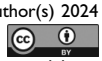
Academic Contribution

ELLJ

European Labour Law Journal
2024, Vol. 15(4) 711–725



DOI: 10.1177/20319525241261030
journals.sagepub.com/home/ell


Religious discrimination at the CJEU and the social inclusion approach

Erica Howard
Middlesex University, London, UK

Abstract

The social inclusion approach to EU anti-discrimination law, as set out by Ringelheim, is aimed at achieving inclusion and participation in employment and wider society of all groups, including the most disadvantaged. But is the CJEU using this social inclusion approach, especially in cases concerning religious discrimination? This article argues that the CJEU, in cases regarding racial and ethnic origin, disability and sexual orientation discrimination as well as in some cases regarding religion or belief discrimination, has indeed applied a social inclusion approach, but that the six judgments regarding the wearing of Islamic headscarves at work are an exception. In the latter cases, the CJEU did not appear to pay any attention to the effect of the judgments on the employment opportunities of Muslim women who want to wear religious symbols at work.

Keywords

Religious discrimination, social inclusion, employment opportunities, Islamic headscarves, CJEU

I. Introduction

In a chapter in 2012, Ringelheim distinguished two approaches to the question of whether religious freedom or anti-discrimination can protect religious interests at work.[1] First, the 'freedom of contract' approach, which emphasises the primary importance of contractual freedom. Second, the

1. J. Ringelheim, 'Religion, Diversity and the Workplace: What Role for the Law?', in K. Alidadi, M-C Foblets and J. Vrielink, (eds.), *A Test of Faith? Religious Diversity and Accommodation in the European Workplace,* (Ashgate, 2012), 348–357.

This article has not been considered for publication elsewhere nor has it been published elsewhere.

Corresponding author:
Erica Howard, Emerita Professor of Law, Middlesex University, The Burroughs, London, NW4 4BT, UK.
Email: e.howard@mdx.ac.uk

social inclusion approach, which recognises 'a central place for the objective of achieving social and political inclusion of all groups, especially the most disadvantaged'.[2] According to Ringelheim, the development of European Union (EU) anti-discrimination law 'clearly reinforces the social inclusion approach', as 'social inclusion is one of the declared aims of this body of law' in Recitals 8 and 9 of Directive 2000/78/EC,[3] which prohibits religion or belief discrimination in employment.[4] At the time Ringelheim was writing, the Court of Justice of the European Union (CJEU) had not handed down any judgments relating to religion or belief discrimination, but 12 years later, a number of cases on this issue have been decided.[5] This article aims to assess whether the development of EU law has indeed reinforced the social inclusion approach to religious and other forms of discrimination, especially for Muslim women who want to wear headscarves at work.

II. Ringelheim's social inclusion approach and the management of religious diversity in the workplace

Ringelheim writes that, in the freedom of contract approach, 'the worker's right to religious freedom is guaranteed insofar as by virtue of his contractual freedom he is free not to take a job or to resign if the conditions conflict with his religious beliefs'. Therefore, freedom to contract overrides the freedom of religion.[6] The social inclusion approach, in contrast, 'acknowledges the importance of employment for individuals' wellbeing as well as for social cohesion and seeks to achieve a balance between freedom to contract and the objective of social inclusion'.[7] Whether an interference with the freedom of religion is justified is then subject to a proportionality test, as laid down in Article 9(2) of the European Convention on Human Rights.[8]

Ringelheim argues that the development of EU anti-discrimination law clearly reinforces the social inclusion approach, because social inclusion is one of the declared aims of this body of law according to the Preamble of Directive 2000/78/EC. She does not refer to any case law of the CJEU. She writes that 'merely prohibiting employers from taking certain characteristics into account in decisions on recruitment, promotion or firing is not sufficient to achieve social and professional integration of those who are excluded from the employment market',[9] including ethnic and religious minorities. Ringelheim focuses on the latter. The

2. Ibid., 348. On these recitals, see below.
3. Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303/16. This Directive prohibits discrimination on the grounds of religion or belief, disability, age and sexual orientation.
4. J. Ringelheim, n. 1, 352.
5. Case C-157/15 *Samira Achbita and Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v G4S Secure Solutions NV*, EU:C:2017:203 (*Acbhita*); Case C-188/15 *Asma Bougnaoui, Association de Défense des Droits de l'Homme (ADDH) v Micropole Univers SA*, EU:C:2017:204 (*Bougnaoui*); Case C-414/16 *Vera Egenberger v Evangelisches Werk fur Diakonie und Entwicklung eV*, EU:C:2018:257 (*Egenberger*); Case C-68/17 *IR v JQ*, EU:C:2018:696 (*IR*); Case C-193/17 *Cresco Investigation GmbH v Markus Achatzi*, EU:C:2019:43 (*Cresco*); Joined cases C-804/18 *IX v Wabe eV* and C-341/19 *MH Müller Handels GmbH v MJ,* EU:C:2021:594 (*Wabe and Müller*); Case C-344/20 *LF*, EU:C:2022:774 (*LF*); Case C-148/22 *OP v Commune d'Ans*, EU:C:2023:924 (*OP*).
6. J. Ringelheim, n. 1, 349–350.
7. Ibid., 351.
8. Ibid, 351–352.
9. Ibid., 352–353.

author continues that workplace rules which disadvantage workers who practise a certain religion could amount to indirect discrimination against Article 2(1)(b) of Directive 2000/78/EC, and that the employer then must prove that the rule has a legitimate aim and that it is a proportionate means to achieve that aim. This justification is subject to judicial review and the way judges will assess this 'will be crucial in determining to what extent the prohibition of indirect discrimination protects religious interests at work'.[10] This suggests that religious interests at work can be protected if judges assess the justification of indirect discrimination using a social inclusion approach.

