands, and Spain have legal restrictions on religious dress, with Italy's restrictions limited to the local level. Austria, Belgium, Bulgaria, Croatia, the Czech Republic, Denmark, Finland, France, Germany, Ireland, Italy, Luxembourg, Netherlands, Spain, Sweden, and the United Kingdom have institutional or private restrictions.

[12] Croatia, Cyprus, Greece, Poland, and Portugal.

[13] Open Society Justice Initiative, *Restrictions on Muslim Women's Dress in the 27 EU Member States and the United Kingdom*, 21 March 2022.

4. how states limit the ability of individual institutions or companies to regulate religious dress, i.e., to what extent are particular entities left free to make their own regulations.

OSJI reports that Belgium and France have implemented the most aggressive restrictions on Muslim women's dress. Both countries have issued blanket bans on the face veil and have issued restrictions on headscarves for both pupils and teachers in public education. In Germany, the headscarf is banned for teachers in some German States (*Bundesländer*), but nowhere for students. **The Federal Labor Court, relying on a previous judgment by the Federal Constitutional Court, ruled that a blanket ban for teachers is inadmissible. However, the German government recently adopted a new law governing the outer appearance of civil servants, which stipulates to what extent tattoos, piercings, beards and other accessories are permissible for civil servants.**[14] While the Ministry of the Interior has clarified that religious dress restrictions may only be applied in exceptional cases, specifically, according to the new law, where they are "objectively likely to undermine confidence in the neutral conduct of the civil servant's duties," this new attempt to regulate the outer appearance of civil servants clearly puts Muslim women at risk of discrimination. It remains unclear, however, how this may impact teachers in light of previous court rulings declaring religious dress restrictions to be discriminatory. Belgian school governing bodies enjoy autonomy to decide which interpretation of neutrality to enforce—religious expressions may be banned but can also be accommodated.

Belgian neutrality codes are also varied for civil servants, as each government body has the autonomy to decide on this for themselves. Several municipalities have instituted bans, which tend to be limited to public-facing civil servants. A notable ruling from the Brussels Labor Court recently qualified a ban on religious dress in the name of neutrality by the public transport company STIB-MIVB as discriminatory on the grounds of religion and gender, calling for the ban to be lifted. **Only in France is there a blanket ban on all religious clothing and symbols in public employment.**[15] **The Netherlands does not limit religious dress for civil servants in general but does ban face veils and other**

[14] Federal Constitutional Court, Order of 27 January 2015, 1 BvR 471/10, 1 BvR 1181/10; Gesetz zur Regelung des Erscheinungsbilds von Beamtinnen und Beamten sowie zur Änderung weiterer dienstrechtlicher Vorschriften (Law regulating the appearance of civil servants and amending other civil service regulations) of 28 June 2021.

[15] European Commission, "Religious Clothing and Symbols in Employment: A Legal Analysis of the Situation in the EU Member States," Erica Howard, November 2017, p. 88.

religious dress for specific functions of public authority, such as the judiciary and the police.[16]

Regarding private employment, only France has implemented legislation permitting private companies to adopt neutrality dress codes, as long as the code is justified by the exercise of other fundamental rights and liberties or by the necessities of the good functioning of the service and proportionate to the objective pursued. Belgium and Germany have not enacted such general legislation, but private neutrality codes have been established in various sectors and industries. Case law in both countries is not clear-cut, and complaints are still pending at national courts.

In the Netherlands, the Dutch College for Human Rights (*College voor de Rechten van de Mens*) and its predecessor, the Equal Treatment Committee (*Commissie Gelijke Behandeling*), have adopted relatively strict interpretations regarding neutrality dress codes. While the Dutch College accepts neutrality as a legitimate aim, the neutrality dress code in question is often not found to be sufficiently necessary or proportionate to achieve the goal of neutrality. Neutrality codes are not ruled out completely but are very strictly scrutinized on a case-by-case basis, leading to quite a few rulings of direct and indirect discrimination. Although not legally binding, decisions of the Dutch College appear to exert influence on employers and institutions as reflected in case proceedings where religious dress bans are revoked or alternative solutions proposed. Employers can however choose to ignore the decisions, as has happened for instance after the College decided that neutrality dress codes for court employees[17] as well as police officers[18] were indirectly discriminatory on grounds of religion.

In sum, EU Member States show great variety regarding all aspects of neutrality codes; to what extent they exist at all, to what occupations they

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[16] Open Society Justice Initiative, *Restrictions on Muslim Women's Dress in the 27 EU Member States and the United Kingdom*, 21 March 2022.

[17] Rechtspraak, "Rechtspraak houdt vast aan neutraliteit kleding rechter en griffier:

Rechters en griffiers dragen geen hoofddoek," 31 May 2016 https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Raad-voor-de-rechtspraak/Nieuws/Paginas/College-voor-mensenrechten-rechtbank-mocht-sollicitante-met-hoofddoek-niet-afwijzen.aspx (last visited 20 March 2022).

[18] *rtl nieuws*, "Politie blijft bij standpunt: geen hoofddoek bij uniform," 20 December 2017, https://www.rtlnieuws.nl/nieuws/nederland/artikel/3775276/politie-blijft-bij-standpunt-geen-hoofddoek-bij-uniform (last visited 20 March 2022).

apply, what types of dress are covered, to what extent the regulations are centralized and to what extent they have been successfully challenged in courts. There is no common European understanding or consensus on the concept of neutrality and how it should be applied.

3.2 Explaining national divergence

Some analysts have explained the divergence between Member States by referring to the different national traditions of state secularism. According to this interpretation, European states have diverging histories regarding the separation of church and state, the position of religious minorities and the construction of national identity. European states exercise different forms and varieties of secularism and on that basis, it is often argued, attach different meanings and interpretations to the concept of neutrality and how it relates to the individual.[19] Some authors even suggest that different countries start from a different conception of state neutrality: France's model of *laïcité* starts from strict state neutrality, while the German model is apparently based on the concept of open state neutrality.[20]

Yet, neutrality codes cannot be understood as the mere implementation of a model of secularism. Policies are always the result of concrete struggles, debates, and contestations, and are also affected by social change. What secularism entails has always been vigorously contested and has been subject to diverging interpretations within countries, most of all in France.[21] It is no surprise that the purpose and content of secularism has changed through time and has undergone continuous reinterpretation. While it is true that a specific conception of neutrality may be dominant in one particular national discourse, several conceptions of neutrality are always present *within* national contexts. **The neutrality justification for restrictions on religious dress features in many European countries, such as Austria, Belgium, France, Germany, and the**

[19] See, for instance, Veit Bader, "Secularisms or Liberal-Democratic Constitutionalism?" Phil Zuckerman and John Shook, eds., *The Oxford Handbook of Secularism*, Oxford University Press: February 2017.

[20] Christian Joppke, "State Neutrality and Islamic Headscarf Laws in France and Germany," *Theory and Society*, August 2007, 36(4) 36, 313-342; Paul Cliteur and Afshin Ellian, "The Five Models for State and Religion: Atheism, Theocracy, State Church, Multiculturalism, and Secularism", *ICL Journal*, June 2020, 14(1), 103-132.

[21] Yolande Jansen, "Secularism and Religious (In-)security: Reinterpreting the French Headscarf Debates," *Krisis,* 2011, 2, 2-19.

Netherlands, even though these countries all employ significantly different models of secularism. Today, neutrality policies are not limited to specific states or models of secularism, indicating that the model of secularism is *not* the determining factor.

4. Legal Challenges to Neutrality Dress Codes: Failures of European case law

Litigators contesting restrictions on religious dress have relied on two different fundamental rights, namely (1) the freedom of religion and belief and (2) the prohibition of discrimination. Concerning the prohibition of discrimination, litigators have claimed discrimination based on religion, race, and gender.[22]

Legal disputes mostly play out on the national level. **Many national courts have developed a large body of case law concerning restrictions on religious dress. Often, national courts offer more protection than European courts.** This is because both the European Convention of Human Rights (ECHR) and European Union law only lay down minimum requirements that have to be respected by all Member States.[23] This means that a disappointing judgment on the European level should not automatically have negative consequences for fundamental rights protection in the national context if domestic law provides more protection than the minimum requirements set out at European level.[24]

As European case law has the most far-reaching potential to protect Muslim women in Europe and has in practice been influential in national legal discourses, this section lays out the main principles of both European courts and identifies

[22] A right related to the freedom of religion is the right to religious education (Article 2, Protocol 1 ECHR); for a summary of the most recent case law on challenging religious dress codes across Europe, see Open Society Justice Initiative, *Restrictions on Muslim Women's Dress in the 27 EU Member States and the United Kingdom*, 21 March 2022.

[23] See, for example, Article 6 of Council Directive 2000/43/EC, Article 8 of Council Directive 2000/78/EC, Article 7 of Council Directive 2004/113/EC, and Article 27 of Directive 2006/54/EC.

[24] The CJEU's most recent ruling on religious dress in the Joined Cases *IX v WABE eV* and *MH Müller Handels GmbH v MJ* of 15 July 2021 confirmed that national constitutional provisions on freedom of religion may be taken into account as more favorable provisions, paras. 86-90.

their main shortcomings. The Annex to this briefing paper explains the legal frameworks and the case law in more detail.

