

# RECLAIMING “NEUTRALITY” IN THE DEBATE ON RELIGIOUS DRESS BANS

Prohibitions on religious dress perpetuate existing structural inequalities and obstruct the economic empowerment of visibly Muslim women, whom they have been shown to target. A commonly used argument in favor of prohibiting individuals from wearing any visible signs of political, philosophical, or religious belief in the workplace is that such a ban on personal expression is required to ensure neutrality. However, this is patently false.

Instead, neutrality entails the achievement of equality in an environment that encompasses diverse beliefs and backgrounds—which is impossible, so long as Muslim women are stigmatized and excluded because of their religious attire.

## TEN FACTS ON RESTRICTIONS ON RELIGIOUS DRESS AND SYMBOLS IN THE WORKPLACE

- 1 State neutrality requires that institutions, not individual bodies, be neutral:** The separation of church and state requires that state institutions function independently from religious institutions and that public policy not be based on religious justifications.<sup>1</sup> Therefore, neutrality is about the functioning of state institutions and their staff, rather than the bodies of individuals employed by the state.<sup>2</sup> Prohibiting people from observing religious requirements at work for no legitimate reason undermines their freedom of religion and belief.
- 2 Dress codes prohibiting religious attire discriminate based on religion, race, and gender:** Religious dress bans can still be discriminatory even if they are not explicitly aimed at, or do not expressly name, a religious group. In the workplace, they exclude mostly Muslim women who wear headscarves<sup>3</sup> in contrast to women who wear headscarves for fashion reasons; Muslim men who practice their faith by having a beard; persons for whom the wearing of religious signs (e.g., a Christian cross) is not required; or persons who do not hold beliefs that require visible attire (e.g., atheists). Muslim women are therefore exposed to discrimination based on different intersecting identity markers.
- 3 The state’s duty of neutrality and impartiality regarding religion means that it should not play a role in assessing the religious practices of its employees:**<sup>4</sup> Dress codes that force employees to look “neutral” rely on the state assessing the

1 Jeroen Temperman, “State Neutrality in Public School Education: An Analysis of the Interplay between the Neutrality Principle, the Right to Adequate Education, Children’s Right to Freedom of Religion or Belief, Parental Liberties, and the Position of Teachers,” *Human Rights Quarterly*, 1 November 2010, 32(4), 865–897.

2 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), paras. 125–129.

3 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. 59.

### TEN FACTS ON RESTRICTIONS ON RELIGIOUS DRESS AND SYMBOLS IN THE WORKPLACE (CONTINUED)

meaning of religious dress and symbols to determine what is permissible and what is not. This assessment violates the state’s duty of neutrality as part of the separation of church and state.

- 4 Prohibitions on religious dress exclude religious minorities from many public service jobs, thereby limiting their equal representation within state institutions and reinforcing whiteness as the norm:** The biggest impact of religious dress bans is the exacerbation of existing discrimination against Muslim women, as well as their underrepresentation. Prohibiting employees from wearing religious attire has substantial consequences on career prospects, potentially affecting millions of jobs in the public sector. Judicial approaches to “accommodate” Muslim women—for example, offering back-office functions—invisibilize Muslim women, and exacerbate, rather than counter, discrimination. It promotes the idea that Muslim women are second-class citizens and constitutes an affront to human dignity by signaling to society that they should not be accorded the right even to be seen, let alone treated as equals.
- 5 The visible religious identity of a particular employee does not reflect a preference for that religion by the employer:** Employers whose staff include visibly religious minorities, or whose staff are otherwise diverse, can only be said to encourage pluralism. In contrast, when an employer has no visible representation of minority groups, it is hard to make the case that there is no exclusion of those groups. Employers who wish to portray a unified identity or image can always introduce a uniform that accommodates religious apparel without impinging on brand recognition.
- 6 Religious dress is not inconsistent with professionalism and claiming otherwise leads to stigmatization and invites discrimination:** The idea that religious clothing is not neutral may also assume that religious dress—or the person who wears it—is not professional or able to represent the organization.<sup>5</sup> Such an assumption is based on a discriminatory idea of who fits the norm and who does not, disqualifying a particular group on the sole basis of how they look. Neutrality, in this sense, becomes a privilege of the majority
- 7 Banning religious dress does not avoid or solve conflicts on the job that stem from prejudice:** Some employers justify banning employees from wearing religious dress with the need to avoid conflicts and tensions on the job with colleagues or customers. This plays into the bias and prejudice of these individuals and is tantamount to discrimination.<sup>6</sup> Removing or rejecting staff who wear religious dress from the workspace

4 *Manoussakis and Others v Greece*, Judgment of the ECtHR of 26 September 1996, para. 47.