Ringelheim analyses the issue of reasonable accommodation of religion and belief as it exists in the US and Canada, which means that the employer must accommodate the individual as long as this does not cause undue hardship. Referring to Article 5 of Directive 2000/78/EC which provides a right to reasonable accommodation in employment for disabled people, she writes that 'various authors argue that the prohibition of indirect discrimination based on religion and belief in employment may implicitly entail an obligation to reasonably accommodate religious practice'. This is because, 'in order to satisfy the requirement of proportionality, a rule having a detrimental effect on a protected group must be the least restrictive means to achieve the legitimate aim sought'.[11] If the employer does not consider alternatives or the possibility of allowing individual exceptions to avoid disadvantages to persons with a particular religion, the rule will not be proportionate. Ringelheim concludes that 'the approach taken in disability discrimination should be considered as the expression of a more general principle, namely that employers should make allowance for the different needs of socially excluded groups and contribute to fostering their social and professional integration'.[12] Again, this fits in with the social inclusion approach to discrimination.

Ringelheim concludes:

> *The development of EU anti-discrimination law is likely to have a crucial impact on the way this question [how religious diversity must be managed in the workplace] is dealt with across Europe. The emphasis it places on the objective of social inclusion, and the prohibition of indirect discrimination it includes, give further strength to the view that freedom of contract is not in itself a sufficient justification for restricting religious freedom at work, and that employers can be required to contribute to the elimination of indirect barriers to the professional integration of minority religious groups.*[13]

10. Ibid., 353–354.
11. Ibid., 355, referring to H. Collins, *Employment Law* (Oxford University Press, 2nd edn, 2010), 73; L. Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing, 2008) 223; E. Bribosia, J. Ringelheim and I. Rorive, 'Reasonable Accommodation for Religious Minorities: A promising Concept for European Antidiscrimination Law?' (2010) 17, *Maastricht Journal of European and Comparative Law*, 157–158. Others who have since argued this are: E. Relano Pastor, 'Religious Discrimination in the Workplace: Achbita and Bougnaoui', in U. Belavusau and K. Henrard (eds.), *EU Anti-Discrimination Law Beyond Gender*, (Bloomsbury Publishing, 2018) 199; E. Howard, *Law and the Wearing of Religious Symbols in Europe*, (Routledge, 2nd edn, 2020), 179–186.
12. J. Ringelheim, n. 1, 355.
13. Ibid., 357.

III. Support for the social inclusion approach in EU (anti-discrimination) law

Support for the social inclusion approach can be found in the EU anti-discrimination Directives[14] as well as within wider EU law. First, the aims of EU anti-discrimination law clearly support this approach. Recital 8 of Directive 2000/43/EC refers to the Employment Guidelines 1999 which 'stress the need to foster conditions for a socially inclusive labour market by formulating a coherent set of policies aimed at combating discrimination…'. Recital 8 of Directive 2000/78/EC refers to these guidelines and to 'fostering a labour market favourable to social integration'. Recital 9 of Directive 2000/78/EC refers to equal opportunities and the full participation of citizens in economic, cultural and social life, while Recitals 11 and 12 of that Directive and Recitals 9 and 13 of Directive 2000/43/EC point out that discrimination may undermine the attainment of a high level of employment, economic and social cohesion and solidarity, and thus needs to be prohibited. Finally, Recital 12 of Directive 2000/43/EC mentions that action against discrimination is needed to ensure the development of democratic and tolerant societies. As Relano Pastor argues, the goal of attaining economic and social cohesion and solidarity is part of the objective of EU action to counter discrimination; and 'to achieve social cohesion, one factor to take into consideration is the protection of vulnerable groups'.[15]

Additional support for the social inclusion approach can be found within other sources. Not only is the official motto of the EU 'unity in diversity',[16] but the Union is also founded on pluralism, tolerance, respect and diversity. As the CJEU stated in both *Wabe and Müller* and *LF*, the right to freedom of religion is one of the foundations of a democratic society and contributes to the pluralism indissociable from such a society.[17] In *LF,* the CJEU mentioned the need to encourage tolerance and respect, as well as acceptance of a greater degree of diversity.[18]

Pluralism, tolerance, respect and solidarity are founding values of the EU as stated in Article 2 of the Treaty on European Union (TEU). Other founding values which support the social inclusion approach are human dignity, equality and respect for human rights, including the rights of persons belonging to minorities. Furthermore, Article 3(3) TEU explicitly states that the Union shall combat social exclusion and discrimination. Article 1 of the Charter of Fundamental Rights of the European Union (the Charter) declares that 'human dignity is inviolable. It must be respected and protected', thus also stressing the importance of human dignity. Article 31 of the Charter determines that 'every worker has the right to working conditions which respect his or her … dignity'. Monaghan, referring to Article 1 of the Charter, argues that 'the focus on dignity as an inviolable right would support a prohibition of discrimination against people in all their diversity'.[19] Other

14. Apart from Directive 2000/78/EC, there is Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22. Two Directives prohibit gender discrimination: Directive 2006/54/EC 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 (recast) [2006] OJ L 204, 23 and Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L 373/37. The focus here will be on Directive 2000/78/EC, as that is the Directive prohibiting religious discrimination; and, on Directive 2000/43/EC, as these two Directives were proposed together, both adopted in 2000 and contain many of the same definitions.
15. E. Relano Pastor, n. 11, 196.
16. https://european-union.europa.eu/principles-countries-history/symbols/eu-motto_en
17. Joined Cases C-804/18 *Wabe* and 341/19 *Müller*, para. 48; Case C-344/20 *LF*, para. 35.
18. Case C-344/20 *LF*, para. 41.
19. K. Monaghan, 'Multiple and Intersectional Discrimination in EU Law' (2011) 13*, European Anti-discrimination Law Review*, 22–23.