4.1 Uncritical acceptance of neutrality dress codes

The main problem with both the case law of the European Court of Human Rights (ECtHR) and the Court of Justice of the EU (CJEU) is that "neutrality" is uncritically accepted as a legitimate aim to justify limiting the freedom of religion and indirectly discriminate against Muslim women. But what "neutrality" actually means to both courts is unclear. In the ECtHR's case law, neutrality is used both as a principle for religious diversity and as a principle that justifies the exclusion of religious dress from the public sphere.[25] These two conceptions, which are simultaneously employed by the Court, mirror the conceptions of neutrality discussed in section 1. The ECtHR so far has failed to critically assess these different interpretations of neutrality and how they relate to each other, thereby developing legal doctrine that is unclear, blurred, and fragmented.[26]

The "strict" interpretation of neutrality has been advanced by governments such as France, Switzerland, and Turkey as a legitimate aim for limitations on the freedom to manifest religion. In all cases, the Court accepted this argument, and found no violation of the freedom of religion regarding neutrality dress codes for primary school teachers, university students, high school pupils, and hospital workers.[27] This conception of neutrality has also been extended to the sphere of private employment. Here as well, the Court uncritically accepted a company's policy to project a "neutral corporate image" as a legitimate aim.[28] Nonetheless, in that case the Court found that the neutrality

[25] See discussion in 7.2.2-7.2.4 in the Annex.

[26] Julie Ringelheim, "State Religious Neutrality as a Common European Standard? Reappraising the European Court of Human Rights Approach,"' *Oxford Journal of Law and Religion*, February 2017, 6(1), 24-47.

[27] *Dahlab v Switzerland,* Judgment of the ECtHR of 15 February 2001; *Şahin v Turkey,* Judgment of the Grand Chamber of the ECtHR of 10 November 2005; *Köse and Others v Turkey,* Judgment of the ECtHR of 24 January 2006; *Dogru v France*, Judgment of the ECtHR of 4 December 2008; *Ebraimian v France*, Judgment of the ECtHR of 26 November 2015.

[28] *Eweida and Others v the United Kingdom,* Judgment of the ECtHR of 15 January 2013.

dress code violated the freedom of religion. The case concerned a Christian female employee of British Airways, who wished to visibly wear a cross around her neck. The Court stated the cross was "discreet" and could not detract from her professional appearance, meaning that the neutrality of the company could not be at stake. **It is unclear from the judgment to what extent the "discretion" of the cross was decisive for the outcome, and if, in that light, the outcome would have been different if the case concerned a Muslim woman wearing a headscarf.**[29]

Given that neutrality is accepted by the ECtHR as a legitimate aim to restrict the freedom of religion, neutrality can be used as a justification for far reaching limitations on that right. This means neutrality dress codes are permitted if they are in line with the principle of proportionality. The case law starts from the premise that the dress code is legitimate, and then puts the burden of proof on the claimant to show that the dress code was applied disproportionately in their case.

In EU law, a similar problem has occurred. The critical distinction in EU anti-discrimination law is the distinction between direct and indirect discrimination. Direct discrimination takes place when a person "is treated less favourably than another in a comparable situation." In contrast, indirect discrimination occurs where "an apparently neutral provision" puts persons at a "particular disadvantage comparted with other persons" on one of the grounds of discrimination.[30] This distinction is important, because direct discrimination cannot be justified except in specific situations, while indirect discrimination can be justified by a legitimate aim and the use of proportionate means to achieve that aim—a similar test as seen with freedom of religion under Article 9 ECHR.

In its case law, the CJEU has found that neutrality dress codes do not constitute direct discrimination but may only give rise to indirect discrimination. For that reason, it turns to a similar test as the ECtHR: is "neutrality" a legitimate aim, and if so, is it applied in accordance with the principle of proportionality? Arguably, the CJEU case law is even less critical of neutrality than the ECtHR. Like the ECtHR, the CJEU accepts at face value that neutrality is a legitimate aim, also for private businesses.

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[29] In the Joined Cases *IX v WABE eV* and *MH Müller Handels GmbH v MJ,* Judgment of the Grand Chamber of the CJEU of 15 July 2021, discussed below, a neutrality dress code was at stake that precisely differentiated between discreet and ostentatious religious symbols.

[30] Article 2(2)(b) of Council Directive 2000/78/EC.

In *Achbita* and *Bouganoaui*, the CJEU, much like the ECtHR, accepted with no additional scrutiny the legitimacy of corporate policies of neutrality.[31] **In *Achbita*, the CJEU found that a private employer's neutrality rule was not directly discriminatory, as it treated all workers in the same way by requiring everyone to dress neutrally by refraining from wearing religious dress and symbols at work. It also was not indirectly discriminatory, as long as the neutrality policy was "genuinely pursued in a consistent and systematic manner" and only applied to workers who interact with customers**.[32] It found the employer's wish to project an image of neutrality towards customers to relate to the freedom to conduct a business and was therefore, in principle, legitimate.[33] In light of the proportionality principle, it might be relevant whether it would have been possible to offer Ms. Achbita another post without customer interaction, but this should not require the employer to take on an "additional burden."

The *Achbita* judgement lacks a critical interrogation of corporate neutrality policies, both under the legitimate aim requirement as well as the proportionality assessment. **The CJEU has not questioned *why* the mere fact that an employee wears a headscarf can affect the corporate image of the employer. It did not scrutinize the employer's wishes to portray an image of neutrality to assess whether it is simply aimed to please prejudiced customers, which is exactly**

[31] *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV,* Judgment of the Grand Chamber of the CJEU of 14 March 2017; *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA,* Judgment of the Grand Chamber of the CJEU of 14 March 2017.

[32] Erica Howard has pointed out that the *Achbita* judgment on this point is also hard to square with CJEU case law on discrimination based on racial and ethnic origin. In *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, Judgment of the Grand Chamber of the CJEU of 16 July 2015, the CJEU found direct racial discrimination to be present regarding Roma in Bulgaria. According to the CJEU, even though the contested rule was neutrally formulated, it was clear that it was introduced for reasons relating to racial or ethnic origin. Moreover, in *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV*, Judgment of the CJEU of 10 July 2008, the CJEU held that an employer statement on Belgian local radio that it would not hire "immigrants" was directly discriminatory, as it was "likely to dissuade some candidates from applying for jobs with this employer. Such dissuasion clearly also takes place with neutrality policies. See Erica Howard, "Headscarves Return to the CJEU. Unfinished Business," *Maastricht Journal of European and Comparative Law,* 13 January 2020, 27(1), 10-28.

[33] This freedom is codified in Article 16 CFR EU.

what anti-discrimination law is supposed to protect against.[34] **The Court also failed to specify the duty of employers to accommodate religion and combat discrimination.** The (minimal) responsibility of employers to find back-office alternatives is not helpful in this regard and risks making the invisibilization[35] of Muslim women legally acceptable.[36]

In the recent *Wabe* and *Müller* judgment, the CJEU has been slightly more critical of neutrality dress codes, stating that the employer needs to show that there is a "genuine need" for a neutrality dress code. However, this "genuine need" could be established without much difficulty. According to the Court, it can follow from "the rights and legitimate wishes of customers," from the economically "adverse consequences" a company may suffer without such a dress code, to "prevent social conflict," and even to "present a neutral image" vis-à-vis customers. In this way, businesses can engage in circular reasoning by arguing that they need neutrality, because they need to be neutral. The Court leaves it to the employer to show any "adverse consequences" they might be facing. In this way, the "genuine need" requirement is rather weak as an additional legal safeguard for affected employees.[37] It may be that depending on the national court's approach, the "genuine need" requirement will either be very hard or very easy to pass.

In summary, the case law of both the CJEU and the ECtHR have made it difficult to contest neutrality policies based on European fundamental rights law. Neutrality is uncritically accepted as a legitimate aim and insufficiently scrutinized under the proportionality requirement. Both courts have presupposed the legitimacy of neutrality policies and have failed to challenge the underlying

[34] See, for example, Erica Howard, "Islamic Headscarves and the CJEU: *Achbita* and *Bougnaoui*," *Maastricht Journal of European and Comparative Law,* 21 August 2017.

[35] The term "invisibilization" refers to the exclusion, marginalization or silencing of social groups. For in-depth discussion, see Benno Herzog, "Invisibilization and Silencing as an Ethical and Sociological Challenge," *Social Epistemology*, 20 November 2017, 32(1).

[36] See also Eleanor Sharpston, "Shadow Opinion of former Advocate-General Sharpston: headscarves at work (Cases C-804/18 and C-341/19)," *EU Law Analysis* http://eulawanalysis.blogspot.com/2021/03/shadow-opinion-of-former-advocate.html (last visited 16 March 2022), para. 243.

[37] See also, Sumaiyah Kholwadia, "EU Headscarf Bans: The CJEU's Missed Opportunity for Reflection on Neutrality in *IX v Wabe and MH Müller Handels v MJ*," *Oxford Human Rights Hub* https://ohrh.law.ox.ac.uk/eu-headscarf-bans-the-cjeus-missed-opportunity-for-reflection-on-neutrality-in-ix-v-wabe-and-mh-muller-handels-v-mj/ (last visited 16 March 2022).

assumptions on which these policies are based. In so doing, they have failed to protect Muslim women who wear a headscarf from discrimination and from enjoying equal rights.