5 *Eweida and Others v the United Kingdom*, Judgment of the ECtHR of 15 January 2013, para. 94: “Ms Eweida’s cross was discreet and cannot have detracted from her professional appearance. There was no evidence that the wearing of other, previously authorised, items of religious clothing, such as turbans and hijabs, by other employees had any negative impact on British Airways’ brand or image. Moreover, the fact that the company was able to amend the uniform code to allow for the visible wearing of religious symbolic jewellery demonstrates that the earlier prohibition was not of crucial importance.”

### TEN FACTS ON RESTRICTIONS ON RELIGIOUS DRESS AND SYMBOLS IN THE WORKPLACE (CONTINUED)

is not only an affront to their dignity, but also removes opportunities for colleagues and customers to become accustomed to religious diversity and promotes the idea that removing religious minorities from public spaces is a legitimate solution. Rather than taking measures to eliminate bullying, harassment, and discrimination in the workplace.

- 8 The claim that Islamic headscarves should be banned because they represent illiberal values expresses Islamophobic prejudice:** Headscarves do not have a clear and fixed meaning shared by all who wear them. Muslim women, for example, wear a headscarf for a wide array of reasons, but primarily to observe what they believe is a religious requirement, not to communicate a political ideology.
- 9 Even in a free-market economy, companies do not have the right to hire or reject whoever they want:** The argument that companies are free to hire whoever they want does not mean that they have the freedom to discriminate without consequence. Private businesses must respect a wide array of human rights obligations, such as labor rights, the rights of trade unions, privacy rights, the right to family life, and fundamental human rights including the freedom of religion.
- 10 The right to freedom of religion includes the right to practice and manifest one’s religion in public:** Proponents of bans on religious dress and signs often claim that religion in a secular society is a private matter and should be “left at home.” This is a misunderstanding of the right to freedom of religion and belief. The idea that religion is a “private matter” refers to freedom of conscience—in other words, freedom from being forced to adhere to a specific religion. Freedom of religion includes the right to express one’s faith in public and implies that the state must respect an individual’s freedom to engage in these social practices

## LEGAL CHALLENGES TO DISCRIMINATORY PROHIBITIONS ON RELIGIOUS DRESS

Courts and tribunals in at least six European countries, including Austria, Belgium, the Czech Republic, Denmark, Germany, and the Netherlands, have established that prohibiting employees from wearing religious dress is at least indirectly discriminatory—in other words, even though a provision is apparently neutral, it can have a disparate impact on a specific group. Case law shows that in many instances, dress codes prohibiting religious attire have not been implemented for the sake of neutrality, but

<sup>6</sup> 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), para. 223.

## RECLAIMING “NEUTRALITY” IN THE DEBATE ON RELIGIOUS DRESS BANS

expressly to exclude Muslim women who wear a headscarf.<sup>7</sup> In addition, public and political debates on religious dress bans in the name of neutrality are rife with rhetoric targeting and stigmatizing Muslim women and showing that the motivation for such dress codes is to ban the visible presence of Muslim women wearing a headscarf.

- In 2020, the German Federal Labor Court ruled in favor of a Muslim teacher’s right to wear a headscarf, confirming that freedom of religion cannot be restricted unless it is proven that the headscarf poses a sufficiently concrete danger to school peace or the state’s duty of neutrality.
- The Labour Court of Brussels ruled in 2021 that a woman who was refused employment by the local public transport operator was subjected to religious and gender discrimination, after recruiters told her she would have to remove her headscarf if she was hired at the company.
- The Dutch Institute for Human Rights, has repeatedly found that neutrality policies are discriminatory in cases where being “neutral” does not constitute a genuine occupational requirement or where alternatives to a neutrality policy are available. For example, it has ruled that it is discriminatory for an employer to adopt religious dress restrictions on the basis that it is “threatening or problematic for cooperation” or to avoid tension among employees.

Unfortunately, the Court of Justice of the European Union and the European Court of Human Rights have failed to critically assess the necessity and legitimacy of prohibiting the wearing of religious symbols for both state and private employers to achieve neutrality. This has created a loophole for employers to use neutrality as a rationale for discriminatory actions, especially in the private sector.

Human rights activists should persist with strategic litigation as part of educating courts and judges on these matters and achieving necessary change. One avenue for strategic litigation is to challenge the existing application of the principle of proportionality, which involves assessing whether the benefit of a ban on religious symbols outweighs the harms that result from restricting Muslim women’s freedom of religion.

<sup>7</sup> Erica Howard, “Islamic Headscarves and the CJEU: *Achbita and Bougnaoui*,” *Maastricht Journal of European and Comparative Law*, 21 August 2017, 348-366

**The Open Society Justice Initiative** uses law to protect and empower people around the world. Through litigation, advocacy, research, and technical assistance, the Justice Initiative promotes human rights and builds legal capacity for open societies around the world.

For more information about the Open Society Justice Initiative and to download the full *Restrictions on Muslim Women’s Dress in the 27 EU Member States and the United Kingdom* report, please visit: [osf.to/headscarfbans](https://osf.to/headscarfbans)