Articles of the Charter that are important here are Article 10, guaranteeing the freedom of religion, including the right to freely manifest one's religion; Article 21, prohibiting discrimination on an extensive list of grounds, including religion and belief; and, Article 22, stating that 'the Union shall respect cultural, religious and linguistic diversity'.

Therefore, EU anti-discrimination law as well as wider EU law support the adoption by the CJEU of the social inclusion approach in discrimination cases.

IV. The case law of the CJEU on religious discrimination

The case law of the CJEU on religion and belief discrimination includes six cases concerning Muslim women who wanted to wear headscarves at work for religious reasons but who were prevented from doing so by their employers (*Achbita, Bougnaoui, Wabe and Müller, LF, OP*);[20] two cases regarding the occupational requirements in Article 4(2) of the Directive (*Egenberger* and *IR*); and one case of discrimination between different religions (*Cresco*).

OP concerned a public employer, a municipal council, while the other five headscarf cases concerned private employers. In all six headscarf cases, the CJEU held that workplace neutrality rules prohibiting the wearing of any signs of religious, philosophical or political beliefs most likely constitute indirect rather than direct discrimination, although it stressed that this is for the national court to decide.[21] It further held that these rules are justified if they pursue a legitimate aim, and if the means to achieve the legitimate aim are appropriate and necessary.[22] In *Achbita, Bougnaoui, Wabe and Müller* and *LF*, the CJEU found that the legitimate aim of the workplace neutrality rules could be found in the freedom to conduct a business under Article 16 of the Charter.[23] In *OP*, the CJEU stated that the aim was to put into effect the principle of neutrality of the public service, based on the principles of impartiality and neutrality of the State in Articles 10 and 11 of the Belgian Constitution. It continued that a policy of 'exclusive neutrality' with a view to establishing an entirely neutral administrative environment may be regarded as being objectively justified by a legitimate aim. The CJEU granted the Member States and infra-State bodies a margin of discretion to decide whether to prohibit all workers or only those who come into contact with customers from wearing religious symbols, or to allow all employees to do so.[24]

The CJEU held, in *Achbita*, that the neutrality rules would be appropriate and necessary under the following conditions: first, the rules must ban all visible signs and not just some signs of religious, philosophical and political beliefs; second, the rules must be genuinely pursued in a consistent and systematic manner and, therefore, must apply to all employees equally and not make a distinction between different religions or beliefs; and, third, the rules must be limited to customer facing employees.[25] The first two requirements were also repeated *OP*,[26] but the third requirement,

20. *LF* concerned a woman who was refused an internship because she did not want to remove her Muslim headscarf.
21. Case C-157/15 *Achbita*, paras 32 and 34. Repeated in Joined Cases C-804/18 *Wabe* and C-341/19 *Müller*, para. 52; Case C-344/20 *LF*, para. 33, Case C-148/22 *OP*, paras 25–28.
22. Case C-157/15 *Achbita*, para. 48. Repeated in Joined Cases C-804/18 *Wabe* and C-341/19 *Müller*, para. 63; Case C-344/20 *LF*, para. 39; Case C-148/22 *OP*, para. 30.
23. Case C-157/15 *Achbita*, para. 48. Repeated in Joined Cases C-804/18 *Wabe* and C-341/19 *Müller*, para. 63; Case C-344/20 *LF*, para. 39.
24. Case C-148/22, *OP*, paras 32 and 33. Note that the CJEU uses the term 'exclusive neutrality' in quotation marks here. See below.
25. Case C-157/15 *Achbita*, paras 30–32. Repeated in Joined Cases C-804/18 *Wabe* and C-341/19 *Müller*, para. 52; Case C-344/20 *LF*, para. 38.
26. Case C-148/22 *OP*, paras 38 and 39.

that the neutrality rule should be limited to customer-facing employees, was dropped as mentioned above. In *Acbhita,* the CJEU added that the employer must have considered whether the employee could be moved to a job where they did not have contact with customers, but this was not repeated in subsequent cases.[27] Another requirement was added in *Wabe and Müller*: the employer must prove that there is a genuine need for the neutrality policy, which includes showing that their business would suffer real harm without it.[28] In that case, the CJEU also held that the employer must balance their genuine need for the policy with the fundamental right of the employee to manifest their religion.[29] In *OP*, the CJEU did not mention the genuine need, but stated that it was up to the referring court to weigh up the interests at stake: the rights in Articles 10 and 21 of the Charter and the principle of state neutrality.[30] In *Bougnaoui,* the CJEU held that the wish of a customer not to have work on their premises done by a woman wearing an Islamic headscarf was not a genuine and determining occupational requirement under Article 4(1) of Directive 2000/78/EC, because that article required that the occupational requirement was 'objectively dictated by the nature of the particular occupational activities and the context in which these are carried out' and, could not 'cover subjective considerations such as the willingness of an employer to take account of the particular wishes of the customer'.[31]