4.2 Judicial discourses on the hijab

The case law of the ECtHR shows how neutrality dress codes, or restrictions on religious dress more broadly, are not only about neutrality per se, but also about the problematization of Islamic dress. The Court has failed to understand, reflect on, and counter this context, even itself issuing problematic statements on the "meaning" of the Islamic headscarf.

In *Dahlab v Switzerland*, the Court found that the headscarf, by and of itself, is "a powerful external symbol" which from the outset may have "some kind of proselytizing effect." By contrast, in *Lautsi v Italy*, the mandatory display of a crucifix in Italian classrooms as per instructions by the Minister of Education, Universities and Research was found to be permissible under the Convention. The Court found the crucifix to be "an essentially passive symbol" that would not have a particular influence on pupils, thereby not impinging on the state's duty of neutrality and impartiality towards religion. So, while the instruction to display a crucifix in all Italian classrooms was not in violation of state neutrality, an individual Muslim woman was found to be capable of undermining that same principle.

In *Dahlab*, the Court also stated that the headscarf "appears to be imposed on women by a precept which is laid down in the Koran" which is "hard to square with the principle of gender equality" as well as "the message of tolerance, respect for others, and above all, equality and non-discrimination that all teachers must convey to their pupils." In *Sahin v Turkey*, the Court found it "understandable" to ban headscarves in the name of secularism and gender equality. The Court also endorsed the idea that the headscarf ban helped to take a stance against extremist political movements which seek to impose religious doctrines on society. In this way, the headscarf ban, according to the Court, helped to "preserve pluralism in the university."

These sweeping statements on "the meaning" of headscarves echo dominant strains of the political discourses on headscarves as imposed on women and as a symbol of oppression. The blatant contradiction in the Court's understanding of Islamic dress and Christian symbols is troubling. It indicates a bias of the Court

regarding the Islamic faith, which can only be understood in relation to the broader public discourses on Islam in European states.

In 2014, the ECtHR's judicial reasoning for the first time took a slightly positive turn on this point. In *S.A.S. v France*, concerning the French face veil ban, the Court refrained from negatively classifying the face veil and explicitly rejected several arguments of the French government to that effect. According to the Court, even though the face veil "is perceived as strange by many of those who observe it,"[38] it should be seen as "an expression of a cultural identity contributing to religious pluralism." The Court did not accept the argument that the face veil ban served gender equality or human dignity and also expressed its concerns about the Islamophobic character of the French political debate preceding the ban. This indicates a learning process within the ECtHR on its approach to Islamic religious dress. It may have been a response to the widely criticized considerations on headscarves in *Dahlab* and *Sahin*, from which the *S.A.S.* judgment seems to depart.[39]

Aside from these very few positive aspects, European judicial institutions have, so far, failed to critically interrogate neutrality dress codes. Instead, they have accepted them as legitimate, and, in practice, have failed Muslim women who on numerous occasions have made the effort to fight for fundamental rights on the European level. Even more troubling are the explicitly Islamophobic remarks that characterize the earlier case law of the ECtHR on freedom of religion and belief. While recent case law seems to be somewhat more considered on this point, there is a continuing need to contest Islamophobic interpretations of Muslim women's dress raised by mainstream political actors. Neutrality dress codes need to be contested beyond the legal framework that represents, and may even seek to uphold, the status quo.

5. Challenging Neutrality Dress Codes as a Manifestation of Institutional Racism

This section will provide a critique of neutrality dress codes beyond the legal framework of European fundamental rights law. It will argue that neutrality dress

[38] *S.A.S. v France*, Judgment of the Grand Chamber of the ECtHR of 1 July 2014, para. 120.

[39] *S.A.S. v France*, Judgment of the Grand Chamber of the ECtHR of 1 July 2014, para. 153.

codes are not "legitimate" but constitute a discriminatory practice that is based on Islamophobic discourses regarding the "meaning" of Islamic religious dress and Muslims more broadly.

Debates about neutrality are never only about neutrality. First, it is no coincidence that in practice, neutrality debates almost always revolve around the headscarf and for that reason are generally coined "headscarf debates," where it is no longer debated what secularism requires, but rather how the headscarf should be understood, what it "represents," and to what extent it should be tolerated or accommodated. Second, debates on neutrality policies often have more to do with European perceptions of Muslims and Islam than with neutrality itself. In this way, neutrality regulations have become a site for debating broader questions that relate to the status of Muslim population in Europe as a whole. **The underlying, often unnamed, debate has to do with ideas about belonging and Europeanness. Neutrality becomes a tool through which Europeanness is redefined, often reinforcing Whiteness.** Hence, it is insufficient to only focus on what conception of neutrality is most appropriate when critiquing neutrality. Rather than only debating neutrality as such, it is critical to scrutinize discourses that support the idea that Muslim dress is "non-neutral" in the first place.

5.1 Islamophobic political context

Proponents of neutrality regulations are mostly found on the conservative and far-right side of the political spectrum in some countries, and along the entire spectrum in others where right-wing, anti-clerical, and Christian supremacist interests align.[40] They do not hesitate to portray the hijab as a sign of religious gender oppression, as contrary to liberal values and even as a security issue.[41] **The neutrality justification, therefore, co-exists with a variety of arguments that do not problematize the presence of religion in general but, specifically, the presence of Islam and Muslims in Europe and as participants in the public sphere.** Even though some regulations officially target all religious expressions equally, they may be specifically motivated by a desire to restrict the rights of Muslim women. There is evidence that demonstrates how initial political debates

[40] Nadia Fadil, "On Not/Unveiling as an Ethical Practice," *Feminist Review,* 2011, 98, 83-109.

[41] See, for example, Darya Safai, "De hoofddoek is niet zomaar een onschuldige expressie van een religieuze identiteit," *Knack.be*, 18 December 2018 https://www.knack.be/nieuws/belgie/de-hoofddoek-is-niet-zomaar-een-onschuldige-expressie-van-een-religieuze-identiteit/article-opinion-1408083.html (last visited 16 March 2022).

and legislative measures aimed to ban the headscarf or other Muslim dress, but then were coded using general and broad language so as not to appear to single out Muslims.[42]

These motivations and justifications should be considered when addressing neutrality regulations, even if officially they apply to all forms of religious, philosophical, or political expression. Not doing so may amount to what has been referred to as *colorblindness*: insisting on the universality of neutrality codes despite concrete evidence to the contrary.[43] In this approach, discrimination related to race, religion, and sex is made invisible by simply positing that neutrality codes apply to everyone in the same way. It ignores how neutrality policies have come about, how they are construed, and how they play out in practice. It is by abstracting from these wider contexts that an uncritical acceptance of neutrality can become widespread.[44]

That neutrally-worded regulations may have a clear discriminatory origin is exemplified by the fact that almost all case law on neutrality codes concerns Islamic dress, even though these bans do not single out Islamic religious clothing explicitly.[45] It is also evident from court rulings or opinions of Advocate Generals (in the case of the CJEU) that specific views about Muslim dress, Muslim minorities or migrants as being non-European or not the norm, form the frame of reference when ruling about cases.[46] A similar example is the general

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[42] Open Society Justice Initiative, *Restrictions on Muslim Women's Dress in the 27 EU Member States and the United Kingdom*, 21 March 2022.

[43] See Leslie Carr, "*Colorblind' Racism,"* 1997, Norfolk: Old Dominion University; Reva Siegel, "Discrimination in the Eyes of the Law: How 'Color Blindness' Discourse Disrupts and Rationalizes Social Stratification," *California Law Review*, 2000, 88(1), 77-118; Cedric Powell, "Rhetorical Neutrality: Colorblindness, Frederick Douglass, and Inverted Critical Race Theory," *Cleveland State Law Review*, 2008, 56(4).

[44] See Eduardo Bonilla-Silva, *Racism Without Racists: Color-Blind Racism and the Persistence of Racial Inequality in America*, 2014, Fifth Edition.

[45] European Commission, "Religious clothing and symbols in employment: A legal analysis of the situation in
the EU Member States," Erica Howard, November 2017, 8.

[46] See for instance, the Opinion of Advocate General Kokott of 31 May 2016 in *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, linking the issue to the "unprecedented influx of third-country migrants," para. 2; "how to best "integrate persons from a migrant background," para. 2; "how much difference […] European society must tolerate within its borders," and "how much assimilation it [Europe] is permitted to require from certain minorities," para. 3.

ban on face veils, adopted by several EU Member States, such as Austria, Belgium, France, and the Netherlands. This ban is colloquially referred to as the "burqa ban" but is officially couched in neutral terms and prohibits all forms of face-covering. This should lead to critical questions about the links of neutrality codes to the Islamophobia and the range of anti-Muslim policies that are increasingly popular in several European countries such as: What do neutrality policies do to sustain power relations and to further marginalize Muslim women in Europe?[47]

5.2 Portraying the hijab as non-neutral

So far, we have linked the *context* of neutrality dress codes—the surrounding discourses, the group most affected, etc.—to Islamophobia and racism. But it is also the *dress codes themselves* that can be linked to anti-Muslim prejudice. Neutrality dress codes not only have a background in Islamophobia but are built on anti-Muslim presuppositions themselves. Why is this the case?