Egenberger and *IR* concerned the exception in Article 4(2) of Directive 2000/78/EC. Article 4(2) contains another occupational exception which applies to organisations with a religious ethos. This has two elements: the first allows organisations with a religious ethos to treat a person's religion or belief as a genuine, legitimate and justified occupational requirement as long as this is needed because of the nature or the context of the activities; and as long as this does not justify discrimination on another ground. The second allows organisations with a religious ethos to require their employees to conduct themselves in a way which is in keeping with the organisation's ethos. Egenberger did not get the job she applied for with an Evangelical Church organisation in Germany because she was not a Protestant Christian, which the job advertisement required.[32] JQ was a doctor in a Catholic hospital who lost his job when he divorced and subsequently remarried without having his first (Catholic) marriage annulled by a church tribunal.[33]

In both *Egenberger* and *IR*, the CJEU explained that the genuine and determining requirement in Article 4(2) of Directive 2000/78/EC must be 'genuine', which means that the requirement of professing the religion on which the ethos of the organisation is based 'must appear necessary because of the importance of the occupational activity in question for the manifestation of that ethos'; must be 'legitimate', which means that this requirement should not be used to pursue an aim that has no connection with that ethos; and must be 'justified', which means that the religious organisation must show that the supposed risk of causing harm to its ethos is probable and substantial, so that imposing such a requirement is indeed necessary.[34] The CJEU also held that the occupational requirement must comply with the principle of proportionality, as one of the general principles of EU law. The

27. Case C-157/15 *Achbita*, para. 43.
28. Joined Cases C-804/18 *Wabe* and C-341/19 *Müller*, paras 64 and 67; the 'genuine need' requirement was repeated in Case C-344/20 *LF*, para. 40.
29. Joined Cases C-804/18 *Wabe* and C-341/19 *Müller*, para. 69.
30. Case C-148/22 *OP,* para. 40.
31. Case C- 188/15 *Bougnaoui,* paras 40–41.
32. Case C-414/16 *Egenberger*, paras 26–27.
33. Case C-68/17 *IR*, paras 23–26.
34. Case C-414/16 *Egenberger*, paras 65–67; Case C-68/17 *IR*, paras 51–53.

national courts must ascertain whether the requirement is appropriate and does not go beyond what is necessary.[35]

Cresco concerned national legislation determining that Good Friday was a public holiday only for employees who were members of certain specified Christian churches and that only those employees, if they were required to work on that day, were entitled to an extra payment in addition to their regular salary. Achatzi was not a member of any of the specified churches and challenged the legislation as religious discrimination.[36] The CJEU held that this constituted direct discrimination on the ground of religion.[37] This confirms what the CJEU held in *Wabe and Müller,* that the prohibition of religion or belief discrimination in Directive 2000/78/EC was not limited to differences in treatment between persons who have a particular religion or belief and those who do not.[38]

V. The CJEU judgments on religious discrimination and the social inclusion approach

The CJEU, in the judgments on religious discrimination, sometimes appears to have used the social inclusion approach, while at other times it does not. This approach concerns integration in employment, including professional integration. In her Opinion in *Achbita*, Advocate General (AG) Kokott mentioned that the principle of equal treatment in Article 21 of the Charter and in Directive 2000/78/EC 'is expressly intended to make it easier for disadvantaged groups to gain access to employment and occupation, in order thus to promote their participation in economic, cultural and social life and the realisation of their potential'.[39] Former AG Sharpston, in her shadow Opinion on *Wabe and Müller*, expressed that: 'Directive 2000/78 seeks to ensure that everyone can access the employment market under conditions that respect their identity and their dignity. Access to jobs matters'. She continued that 'work is of fundamental importance, both economically and psychologically, for us as individuals and for our society as a whole'.[40] And, in Ringelheim's words quoted above, 'employers can be required to contribute to the elimination of indirect barriers to the professional integration of minority groups'.[41] Therefore, widening access to employment for people belonging to groups covered by anti-discrimination law is an important part of the social inclusion approach.

By its interpretation of Article 4(2) of Directive 2000/78/EC in *Egenberger* and *IR*, the CJEU laid down strict conditions for employers who wish to use this occupational requirement. In other words, it used the social inclusion approach and widened the employment opportunities for people belonging to religious groups by ensuring that employers cannot easily justify putting up barriers to employment and integration through this Article. The same can be said about the

35. Case C-414/16 *Egenberger*, para. 68; Case C-68/17 *IR*, para. 54.
36. Case C-193/17 *Cresco*, para. 13.
37. Ibid., para. 69.
38. Joined Cases C-804/18 *Wabe* and C-341/19 *Müller*, para. 49.
39. Opinion AG Kokott in Case C-157/15 *Achbita*, EU:C:2016:382, para. 123, referring to Recitals 9 and 11 of the Directive.
40. E. Sharpston, 'Shadow Opinion of Former Advocate General Sharpston: Headscarves at Work (Cases C-804/18 and C-341/19)', *EU Law Analysis*, 23 March 2021, http://eulawanalysis.blogspot.com/2021/03/shadow-opinion-of-former-advocate.html. These cases were allocated to AG Sharpston, but after she left office in September 2020, they were reallocated to her successor, AG Rantos. Because the former AG and her team had already done much of the work for the opinion, she wrote a shadow Opinion to contribute to the debate in this area.
41. Ringelheim, n. 1, 357.

CJEU's judgment in *Cresco*, because it made clear that legislation treating members of some religious groups more favourably than members of other religious groups, or people without a religion or belief, constituted direct religious discrimination and was against the law. All three judgments removed barriers to employment for the people involved and other people possibly affected by the rules.