Neutrality dress codes determine which types of clothing are needed to ensure the "neutral appearance" of employees. By determining which types of dress are sufficiently neutral and which ones can be legitimately banned, the state and/or the private employer necessarily must establish what constitutes a neutral appearance and what does not. In other words, the state and/or the private employer must establish the boundaries of neutrality. In this way, the neutrality principle is shifted from the ideal of equal treatment to an assessment of neutral appearance. **Neutrality as a principle is transformed to neutrality of the body. In this way, "neutrality" becomes more about who looks neutral and who does not.** Every statement on what "neutral dress" requires, implicitly contains an idea of who looks sufficiently neutral and who does not. **Neutrality no longer refers to the principle of equal treatment, but to the appearance of those who belong and those who do not.**

[47] In some cases, the neutrality justification is only given *after* the legislative process. The prohibition on Dutch police officers wearing a headscarf is currently justified on the basis of neutrality, while police regulations and statutes originally did not mention neutrality at all. This indicates that neutrality can also be used to rationalize a discriminative practice that was not foreseen at the time the regulation was formulated. See Odile Verhaar, "Mogen Nederlandse moslimagenten een hoofddoek dragen? Een bijdrage aan de discussie over accommodatie van het islamitische hoofddoekvoorschrift in openbare ambten," *Beleid & Maatschappij*, 2001, 28(4), 202-212.

Furthermore, the shift of the principle of neutrality to the appearance of neutrality incorrectly assumes a link between the two. By assuming such a link, neutrality dress codes are built on the implicit claim that employees who express their religious convictions at work are likely to be biased in favor of or against certain groups. In reality, the neutrality of an employee can only follow from the actions of that employee, i.e., if they do their job without unduly discriminating between customers or, in civil service, between citizens. By prohibiting religious attire under the guise of neutrality, it is implicitly accepted that someone's religious attire constitutes a legitimate basis to distrust their professionalism and integrity.

Neutrality policies that are justified on the basis of the "preservation of social peace" are equally problematic, as this starts from another unfounded assumption: that the outward expression of Islam, or any other religion, disrupts public peace or will give rise to conflicts and tensions. This suggests that it is the mere visible presence of religious minorities in a public space that causes conflicts and tensions, rather than the intolerant and racist responses they provoke in others that give rise to hostility.

Neutrality policies can thus be linked to wider Islamophobic discourses, in which Islamic practices, symbols, and dress are regarded as suspicious, dangerous, or representative of an illiberal, "un-western" ideology. It is not the clothing itself that is problematized, but the meanings assigned to those who wear it. It only makes sense to designate the hijab as non-neutral if the hijab is associated with negative perceptions about the women who wear it—what they "really" believe and how these beliefs affect that person's neutrality. **In other words, neutrality codes, indirectly, are grounded in prejudice, fear, and a culture of suspicion. They legitimate that very prejudice by legalizing the categorical exclusion of that religious sign and/or person on the basis of neutrality**.

Another problematic aspect of neutrality policies is how they frame all religious, philosophical, and political expressions as affecting neutrality in the same way. Neutrality policies miss the differences between, for example, political statements, and religious dress. In most cases, they misinterpret religious dress as a political statement, rather than a religious requirement or practice. They assume that people who observe their religion, automatically also "manifest" or "communicate" something that is on a par with a political statement. A recurring question that combines anti-Muslim prejudice with the equation of religious practice and political ideology is that if headscarves are allowed, should swastikas be tolerated as well? While it is true that some religious groups have political

ambitions, it should be recognized that religious dress, both within and between religions, is worn for a great diversity of reasons and motivations and for the majority as a faith practice.

Political and legal discourses do not acknowledge the variety of individual motivations, but rather tend to blur them into one presupposed "meaning," a hidden political agenda. It is no surprise that neutrality dress codes are viewed as contributing to the entrenchment of institutional Islamophobia in society. This Islamophobia rests on the same premise of Muslims being one homogenous and inherently inferior group, because of their supposedly inferior values or practices.[48]

5.3 Two practical examples

Two recent examples from the Netherlands and Belgium may serve to illustrate these points.

The first example concerns Dutch police officer Sarah Izat, who in 2017 successfully challenged the neutrality regulations of the police force before the Dutch College for Human Rights. The College's decision caused public controversy and was frequently discussed in Dutch media. Far-right politicians called for the abolition of the College for Human Rights and saw the decision as a victory for "political Islam." More mainstream commentators also questioned the decision. Most frequently, they suggested that the decision was problematic for the victims of anti-LGBT violence, as these victims "cannot expect to be adequately helped by a hijab-wearing police officer."[49] The neutrality requirement was not invoked here in defense of an abstract principle of secularism, but rather as a principle that is not likely to be respected by Muslim employees.

A similar dynamic was present in the public debate surrounding the appointment of Ihsane Haouach, a Belgian-Moroccan hijab-wearing woman, as a government commissioner at the Institute for Equality between Women and Men. As soon as her appointment was made public, Haouach was subjected to personal attacks, and her qualification and capabilities were questioned

[48] See, for example, Alia Al-Saji, "The Racialization of Muslim Veils: A Philosophical Analysis," *Philosophy and Social Criticism*, 8 October 2010.

[49] See the interview with *Nos,* "Rotterdamse agente: 'geen hoofddoek dragen voelt onnatuurlijk,'" 10 November 2017 https://nos.nl/nieuwsuur/artikel/2203809-rotterdamse-agente-geen-hoofddoek-dragen-voelt-onnatuurlijk (last visited 16 March 2022).

extensively. She resigned within weeks of her appointment. The main objection against her holding the position as the government commissioner was that her headscarf was considered to compromise the neutrality of the state. The president of the Francophone liberal Mouvement Réformateur party, Georges-Louis Bouchez, argued that her appointment was in breach of the prohibition on the wearing of religious symbols. While her right to wear a headscarf was acknowledged, it was argued that this right did not outweigh the need to project and maintain the neutrality of the state. Some politicians reasoned that in certain places and within certain families, the hijab is a symbol of domination; as such, a woman who wears a hijab cannot be a representative of a governmental body whose main task is the maintenance of equality. The attacks went as far as associating Haouach with the Muslim Brotherhood, requiring an investigation from the state security service to clear her name. Her already precarious position became unsustainable because of all these suspicions. Reacting to the public uproar surrounding her appointment, Haouach, in an interview with the newspaper *Le Soir*, stated that the public debate was not about neutrality; rather, it was based on sexism and racism.[50] She argued that "outward religious signs do not jeopardize the basic principles of the state, but the rising number of reactions and attacks from the far right were the real threat."[51]

In both cases, we see how the headscarf functions as a trigger to assign preconceived beliefs to the women concerned. Even though there is no evidence that the women in question ever said or did anything of the sort, hijab-wearing Muslims were associated with illiberal political positions. Even if they explained or past work demonstrated otherwise, they were still treated as suspect, as a group who may have something to hide.

[50] *Le Soir*, "Ihsane Haouach: 'Je n'ai pas pu lui raconter ma journée…,'" 3 July 2021 https://www.lesoir.be/381954/article/2021-07-03/ihsane-haouach-je-nai-pas-pu-lui-raconter-ma-journee (last visited 16 March 2022).

[51] Rik Arnoudt, "Ihsane Haouach neemt dan toch ontslag als regeringscommissaris," *VRT*, 10 July 2021 https://www.vrt.be/vrtnws/nl/2021/07/09/ihsane-haouach-neemt-dan-toch-ontslag-als-regeringscommissaris/ (last visited 16 March 2022).

6. In Conclusion: Rejecting or Reclaiming Neutrality?

As argued in previous sections, neutrality dress codes discriminate against Muslim women and reinforce Islamophobic discourses that present Muslim women as dangerous, suspect, or simply as different from the norm. On this basis, neutrality dress codes that ban religious dress at work should be categorically rejected. **Religious minorities are not helped by a "more proportionate" application of neutrality codes or their limitation to specific professions. It is the very notion that the headscarf, or the kippah or the turban make someone appear insufficiently neutral that should be rejected. This does not mean that the principle of neutrality itself should be rejected.**

First, the principle of state neutrality can be seen historically as a significant accomplishment for religious minorities (see section 1). It ensures, in theory at least, that the state may not identify with or assess the legitimacy of a particular religion. It also means that the state must strive to protect the freedom of religion and accommodate the diversity of religions in society and promote pluralism in general.[52] This principle should be upheld and defended. In fact, it is precisely the principle of state neutrality in this sense that is violated by neutrality dress codes. As was discussed in section 4, this is because neutrality dress codes rely on assumptions about the content and meaning of religious symbols, which the principle of state neutrality prohibits. Moreover, neutrality dress codes exclude religious practitioners from employment opportunities, which has severe consequences for the freedom of religion (and society more broadly) and leads to discrimination. Neutrality dress codes can therefore be countered by arguing for genuine neutrality.

Second, neutrality can be invoked more broadly by drawing on its connection to equal treatment. State neutrality requires that the state is impartial in its treatment of citizens, regardless of their religion, and should actively counter all discriminatory practices in society. States should actively oppose discriminatory practices where specific groups are disproportionately affected, even if they are not the main target by intention. For example, the police can only be a neutral institution if it does not disproportionately target racialized minorities. The tax service can only be a neutral institution if it does not use ethnic background to investigate fraud cases. And courts can only be neutral if

[52] See Article 2 of the Treaty on European Union.

they are sufficiently sensitive to the differential treatment of cultural and religious groups in society. By reframing neutrality as aiming to achieve equality, the concept of neutrality can be utilized for progressive and inclusive political goals.

Finally, neutrality can be an instrument to promote pluralist instead of exclusionary labor markets. States can only communicate genuine religious neutrality and religious pluralism if they actively include, and not exclude, religious minorities in all branches of civil service. The state can only effectively communicate and practice neutrality if its employees represent all groups in society. If its employees are disproportionality white, male, and middle-aged, this signals a bias towards a particular group in society. The government may gain more trust from a diverse population if it is also visibly diverse and inclusive. Adequate representation can therefore improve state impartiality and neutrality of treatment. Banning religious symbols in employment has a negative symbolic effect: it communicates that a specific group in society does not belong and reinforces partiality. If the state wants to express respect for religious pluralism, the best way to do this is to show openness by allowing visible diversity. Neutrality is best served by abolishing all forms of neutrality dress codes.

The key distinction to be made is between the ideal of *neutral institutions* and the fiction of *neutral individuals*. The neutrality of institutions continues to be necessary as an essential principle of secular democracies. Only a religiously neutral state can effectively protect religious freedom for all groups in society and ensure equal treatment between these groups. Secularism is not about outlawing religion, but about protecting the rights of all to freely manifest their beliefs. But when state neutrality is understood as requiring a specific dress code, it effectively undermines the freedoms and principles it aims to protect. This shift from neutral institutions to neutral bodies does not enable, but rather disables the very possibility of state neutrality.

7. Annex: Neutrality Dress Codes in European Fundamental Rights Law

This annex gives an overview of the European legal sources and regimes that apply to religious dress restrictions in the workplace: that of the European Union (EU) and the Council of Europe (CoE) (Section 1). European case law related to neutrality dress codes will be reviewed relative to the right to freedom of religion and belief (Section 2) and the prohibition of discrimination (Section 3).

The European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) are the two main organs that will be addressed here. Section 4 will analyze why the case law has so far failed to adequately protect religious minorities from workplace discrimination, highlighting three of the most striking weaknesses in the case law. Even though sections 2 and 3 relate to different rights and different courts, we can distill similar legal argumentations and assumptions in both lines of case law: the Courts' assessments of religious dress, and requirements of legitimate aim and proportionality.[53]

7.1 European legal sources and regimes

	European Union	Council of Europe
Type of organization	Supranational Organization	Intergovernmental Organization
Human rights document(s)	Charter of Fundamental Rights of the European Union (CFR EU)—enforced via Equality Law Directives	European Convention on Human Rights (ECHR)
Court	Court of Justice of the European Union (CJEU)	European Court of Human Rights (ECtHR)
Typical Court procedure	Preliminary references during national procedure	Individual complaints after national procedure
Freedom of Religion and Belief	Article 10 CFR EU	Article 9 ECHR
Right to respect for private and family life	Article 7 CFR EU	Article 8 ECHR
Freedom of expression	Article 11 CFR EU	Article 10 ECHR
Prohibition of Discrimination	Article 21 CFR EU Directives on Equality Law	Article 14 ECHR

[53] While an in-depth review of jurisprudence beyond the ECtHR and CJEU is outside the scope of this briefing paper, it is important to note that the United Nations Human Rights Committee has in recent years produced several favorable decisions on religious dress restrictions that recognize the discriminatory impact of such restrictions on Muslim women, including intersectional discrimination. See *F.A. v France*, para. 16 July 2018, 8.13; *Seyma Türkan v Turkey*, 17 July 2018, para 7.8; *Sonia Yaker v France*, 17 July 2018, para. 8.17; *Miriana Hebbadj v France*, 17 July 2018, para. 7.17.

Table 1: The European Union and the Council of Europe

The legal situation is complex as two different European legal regimes apply: EU law enacted by the EU, and the European Convention of Human Rights enacted by the Council of Europe. Each has different courts, Member States, and applicable law. These differences have consequences for the way fundamental rights are protected.

Another difference concerns the mandates of the different courts. In short, the ECtHR is a human rights court that settles individual cases. The CJEU can only give rulings on the interpretation and validity of EU law. The practical consequence is that the ECtHR mostly rules on individual complaints, after an applicant has exhausted domestic remedies at the national level. The CJEU, however, does not rule on individual complaints, but primarily receives questions from national judges about how to interpret EU law, such as the Equality Law Directive.[54] Once the CJEU gives its interpretation on a particular question, the referring court proceeds with the case at the national level. This means that the CJEU is mainly activated during national procedures, while the ECtHR will only deal with a case when national procedures have finished.

Actors contesting religious dress restrictions have relied mainly on two different fundamental rights, namely (1) the freedom of religion and belief and (2) the prohibition of discrimination. Concerning the prohibition of discrimination, litigators have claimed discrimination based on religion, race, and gender.[55] Both rights are protected by the European Convention on Human Rights (ECHR) as well as the Charter of Fundamental Rights of the EU (CFR EU).

Legal disputes mostly play out on the national level. Many national courts have developed a large body of case law concerning restrictions on religious dress. In practice, national courts may offer more protection than European courts. This is because both the ECHR and EU law only lay down minimum requirements on non-discrimination that have to be respected by all European states. This means that a disappointing judgment on the European level should not automatically

[54] For a full outline of the CJEU's functions, see European Union, "Court of Justice of the European Union (CJEU)" https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/institutions-and-bodies-profiles/court-justice-european-union-cjeu_en (last visited 16 March 2022).

[55] A right related to the freedom of religion is the right to education (Article 2, Protocol 1 ECHR).

have negative consequences for fundamental rights protection in the national context.

7.2 European Court of Human Rights

The ECtHR has dealt with several cases concerning religious dress restrictions. Almost all cases were unsuccessful for the applicant.

Under Article 9 ECHR, the freedom to manifest religion can be limited if it fulfils three criteria: (1) the limitation must have a legal basis; (2) the limitation must pursue a legitimate aim; (3) the limitation must be proportionate to that aim.

The ECtHR has consistently emphasized the importance of the freedom of religion as a "foundation" of democratic societies. According to the Court, a "healthy democratic society" needs "to tolerate and sustain pluralism and diversity."[56] Religion is acknowledged as "one of the most vital elements" of the identity of believers and their conception of life. At the same time, **the ECtHR grants states a wide margin of appreciation regarding limitations on the freedom of religion.** This margin follows from the fact that European societies have different views and traditions regarding the significance of religion in society. Because of this diversity, the Court gives states leeway to make their own choices in this regard. This emphasis on both the importance of protecting the freedom of religion, and the freedom of states to decide the regulation of issues involving religion, creates a tension that is present in almost all ECtHR decisions with regard to Article 9 ECHR.

7.2.1 ECtHR case law on neutrality

In the Court's case-law, neutrality is invoked both as a principle for religious diversity and a principle that justifies the exclusion of religious dress from the public sphere. The Court has thus far failed to critically assess the different interpretations of neutrality and how they relate to each other. The Court's case-law is unclear, blurred, and fragmented.[57] Two meanings of neutrality—inclusive and exclusive neutrality—can be identified in the Court's case law.

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[56] *Eweida and Others v the United Kingdom*, Judgment of the ECtHR of 15 January 2013, para. 94.

[57] Julie Ringelheim, "State Religious Neutrality As a Common European Standard? Reappraising the European Court of Human Rights Approach,"' *Oxford Journal of Law and Religion*, February 2017, 6(1), 24-47.

7.2.2 Inclusive neutrality: the state's duty of neutrality and impartiality towards religion

This principle is firmly established in the Court's case law.[58] States may not interfere with or assess the legitimacy of religious beliefs and practices.[59] The Court has gradually strengthened this duty of neutrality. **While earlier case law reflected more "neutrality as absence from coercion" (a state cannot actively coerce a specific religion on its citizens), it gradually came to mean "neutrality as absence of preference" (a state must also refrain from promoting a specific religion).** In other words, states have an obligation to ensure that religions in society are treated equally. In this way, the freedom of religion is intimately connected to the prohibition of discrimination.

7.2.3 Exclusive neutrality: neutrality as the exclusion of religion from the public sphere

This conception of neutrality has been actively pressed by governments in France, Switzerland, and Turkey as a legitimate aim for limitations on the freedom to manifest religion. The key assumption underlying this argument is that forbidding individuals from displaying religion is necessary to preserve the neutrality of state institutions and to protect others from unwanted pressures. In all cases, the Court accepted this argument, and found no violation of the freedom of religion regarding neutrality dress codes for primary school teachers (*Dahlab*), university students (*Sahin*), high school pupils (*Köse* and *Dogru*), and hospital workers (*Ebrahimian*).

The Court was particularly lenient regarding states that invoked the principle of *laïcité* as a principle that required a strict obligation of state neutrality. According to the Court, this principle is compatible with the Convention and justifies the application of a wide margin of appreciation.[60] In such cases, the Court's proportionality assessment becomes very loose, accepting at face value that not

[58] See, for instance, *Hasan and Chaush v Bulgaria*, Judgment of the ECtHR of 26 October 2000; *Jehovah's Witnesses of Moscow and Others v Russia*, Judgment of the ECtHR of 10 June 2010; *Svyato-Mykhaylivska Parafiya v Ukraine*, Judgment of the ECtHR of 14 June 2007.

[59] *Eweida and Others v the United Kingdom*, Judgment of the ECtHR of 15 January 2013, para. 81.

[60] S.A.S. v France, Judgment of the Grand Chamber of the ECtHR of 1 July 2014, para. 155.

only veiled state employees but also pupils and students affect the neutrality of state institutions.