In contrast to this, the six headscarf judgments do not appear to follow the social inclusion approach. Although some aspects of these cases hint at such an approach, this is undermined by other considerations. For example, the judgment in *Bougnaoui*, that the wish of a customer not to have work on their premises done by a woman wearing an Islamic headscarf was not a genuine and determining occupational requirement under Article 4(1) of Directive 2000/78/EC because this could not cover 'subjective considerations',[42] can be said to follow the social inclusion approach as it imposes a stricter test on employers who want to use this exception and thus makes it more difficult for them to do so. However, this is then undermined in *Achbita, Wabe and Müller* and *LF*: the fact that a workplace neutrality policy can be justified if it is limited to employees who are in contact with customers suggests that the wishes of customers do play a role in the adoption of such rules. This was confirmed in *Wabe and Müller*, where the CJEU held that the employer must establish that there is a genuine need for the policy, but that they, in doing so, may take account of the rights and legitimate wishes of customers or users.[43] In *OP*, the CJEU went even further by allowing public authorities to ban all employees, even those who do not come into contact with customers, from wearing religious symbols. The CJEU followed AG Collins in referring here to 'exclusive neutrality'.[44] Collins explained that the exclusive conception of neutrality, 'rests on the premiss that both the public employee's actions and his or her appearance must be strictly neutral' and that, thus, all public employees must be prohibited from wearing such signs at work.[45] Exclusive neutrality, therefore, means excluding every worker who wants to wear religious symbols from the public workplace. This is the opposite of the social inclusion approach, as it excludes a large group of people, including women who wear the Islamic headscarf, from public employment.

In none of the headscarf cases did the CJEU pay any attention to the fact that these customer wishes could well be based on prejudice and stereotypes of Muslim women. Some authors have criticised the CJEU, in *Achbita* and *Bougnaoui*, for not referring at all 'to either the Europe-wide context of Islamophobia, or the widespread existence of negative stereotypes about Muslim women, and in particular those who wear Islamic dress', as Brems writes.[46] Hennette Vauchez states that 'the French *Bougnaoui* case directly echoes contemporary concerns about growing Islamophobia'.[47] And in a report of 2022 after the judgments in *Wabe and Müller* had been handed down, the Open Society Justice Initiative put this even more strongly:

> *Public national and local debates and developments targeting Muslims and Islam that indicate Islamophobia or anti-Muslim racism and prompt the introduction of religious dress restrictions, help*

42. Case C-188/15 *Bougnaoui,* paras 40–41.
43. Joined Cases C-804/18 *Wabe* and C-341/19 *Müller*, paras 64–65.
44. Case C-148/22 *OP,* para. 33; Opinion AG Collins in Case C-148/22 *OP,* EU:C:2023:378, para. 66.
45. Opinion AG Collins in Case C-148/22 *OP,* para. 66.
46. E. Brems, 'European Court of Justice Allows Bans on Religious Dress in the Workplace', *IACL-AIDC Blog*, 26 March 2017: https://blog-iacl-aidc.org/test-3/2018/5/26/analysis-european-court-of-justice-allows-bans-on-religious-dress-in-the-workplace see also: E. Cloots, 'Safe Harbour or Open Sea for Corporate Headscarf bans? Achbita and Bougnaoui' (2018) 55 *Common Market Law Review*, 611.
47. S. Hennette-Vauchez, 'Equality and the Market: The Unhappy Fate of Religious Discrimination in Europe' (2017) 13, *European Constitutional Law Review*, 745.

> *define the context in which restrictions arise. Courts, especially the CJEU, tend to rule on religious dress cases with no reference or acknowledgement of this context assuming—and often stating explicitly—that policies banning religious dress apply equally to all religious groups, disregarding how the public and political vilification of aspects related to Muslim identity drives such policies*.[48]

It is suggested that Islamophobia and prejudice against Islam and Muslims could well have played a role in the desire of the employers to ban the wearing of religious symbols in the workplace and that the CJEU should have acknowledged and examined this, because pandering to this prejudice could lead to even more social exclusion of groups already vulnerable to discrimination.[49] Taking this into account fits in with the social inclusion approach. It also appears highly unlikely that the CJEU would accept moving a Black person or a woman to the back office if customers did not want to be served by them, so why accept this for religious persons? As Cloots writes, 'it would defeat the very purpose of anti-discrimination law if individual employers were permitted to invoke customer pressure to legitimize an interference with their anti-discrimination duties'.[50]

Another consideration of the CJEU in *Achbita*, which could also be seen as somewhat going towards a social inclusion approach, was that the employer must have considered whether the employee could be moved to a job where they did not have contact with customers. In other words, the employer should try to make some form of accommodation. However, this should not require the employer to take on an additional burden.[51] The latter suggests that the onus on the employer to do so is not very strict. Moreover, the condition was not repeated in any of the later headscarf cases.

Overall, the six headscarf judgments not only restrict the employment opportunities of people who want to manifest their religion at work by wearing certain religious symbols, but also hinder their inclusion in the workplace and in wider society. The judgments in *Achbita* and *Bougnaoui* have been criticised for this. Vickers writes that 'the effect is to restrict not only employment opportunities, but also broader inclusion of groups such as Muslim women and Sikh men at work'; and 'this has the potential to create very significant limits on the protection of religious dress at work, given just how many roles can be public-facing'.[52] Loenen comments that even limiting such rules to employees who come into contact with customers 'still leaves a very large group of workers exposed to the negative effects of a ban on wearing religious clothing or symbols'.[53] Sharpston compares *Achbita* and *Bougnaoui* with *Egenberger* and *IR* and asks what hiding religious staff 'away from public view somewhere backstage out of sight' will do 'either for the prospects of a normal career or for real tolerance and respect within society'.[54]