This conception of neutrality has also been extended to the sphere of private employment. Here as well, the Court uncritically accepted a company's policy to project a neutral corporate image as a legitimate aim *(Eweida*). At the same time, the Court has arguably been more critical of restrictions outside the sphere of state institutions. In *Eweida*, the Court found a violation of the freedom of religion regarding a Christian female employee of British Airways, who wished to visibly wear a cross around her neck. The Court stated that the cross was "discreet" and could not detract from her professional appearance, meaning that the neutrality of the company could not be at stake. Furthermore, the company had previously allowed employees to wear other types of religious clothing, such as turbans and hijabs, which also did not affect the neutrality of the airline. In another case, *Ahmet Arslan and others v Turkey*, the Court found a violation of Article 9 ECHR for convicting a group of persons on the sole basis that they had worn the distinctive dress of their religious movement in the streets. The Court emphasized the fact that they were private individuals outside state institutions and that they did not pose a threat to public order. **This indicates that *laïcité* and neutrality cannot be invoked to justify any type of restriction on religious expressions—the freedom of religion sets limits on such measures.**

Nonetheless, the case law shows how the concept of neutrality can be used as a justification for far-reaching limitations on the freedom to manifest religion. Once it is accepted that a religious symbol is incompatible with "neutrality," which the ECtHR has always done, a ban on that symbol is permitted as long as this is done in a proportionate manner. This shows how "neutrality" can easily find itself on a slippery slope from an inclusive concept to promote religious diversity to an exclusive concept that requires the banishment of "non-neutral" symbols and

practices.[61] The *Lautsi* judgment, discussed below, also shows a different application of the concept of neutrality in the case law of the Court.[62]

7.2.4 ECtHR case law on (Islamic) religious symbols and dress

The ECtHR has a particularly problematic track record regarding the assessment of Islamic headscarves. In *Dahlab v Switzerland*, the Court found that the headscarf, by and of itself, is "a powerful external symbol" which from the outset may have "some kind of proselytising effect." By contrast, in *Lautsi v Italy*, the mandatory display of a crucifix in Italian classrooms as per instructions by the Minister of Education, Universities and Research was found to be permissible under the Convention. The Court found the crucifix to be "an essentially passive symbol" that would not have a particular influence on pupils, thereby not impinging on the state's duty of neutrality and impartiality towards religion. So, while the instruction to display a crucifix in all Italian classrooms was not in violation of state neutrality, an individual Muslim woman wearing a headscarf was found to be capable of violating that same principle.

In *Dahlab v Switzerland* (2001), the Court decided on the dismissal of a female Muslim primary school teacher because she did not comply with the prohibition to wear the headscarf. The dismissal took place when the teacher has already been wearing the headscarf for three years without any action being taken or objections being raised. It was also clear to the Court that the teacher never

[61] Compare for instance, the consideration of the Swiss court in *Dahlab v Switzerland,* Judgment of the ECtHR of 15 February 2001, which already seemed to anticipate the problems attached to the concept of neutrality: "[T]he neutrality requirement is not absolute […]. Neutrality does not mean that all religious or metaphysical aspects are to be excluded from the State's activities; however, an attitude that is anti-religious, such as militant secularism, or irreligious does not qualify as neutral. The principle of neutrality seeks to ensure that consideration is given, without any bias, to all conceptions existing in a pluralistic society," p. 5. This did not prevent the Swiss Court from finding that the headscarf ban was permitted to avoid the "provocation of reactions or conflict" and to preserve the principle of neutrality.

[62] *Lautsi v Italy*, Judgment of the Grand Chamber of the ECtHR of 18 March 2011, can be read as a contestation of the meaning and use of the concept of neutrality. Almost all parties in the case (the applicants, the governments, and non-governmental organizations) pressed for different understandings of neutrality. Significantly, the Chamber judgment preceding the judgment of the Grand Chamber based its opposite conclusion on the finding that the mandatory display of a Christian symbol violates the principle of state neutrality, therefore violating Article 9 of the Convention.

engaged in proselytizing or even talking about her religion to her pupils. Yet, the Court found that the headscarf represents a "powerful external symbol" which from the outset may have "some kind of proselytizing effect." The Court went on to consider that the headscarf "appears to be imposed on women by a precept which is laid down in the Koran" which is "hard to square with the principle of gender equality" as well as "the message of tolerance, respect for others, and above all, equality and non-discrimination that all teachers must convey to their pupils." On this basis, weighing the interest of Ms. Dahlab to express her religion against the need to protect her pupils (of "tender age"), the Court found the interference to be justified; no violation of the freedom of religion had taken place.

In *Sahin v Turkey*, the Court found it "understandable" to ban headscarves at a university in the name of secularism and gender equality. The Court also endorsed the idea that the headscarf ban helped to take a stance against extremist political movements which seek to impose religious doctrines on society. In this way, the headscarf ban, according to the Court, helped to "preserve pluralism in the university."

These sweeping statements on "the meaning" of headscarves contradict the Court's own principle[63] that, as a Court, it should not engage in the interpretation or appreciation of religious symbols and practices.[64] More important, however, is that **the Court's statements echo dominant strains of the political and Islamophobic discourses on headscarves as imposed on Muslim women and a symbol of oppression.** The blatant contradiction in the Court's understanding of Islamic dress and Christian symbols is telling. It indicates a bias of the Court regarding the Islamic faith, which can only be understood in relation to the broader public discourses on Islam in European states.

In S.A.S. v France (2014), concerning the French "burqa-ban," the Court took a more considered approach. In finding the blanket ban disproportionate to the aim of ensuring public safety, the Court recognized the effects the ban might

[63] See *Manoussakis and Others v Greece*, Judgment of the ECtHR of 26 September 1996, para. 47.

[64] The Court's statements have been widely criticized. See, for instance, Claudia Morini, "Secularism and the Freedom of Religion: The Approach of the European Court of Human Rights," *Israel law Review,* 19 March 2012.

have on the applicant.[65] Moreover, it refrained from negatively classifying the burqa as such and explicitly rejected a number of arguments by the French government to that effect. According to the Court, even though the burqa "is perceived as strange by many of those who observe it,"[66] it should be seen as "an expression of a cultural identity contributing to religious pluralism." The Court did not accept the argument that the burqa ban served gender equality or human dignity and also expressed its concerns about the Islamophobic character of the French political debate preceding the ban. **This indicates a learning process within the ECtHR on its approach to Islamic religious dress. It may have responded to criticism of its previous considerations on headscarves in Dahlab and Sahin, from which the S.A.S. judgment seems to depart.**[67]

Another positive development concerns the Court's increasing appreciation of headscarves as a central element of the identity of many individuals. In previous case law, the Court attached considerable weight to the fact that the headscarf was not an absolute religious mandate and thus constituted an alterable choice for female Muslims. Moreover, the Court previously found that if an individual can take steps to circumvent a limitation on her freedom of religion, for instance by finding another job, no interference with the freedom of religion had taken place. The Court explicitly departed from that case law, stating that the only important factor is that the specific manifestation of religion is intimately linked to the religion or belief in question.[68] At the same time, the Court still considers religion to be "primarily" a private affair of individual conscience, a conception that allows for more limitations on manifestations of religion in public.

In sum, the ECtHR case law shows the following:

- Both state neutrality and corporate neutrality are in principle accepted as legitimate aims to interfere with the freedom of religion.
- The *Eweida* judgment indicates the Court is willing to critically assess the proportionality of interferences on religious freedom based on corporate

[65] *S.A.S. v France,* Judgment of the Grand Chamber of the ECtHR of 1 July 2014, para. 139.

[66] *Ibid*. para. 120.

[67] *Ibid*. para. 153.

[68] This possibility can still be weighed in the proportionality assessment (*Eweida and Others v the United Kingdom*, Judgment of the ECtHR of 15 January 2013, para. 83).

neutrality. However, it is unclear to what extent the Court attached weight to the "discreetness" of the Christian cross in that case.

- In earlier judgments, the Court has repeatedly displayed a wide array of presumptions on the meaning and the effect of Islamic headscarves in public education. More recent rulings indicate the Court now refrains more from such negative qualifications of Islamic dress.
- The Court has utilized both inclusive and exclusive conceptions of neutrality. The inclusive conception understands neutrality as a state obligation to ensure religious pluralism. States have a duty of neutrality to refrain from normative assessments of religious teachings and practices.

7.3 Court of Justice of the European Union

For several decades, Muslim women have relied on antidiscrimination law to contest restrictions on religious dress. Such restrictions have been claimed to be discriminatory on the grounds of religion, race, and gender. In many EU states, national courts and national equality bodies have dealt with many claims on this issue. Most legal struggles are centered in the national, not in the European, legal arena.

The CJEU has a larger case law concerning the freedom of religion, in comparison to that of the prohibition of discrimination. However, two judgements in 2017 (*Achbita* and *Bougnaoui*), and another one in 2021 (*WABE* and *Müller*), have increased the CJEU's case law on the prohibition of discrimination.[69]

In EU law, several Directives have been adopted in the field of equality. In practice, Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation has proven to be the most important, as it covers by far the most grounds of discrimination. However, the

[69] This shift again can be attributed to reasons concerning the respective scope of application of the Convention and the Charter, and with the material scope of the rights concerned. In the ECHR, the scope of the prohibition of discrimination is limited to *the securement of Convention rights*. This means that complaints concerning discrimination must always be connected to one of the other rights protected in the ECHR, thus restricting its scope. Protocol No. 12 to the ECHR in fact gives Article 14 ECHR an independent status and no longer requires the connection to a Convention right. Most countries however, such as Belgium, France, Germany, and the UK, have not ratified this protocol. The Netherlands has ratified the protocol, which means that Dutch claimants have more opportunities to base claims on the prohibition on discrimination on the ECHR.