48. Open Society Justice Initiative, Policy Report, *Restrictions on Muslim Women's Dress in the 27 EU Member States and the United Kingdom,* 2022, 5: https://www.justiceinitiative.org/uploads/0b300685-1b89-46e2-bcf6-7ae5a77cb62c/policy-brief-restrictions-on-muslim-women's-dress-03252022.pdf 9.
49. For more information on the possible role of Islamophobia in the adoption of bans on religious symbols at work, see: E. Howard, *Headscarves and the Court of Justice of the European Union An Analysis of the Case Law*, (Routledge, 2024), 8–11.
50. E. Cloots, n. 46, 613.
51. Case C-157/15 *Achbita*, para. 43.
52. L. Vickers, '*Achbita* and *Bougnaoui*: One Step Forward and Two Steps Back for Religious Diversity in the Workplace' (2017) 8, 3, *European Labour Law Journal*, 252.
53. T. Loenen, 'In Search of an EU Approach to Headscarf Bans: Where to go After Achbita and Bougnaoui?', (2017) 10, *Review of European Administrative Law*, 67.
54. E. Sharpston, 'Religion in the Workplace When is Enforcing a Religious Ethos Acceptable? And When is Neutrality Discrimination?' in K. Lenaerts, J-C. Bonichot, H. Kannine, C. Naômé and P. Pohjankoski, *An Every-Changing Union? Perspectives on the Future of EU law in Honour of Allan Rosas*, London, Bloomsbury Publishing, 2021, 256. See also: J. Weiler, 'Je Suis Achbita!' (2017) 15, *International Journal of Constitutional Law*, 894.

The judgments in *Wabe and Müller* and *LF* mainly repeated what was said in *Achbita*, while *OP* went even further in allowing workplace neutrality policies and, therefore, the same criticism, that people who want to manifest their religion through the wearing of religious symbols at work are excluded from employment, can be raised against those cases. In *Wabe and Müller* and *LF*, the CJEU referred to Recitals 9 and 11 of Directive 2000/78/EC but did not really link this to the effect of the rules on the women affected: the women in *Wabe and Müller* lost their jobs, while the woman in *LF* did not get an internship. AG Medina, in her Opinion in *LF*, acknowledged this, as she pointed out that some Member States might conceive workplace neutrality rules 'as an obstacle to access to the labour market and, as such, a way further to exclude employees obliged to fulfil those obligations'; and that 'Muslim women may in reality not only experience "particular inconveniences", but a deep disadvantage to becoming employees'.[55] Former AG Sharpston mentioned, in her shadow Opinion on *Wabe and Müller*, that workplace neutrality rules 'which effectively prevent observant Muslim women from wearing mandated religious apparel (such as the Islamic headscarf) in the workplace' can 'act as a barrier to their (continued) employment'.[56] She also questioned whether moving people who wear religious clothing to the back office – which probably, given most corporate promotion structures, also places them at a significant and continuing disadvantage in terms of career path – is what the EU legislature had in mind when it formulated Directive 2000/78/EC.[57]

Moving people to the back office is also often not a satisfactory solution in these cases and could mean moving someone away from a job they are qualified for. In *Wabe and Müller*, IX was a special needs carer in one of the child day care centres run by Wabe. The employer stated that IX could not be transferred to a post which did not involve contact with the children and their parents since such a post did not correspond to her abilities and qualifications.[58] This could also apply to Achbita, who worked as receptionist, a job that cannot be done without contact with customers.

In a similar vein to former AG Sharpston, Bell, in his assessment of *Achbita* and *Bougnaoui*, points out that workplace neutrality rules 'could exclude those who wear visible religious symbols from a very wide range of jobs'; and that 'this runs counter to the ethos of EU equality policy, which has often emphasized the need to celebrate diversity and to recognize its social and economic contributions'.[59] Weiler writes that firing employees or hiding them in the back office because they wear a headscarf, is 'not a particularly appealing way for our society, in whose name the Directive was enacted, to combat the prejudice which feeds—and in this case even results—in discrimination as well as exclusion'.[60] Therefore, Sharpston, Bell and Weiler see the judgments as going against the aims of EU anti-discrimination law, against the aim of a socially inclusive labour market laid down in Recitals 9 and 11 of Directive 2000/78/EC. It is submitted that allowing the wearing of religious symbols in the workplace would advance these stated objectives of EU anti-discrimination law much more. This strongly suggests that the CJEU should have used the social inclusion approach in the headscarf cases as well.

55. Opinion AG Medina in Case C-344/20 *LF*.
56. E. Sharpston, n. 40, para. 1.
57. Ibid., para. 243.
58. Joined Cases C-804/18 *Wabe* and C-341/19 *Müller*, para. 31.
59. M. Bell, 'Leaving Religion at the Door? The European Court of Justice and Religious Symbols in the Workplace' (2017) 17, 4, *Human Rights Law Review*, 795–796.
60. J. Weiler, n. 54, 894.

VI. The CJEU judgments on other grounds of discrimination and the social inclusion approach

But has the CJEU used the social inclusion approach in cases concerning other grounds of discrimination? This is examined in this part, which looks at the case law on racial and ethnic origin discrimination under Directive 2000/43/EC, but only at cases that affect employment opportunities or that established a more general issue - and at disability and sexual orientation discrimination under Directive 2000/78/EC. Case law on age discrimination, also prohibited by Directive 2000/78/EC, is not addressed, because a different regime applies to age discrimination, where both direct and indirect discrimination can be justified.[61] For reasons of space, case law on gender discrimination will also not be analysed. Another reason for examining Directives 2000/43/EC and 2000/78/EC only is that they contain the same definitions of direct and indirect discrimination and genuine occupational requirements.