Directive only applies to discrimination arising in the sphere of employment, leaving no recourse under EU law for those excluded from public space, education or services based on their religious attire.[70] Incidentally, this is also one of the reasons why the CJEU receives few cases on this theme and only recently issued several judgments.

Directive	Grounds of discrimination	Material scope
Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, 29 June 2000	Race and ethnic origin	(Access to) employment and occupation, social protection, education, housing, etc.[71]
Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, 27 November 2000	Religion or belief, disability, age, sexual orientation	(Access to) employment and occupation
Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, 5 July 2006	Sex	(Access to) employment and occupation
Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in access to and supply of goods and services, 13 December 2004	Sex	Goods and services

Table 3: EU Directives on equality law

The critical distinction that is made in Council Directive 2000/78/EC is the distinction between direct and indirect discrimination. Direct discrimination takes place when a person "is treated less favourably than another in a comparable situation." In contrast, indirect discrimination occurs where "an apparently neutral provision" puts persons at a "particular disadvantage comparted with other persons" on one of the grounds of discrimination.[72] This distinction is important, because direct discrimination cannot be justified except under very limited

[70] The Council Directive 2000/43/EC on racial discrimination has a broader material scope, i.e., it not only applies to situations involving employment, but is also applicable to discrimination in, among others, education, housing, and social security. However, it does not cover discrimination based on religion, nor does it acknowledge the racialization of religious groups.

[71] See Article 3 of the Directive for the full list.

[72] Article 2(2)(b) of Council Directive 2000/78/EC.

conditions prescribed by the Directive, while indirect discrimination can be justified by a legitimate aim and the use of proportionate means to achieve that aim—a similar test as seen under the freedom of religion under Article 9 ECHR.

7.3.1 CJEU case law

The relevant case law (*Achbita*, *Bougnaoui*, *WABE* and *Müller*) will be discussed highlighting the problematic aspects and untenability of neutrality as a legitimate aim to justify restrictions of fundamental rights. In all cases, a private employer prohibited a Muslim woman from wearing a headscarf on the basis of a neutrality policy. In all cases, the legal question essentially is whether such policies discriminate, directly or indirectly, on the grounds of religion (*Achbita* and *Bougnaoui* 2017).[73]

> Ms. Achbita, a Belgian Muslim woman, worked as a receptionist for the international security company G4S. She started wearing a headscarf a couple of years after she started working there and was subsequently dismissed allegedly because the company had an unwritten rule prohibiting employees from wearing conspicuous political, philosophical, or religious signs in the workplace. Ms. Bougnaoui is a French Muslim woman who worked as an IT consultant. In 2009, her employer received a complaint from a customer, stating that her headscarf had been upsetting and requesting that there should be "no veil next time."[74] Her employer then requested her to remove her headscarf to respect the need for neutrality. Ms. Bouganoui refused and was subsequently dismissed. The Belgian and French courts asked the CJEU whether these rules and practices were discriminatory under Council Directive 2000/78/EC.

In *Achbita* and *Bougnaoui*, the CJEU, much like the ECtHR, accepted at face value the legitimacy of corporate policies of neutrality. In *Achbita*, the CJEU found that the internal neutrality rule was not directly discriminatory, as it treated all workers the same by requiring everyone to dress neutrally by refraining from

[73] *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV,* Judgment of the Grand Chamber of the CJEU of 14 March 2017; *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA,* Judgment of the Grand Chamber of the CJEU of 14 March 2017.

[74] *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA,* Judgment of the Grand Chamber of the CJEU of 14 March 2017, para. 14.

wearing religious dress and symbols at work. It was not indirectly discriminatory either, as long as the neutrality policy was "genuinely pursued in a consistent and systematic manner" and only applies to workers who interact with customers.[75] It found the employers' wish to project an image of neutrality towards customers to relate to the freedom to conduct a business[76] and therefore, in principle, legitimate. In the application of the proportionality principle, the Court considered it might be relevant to assess whether it would have been possible to offer Ms. Achbita another post without customer interaction, but, according to the Court, this does not require the employer to take on an "additional burden."

The *Achbita* judgment lacks a critical interrogation of corporate neutrality policies both as a legitimate aim for indirect discrimination, as well as during the proportionality assessment. **The CJEU does not question why the mere fact that an employee wears a headscarf can affect the corporate image of the employer.** Furthermore, the Court failed to establish a duty of employers to accommodate religion and combat discrimination. The (minimal) responsibility of employers to find back-office alternatives are not helpful in this regard and risks making excluding visibly Muslim women legally acceptable.[77]

A confusing aspect of the CJEU's assessment of neutrality policies concerns the extent to which it is relevant that these policies stem from customer wishes. In *Bougnaoui*, the CJEU considered that the willingness of the employer to take account of the specific wishes of the customer may not be considered an

[75] Erica Howard has pointed out that the *Achbita* judgment on this point is also hard to square with CJEU case law on discrimination based on racial and ethnic origin. In *CHEZ*, the CJEU found racial discrimination to be present regarding Roma in Bulgaria. According to the CJEU, even though the contested rule was neutrally formulated, it was clear that it was introduced for reasons relating to racial or ethnic origin. Moreover, in *Feryn*, the CJEU held that an employer statement on Belgian local radio that it would not hire "immigrants" was directly discriminatory, as it was "likely to dissuade some candidates from applying for jobs with this employer. Such dissuasion clearly also takes place with neutrality policies. See Erica Howard, "Headscarves Return to the CJEU. Unfinished Business," *Maastricht Journal of European and Comparative Law*, 13 January 2020, 27(1), 10-28; *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, Judgment of the Grand Chamber of the CJEU of 16 July 2015, para. 9.

[76] This freedom is codified in Article 16 CFR EU.

[77] See also Eleanor Sharpston, "Shadow Opinion of former Advocate-General Sharpston: headscarves at work (Cases C-804/18 and C-341/19)," *EU Law Analysis* http://eulawanalysis.blogspot.com/2021/03/shadow-opinion-of-former-advocate.html (last visited 16 March 2022), para. 243.

"occupational requirement" (which may serve as an exception to justify discrimination in particular circumstances). In other words, the prejudice of a customer towards an employee's religious dress does not justify any discrimination against her. This CJEU judgment is clearly important, but it also led legal scholars to question why an employer cannot justify a neutrality dress code on the basis of customers' wishes, but still can implement a neutrality policy on the basis of the wish to present a neutral corporate image. This is clearly inconsistent, as the point of a neutrality dress code is, per definition, to present a neutral image *towards customers*.

In ***WABE* and *Müller***,[78] two German courts challenged the CJEU judgments on religious dress. The Hamburg Labor Court argued that direct discrimination occurs when a rule directly relates to a certain characteristic protected by Article 1 of Directive 2000/78/EC, in this instance religious expression. Direct discrimination, in the opinion of the Court, cannot become indirect discrimination, simply because other groups of employees are also prohibited from doing something. The Court equates this with "general hostility to all religions being perceived as neutrality and not as direct discrimination."[79] The Court further remarked that the CJEU left open the question of whether neutrality requirements constitute indirect discrimination on the grounds of religion and/or gender, as women are most impacted by such requirements.[80] Both referring courts also asked if they remained free to apply more protective national provisions on freedom of religion. This includes, as stipulated by the Hamburg Labor Court in *Wabe*, a requirement that employers show that a neutrality policy is based on a sufficiently specific risk, particularly economic disadvantage. Finally, the Federal Labor Court in *Müller* asked to what extent it is acceptable for an employer to prohibit only religious dress and symbols which are "prominent and large-scale."[81]

WABE concerns a Muslim woman employee of a day care provider. The employee had worn a headscarf at work, but after she returned from parental

[78] Joined Cases *IX v WABE eV* and *MH Müller Handels GmbH v MJ*, Judgment of the Grand Chamber of the CJEU of 15 July 2021.

[79] See *IX v WABE eV*, Request for a preliminary ruling, Hamburg Labor Court, 20 December 2018, p. 11 onwards.

[80] *Ibid*.

[81] See *MH Müller Handels GmbH v MJ*, Request for a preliminary ruling, Federal Labor Court, 30 April 2019, p. 6 onwards.

leave was asked to comply with a newly adopted neutrality policy. She refused and was then released from work. The Hamburg Labor Court referred the case to the CJEU. *Müller* concerns a Muslim woman employed by a drug store company. In 2016, she wanted to start wearing a headscarf at work. This was against company rules, which required employees to work without any *prominent and large-scale* signs of religious, philosophical, and political convictions. These rules aimed to preserve neutrality and to avoid conflict between employees. The German Federal Labor Court referred the case to the CJEU.