In *Coleman*, a woman suffered detriment at work because she had to take time off to look after her disabled son. The CJEU extended the definitions of direct discrimination and harassment to include these forms of discrimination by association with someone with a protected ground because 'the principle of equal treatment enshrined in the directive in that area applies not to a particular category of person but by reference to the grounds mentioned in Article 1'.[62] This extends the group of people who can bring discrimination claims and thus applies the social inclusion approach. However, the CJEU did not go as far as it could have gone towards the social inclusion approach because it held that the provisions in Directive 2000/78/EC for reasonable accommodation (Article 5) and for positive action (Article 7) only applied to the disabled person themselves.[63] Extending these provisions to carers would have made their participation in the labour market easier.

In *Feryn*, the director of a company fitting garage and security doors stated, on local radio, that his company would not hire 'immigrants' because his customers did not want to give them access to their private residences.[64] The CJEU held that this was direct racial or ethnic origin discrimination against Directive 2000/43/EC because this statement was 'clearly likely to strongly dissuade' some candidates from applying for jobs with this employer, and thus hinder their access to the labour market'.[65] The CJEU referred to the aim of the Directive in Recital 8 'to foster an inclusive labour market'. It also held that, to establish discrimination, no individual victim needed to be identified;[66] and that the statements of the employer were enough for a presumption of the existence of a discriminatory employment policy, which meant that, following Article 8(1) of the Directive, the burden of proof shifted to the employer who had to prove that their recruitment policy was not discriminatory. The CJEU thus clearly used a social inclusion approach.

The CJEU held, in *Ring and Werge*, that Directive 2000/78/EC must be interpreted in a manner consistent with the Convention on the Rights of Persons with Disabilities 2006 (CRPD), which has been signed and ratified by the EU. The CJEU followed the wide definition of 'disability' in Article

61. Article 6 Directive 2000/78/EC.
62. Case C-303/06 *Coleman v Attridge Law and Steve Law*, EU:C:2008:415, para. 38.
63. Ibid., paras 42-43.
64. Case C-54/07 *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV,* EU:C:2008:397, paras 15–16 (*Feryn*).
65. Ibid., para. 25.
66. Ibid., paras 23–25.

1 CRPD: 'the concept of "disability" must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers', and the impairment must be 'long term'.[67] An incurable illness resulting in such a limitation, and which was long term, would also fall under this concept.[68] Moreover, part-time workers were also covered by the concept of disability and there was no requirement that an individual required accommodation to qualify.[69] The CJEU also clarified the concept of 'reasonable accommodation' in Article 5 of Directive 2000/78/EC: 'such measures are intended to accommodate the needs of disabled persons'. … They 'do not apply unless there is a disability'.[70] Referring to the CRPD, the CJEU also held that this concept must be defined widely and includes material and organisational measures; and that a reduction in working hours could be a reasonable accommodation.[71] Here we can detect the social inclusion approach because the judgment improves the protection of disabled persons against discrimination and extends the concept of reasonable accommodation and, therefore, improves their social inclusion. The CJEU, however, did define the concepts of 'disability' and 'reasonable accommodation' in a work-related way and, thus, disabilities which do not interfere with the worker's capacity to work are not relevant. Although this could be linked to the fact that Directive 2000/78/EC only applies to employment or occupation, the CJEU could have gone further towards the social inclusion approach in its definitions.

In relation to sexual orientation, the CJEU has held, in a number of cases relating to occupational pensions and in-work benefits enjoyed by workers, that, although the Member States remain free to decide whether or not to institute legally recognised same-sex partnerships or allow for same-sex marriage, as this is a competence of the Member States, once national law recognises such relationships as comparable to that of spouses, then the principle of equal treatment applies.[72] Therefore, same-sex couples should be treated the same at work and after the work relationship has ended as opposite-sex couples, which improves their social inclusion.

In *Asociatia Accept*, a shareholder in a football club, describing himself as the club's banker and patron, made, in an interview with a journalist, homophobic comments and stated that he would rather hire a player from the junior team or even close the club down than agreeing to the transfer of professional footballer X who was thought to be gay. The CJEU held that the football club could not deny that it had a discriminatory recruitment policy simply by arguing that the person who made the comments was 'not legally capable of binding it in recruitment matters'. The fact that the club had not distanced itself from the statements, as well as the perception of concerned public and social groups, could be taken into account by the national court. The CJEU confirmed what it had held in *Feryn*, that the facts of the case were capable of amounting to facts from which a court could

67. Joined Cases C-335/11 *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab* and 337/11 *HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S*, EU:C:2013:222, paras 38-39 (*Ring and Werge*).
68. Ibid., para. 41.
69. Ibid., paras 44–45.
70. Ibid., para. 46.
71. Ibid., paras 53–55
72. Case C-267/06 *Tadao Maruko v Versorgungsanstalt der Deutschen Buhnen,* ECLI:EU:C:2008:179; Case C-147/08 *Jürgen Römer v Freie und Hansestadt Hamburg*, ECLI:EU:C:2011:286; Joined Cases C-124/11 *Dittrich*, C-125/11 *Klinke* and C-143/11 *Muller v Bundesrepublik Deutschland,* ECLI:EU:C:2012:771; Case C-267/12 *Frédéric Hay v Crédit Agricole Mutuel de Charente-Maritime et des Deux-Sèvres,* ECLI:EU:C:2013:823.

presume that there had been discrimination and that meant that the burden of proof shifted to the football club.[73] Again, the CJEU used the social inclusion approach to expand the protection against sexual orientation discrimination.