In February 2021, Advocate General Athanasios Rantos issued his opinion on both cases. Eleanor Sharpston, who was advocate general at the CJEU from 2006 to 2020 and had worked on *Bougnaoui v Micropole*, was first tasked with writing an opinion on the cases. She worked on it until her departure from office and, as a contribution to the legal debate, published her Shadow Opinion in March 2021.[82]

The Court's judgment was issued in July 2021.[83] The CJEU confirmed its finding in *Achbita* that neutrality policies are not directly discriminatory on grounds of religion, as long as they apply to all visible signs of political, philosophical, and religious beliefs.[84] In that light, a partial ban of "prominent and large-scale" religious symbols is not allowed, as this would be directly discriminatory and would make the neutrality policy inconsistent.[85]

Regarding indirect discrimination, the CJEU found that neutrality policies constitute a difference of treatment indirectly based on religion, as such policies statistically almost exclusively concern Muslim women. However, the Court again found that neutrality is, in principle, a legitimate aim to justify such a difference in treatment. That aim of neutrality must be pursued in accordance with the principle of proportionality. **According to the CJEU, this puts a burden of**

[82] See Eleanor Sharpston, "Shadow Opinion of former Advocate-General Sharpston: headscarves at work (Cases C-804/18 and C-341/19)," *EU Law Analysis* http://eulawanalysis.blogspot.com/2021/03/shadow-opinion-of-former-advocate.html (last visited 16 March 2022).

[83] Joined Cases *IX v WABE eV* and *MH Müller Handels GmbH v MJ*, Judgment of the Grand Chamber of the CJEU of 15 July 2021.

[84] *Ibid*. para. 55.

[85] *Ibid*. para. 78.

proof on the employer to show that there is a "genuine need" for a neutrality policy.

To establish a genuine need, account may be taken, firstly, of "the rights and legitimate wishes of customers or users," such as the wish of parents to have their children supervised by persons who do not manifest their religion in contact with children.[86] Companies, however, cannot respond to "discriminatory requirements" on the part of customers, as was the case in *Bougnaoui*.[87] **Secondly, a genuine need may be established if the company can provide evidence that the absence of a neutrality policy would lead that company to "suffer adverse consequences," undermining that company's freedom to conduct a business, which is enshrined in Article 16 CFR EU.**[88] The neutrality policy should be strictly necessary in view of those adverse consequences.[89] **Thirdly, the Court found that the prevention of social conflicts, as well as the presentation of a neutral image vis-à-vis customers, may correspond to a genuine need.**[90]

Finally, the CJEU found that national courts remain free to apply more favorable national provisions.[91] This is because the Directive only establishes a general framework for equal treatment in employment, which leaves a margin of discretion to the Member States.[92] **National courts thus remain free to formulate stricter requirements for neutrality policies than formulated by the CJEU itself.**

[86] *Ibid*. para. 65.

[87] *Ibid*. para. 66.

[88] *Ibid*. para. 67.

[89] *Ibid*. paras. 68-69.

[90] *Ibid*. para. 76.

[91] *Ibid*. para. 90.

[92] *Ibid*. paras. 86-88.

7.3.2 Three problems: legitimate aim, proportionality, and business freedom

In *WABE* and *Müller*, the CJEU essentially continued the lines set out in *Achbita* and *Bougnaoui*.[93] Although the German courts asked the CJEU to essentially reconsider its earlier judgments, the CJEU instead chose to expand on those judgments by laying out in more detail how the earlier ruling should be applied.

As we have seen in the ECtHR's case-law under the freedom of religion, the automatic acceptance of the legitimacy of neutrality policies puts those affected in a difficult legal position, as it essentially entails that the neutrality policy is allowed, as long as it is pursued in a proportional manner. Not the prohibition of discrimination, but rather the employer's "right" to pursue a neutrality policy, is the starting point. **According to the Shadow Opinion of former Advocate General Sharpston, the CJEU should establish more concrete norms to define when neutrality may pass as a legitimate aim.94 According to Sharpston, the Court should put the burden of proof on the employer to show that their aim is legitimate.** The CJEU, however, only formulates such a burden regarding the proportionality assessment.

In *WABE* and *Müller*, the Court blurs the distinction between the legitimate aim and the proportionality assessment. It accepts that neutrality is legitimate, in principle, but then, in light of the proportionality assessment, asks employers to adduce evidence that it has a genuine need for such a policy.[95] In this context, "the legitimate wishes of those customers or users and the adverse consequences that that employer would suffer in the absence of that policy, given the nature of its activities and the context in which they are carried out" can be taken into

[93] See Martijn van der Brink, "Pride or Prejudice? The CJEU Judgment in *IX v Wabe and MH Müller Handels GmbH*," Verfassungsblog, 20 July 2021 https://verfassungsblog.de/pride-or-prejudice/ (last visited 16 March 2022).

[94] Eleanor Sharpston, "Shadow Opinion of former Advocate-General Sharpston: headscarves at work (Cases C-804/18 and C-341/19)," EU Law Analysis http://eulawanalysis.blogspot.com/2021/03/shadow-opinion-of-former-advocate.html (last visited 16 March 2022), para. 225.

[95] The employer must also demonstrate that the difference of treatment is appropriate for ensuring that the policy is properly applied, including that it is pursued in a consistent and systemic manner, and that it is limited to what is strictly necessary.

account.[96] While the Court now distinguishes between "legitimate customer wishes" and "discriminatory customer requirements," it is hard to see how such a distinction can be helpful in practice. More fundamentally, the judgment allows a discriminatory customer's wish to be respected under a different heading (economic disadvantage, general corporate image, etc.). The background of customer wishes (discriminatory or legitimate) is simply irrelevant when it comes to economic disadvantage and can indirectly still justify a neutrality policy. It can also be questioned whether the wish of parents that the teacher of their children does not wear a headscarf is any less discriminatory than the wish of a customer not to interact with a hijab-wearing employee. Simply put, both parents' and customers' wishes may rest on anti-Muslim prejudice.[97] Equally worrisome is that by accepting the "prevention of social conflicts" as a legitimate aim, any discussion where the headscarf is problematized could essentially justify the introduction of a ban. In both cases, the Muslim employee is cast as untrustworthy and their intentions as professionals and ability to carry out their work are viewed with suspicion.[98]

The Court's choice to attach much more weight to the freedom to conduct a business compared to the prohibition of discrimination in assessing whether indirect discrimination is justified, is problematic. The freedom to conduct a business should be limited precisely by the prohibition of discrimination: companies should be free in their personnel policy, *as long as this policy does not violate the prohibition of discrimination.* This would also mean that the wish to avoid social conflicts, economic disadvantages and to respect customer wishes could not serve as a grounds to implement a neutrality policy, simply because such wishes cannot outweigh the prohibition of discrimination.[99]

Another fundamental problem with the reliance on the proportionality assessment is that a "proportional" neutrality policy may create more, rather than less,

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[96] Joined Cases *IX v WABE eV* and *MH Müller Handels GmbH v MJ*, Judgment of the Grand Chamber of the CJEU of 15 July 2021, para. 92.

[97] See also, Erica Howard, "German Headscarf Cases at the ECJ: A Glimmer of Hope?," European Law Blog, 16 July 2021https://europeanlawblog.eu/2021/07/26/german-headscarf-cases-at-the-ecj-a-glimmer-of-hope/ (last visited 16 March 2022).

[98] See also Chapter 5 of the briefing paper, which dives more deeply into the Islamophobic assumptions underlying neutrality dress codes.

[99] See also Chapter 4 of the briefing paper, which critically assesses these arguments for neutrality dress codes.

discrimination. In *Achbita*, the Court found that neutrality codes can only be proportionate if they apply only to workers who interact with customers and, in certain circumstances, if workers who wear the headscarf have been given the opportunity to take a post not involving customer contact. As a result, neutrality policies legitimize a situation where all religious minorities are referred to back-office positions, which is clearly a discriminatory outcome. Another example follows from the judgment of the European Court of Human Rights (ECtHR) in *Eweida and Others v the United Kingdom*. Here the Court found that the application of a neutrality policy was disproportionate for a Christian employee wearing a Christian cross. This cross was so "discreet" it could not affect the neutral image of the company concerned. This judgment led to practices where Christian crosses were allowed, and Islamic scarves were banned in reference to this requirement of "discreetness."[100] In *WABE* and *Müller*, the CJEU has taken the opposite position, ruling that a neutrality policy can only be justified if it applies to all visible forms of religious expression, as a limitation to "conspicuous, large-sized signs" would amount to direct discrimination on the grounds of religion or belief. This not only shows that judicial bodies disagree on neutrality policies, but also that legal principles such as proportionality can, in fact, lead to more, instead of less discrimination. In the interpretation of the ECtHR in *Eweida*, it can mean that an employer can distinguish between "discreet" (Christian) and "ostentatious" (Islamic) symbols—which would result in a discriminatory practice, as the CJEU rightly indicated in *WABE* and *Müller*.

In sum, the CJEU case law shows that:

- It can be difficult to effectively contest neutrality policies using EU law although national courts still can and often do provide greater protection than the minimum requirements set out by the CJEU.

Neutrality is uncritically accepted as a legitimate aim. The legitimacy of neutrality and the underlying assumptions on which neutrality policies are based need to be more thoroughly challenged. This will require bringing more cases and making more references to the CJEU to press the Court to change its position on the matter.[101]

[100] For instance, in the *MH Müller Handels GmbH v MJ*, Judgment of the Grand Chamber of the CJEU of 15 July 2021.

[101] A preliminary reference from the Brussels Labour Tribunal in *L.F. v S.C.R.L*, lodged on 27 July 2020, is currently pending before the CJEU.