Although not concerning employment, *Chez* is important because the CJEU clarified a number of issues relating to racial and ethnic origin discrimination.[74] First, it explained that the concept of 'ethnicity' has its origin in the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds; and it made clear that this applied to Roma people.[75] Second, the CJEU clarified that direct discrimination takes place when the discrimination ground determined the decision for the treatment, where the treatment was by reason of the ground;[76] while indirect discrimination considers the effect of a measure, which is 'ostensibly' neutral or neutral 'at first glance' on a specific group of people characterised by racial or ethnic origin.[77] Third, the CJEU established that indirect discrimination by association is also covered by the Directive. This all improves the protection under Directive 2000/43/EC, and can thus been seen as applying the social inclusion approach.

In *NH*, the CJEU confirmed and explained what it had held in *Feryn* and *Asociatia Accept*, where a lawyer had stated on the radio that he would not wish to recruit homosexual persons. The firm was not recruiting or planning to recruit in the near future. The case was brought by an association defending the rights of LGBTI people.[78] The CJEU held that the Directive applied even if there was no open or planned recruitment procedure, as long as the link between the statement and the conditions for access to employment was not merely hypothetical. This depended on the status of the person making the statement and the capacity in which they made it, including, first, whether they were a potential employer or were, in fact, capable of exercising a decisive influence on the recruitment procedure; second, whether the nature and the content of the statement related to conditions for access to employment and establish the employer's intention to discriminate; and third, whether the statement was made in a public or private context.[79] The CJEU confirmed that an association could bring legal proceedings without acting in the name of a specific or identifiable complainant, if national law allowed this.[80] Therefore, the CJEU again extended the protection against discrimination.

In *VL*, which concerned disability discrimination, the CJEU held that the prohibition of discrimination could not be limited only to differences in treatment between persons who have disabilities and able-bodied persons but should focus, instead, on the existence of differential treatment as between persons concerned by that common ground.[81] The CJEU commented that the protection given by the Directive 2000/78/EC would be diminished if it did not cover differences in treatment between persons with disabilities.[82] So, the CJEU has extended the protection against discrimination for disabled people and so has improved their inclusion in the world of work and beyond.

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73. Case C-81/12 *Asociaţia ACCEPT v Consiliul Naţional pentru Combaterea Discriminării*, ECLI:EU:C:2013:275, paras 50 and 53.
74. Case C-83/14 *Chez Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, EU:C:2015:480 (*Chez*).
75. Ibid., para. 46.
76. Ibid., paras 75–76.
77. Ibid., para. 93.
78. Case C-507/18 *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford*, ECLI:EU:C:2020:289, paras 16–17.
79. Ibid., paras 42–46.
80. Ibid., para. 63.
81. Case C-16/19 *VL v Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, EU:C:2021:64 paras 29-30.
82. Ibid., para. 35.

The CJEU held, in *HR Rail*, that the duty of reasonable accommodation for disabled workers requires that a worker, including a trainee who, owing to a disability, cannot resume their essential functions, is assigned another position for which they are competent and capable, unless this imposes a disproportionate burden on the employer.[83] According to the CJEU, this concept 'must be understood as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers'.[84] Therefore, the CJEU again used the social inclusion approach to give a wide interpretation to the duty of reasonable accommodation of disabled people, as it did in *Ring and Werge*. However, the CJEU did mention that: 'in any event, the possibility of assigning a disabled person to another job is only available where there is at least one vacancy that the worker in question is capable of holding'.[85] The latter shows that there are limits to the duty.

In *JK*, JK had been working as a freelance audio-visual editor for TP, a Polish Television Station, for seven years. After JK posted a video on YouTube of him and his partner celebrating Christmas to promote tolerance towards same-sex couples, TP ended the collaboration.[86] The CJEU assessed whether this fell under Article 3(1)(a) of Directive 200/78/EC and the conditions for access to self-employment. To do so, the activities had to be genuine and pursued in the context of a legal relationship characterised by a degree of stability. The CJEU concluded that this was the case, and that thus the refusal of TP to conclude a further contract fell under the Directive.[87] The CJEU pointed out that the terms in Article 3(1)(a) and the scope of the Directive must be constructed broadly.[88] This fits in with the social inclusion approach as a broad interpretation of its scope means that more individual workers are covered.

This shows that the CJEU generally applies the social inclusion approach to the interpretation of Directives 2000/43/EC and 2000/78/EC in relation to racial and ethnic origin, disability and sexual orientation discrimination, although in relation to disability, it could have gone further.

VII. Conclusion

It is submitted that EU anti-discrimination law has indeed developed towards a social inclusion approach in many of the cases on discrimination, including some cases on religious discrimination. However, in the six judgments concerning Muslim women wearing headscarves for religious reasons, the CJEU did not apply a social inclusion approach and did not give any attention to the effect of the judgments on the employment opportunities of the women involved. The latest case, *OP*, even allows public authorities to completely exclude these women and others who wear religious symbols from their entire employment.

It is difficult to assess the reason why the CJEU applies the social inclusion approach in some cases concerning religious discrimination and not in others. It is not clear whether the fact that the headscarf cases all concerned a particular religion (Islam), not only different from the majority religion in European states but also a religion which has given rise to Islamophobia, while the other cases concerned the majority Christian religion, played a role. Because of this, the CJEU, in its

83. Case C-485/20 *HR Rail SA*, EU:C:2022:85, para. 49.
84. Ibid., para. 44.
85. Ibid., para. 48.
86. Case C-356/21 *JK v TP SA*, EU:C:2023:9, paras 12–20.
87. Ibid., paras 45–50.
88. Ibid., paras 36 and 47.

headscarf judgments, should have examined whether Islamophobia and prejudice influenced the employers' neutrality policies, as this would fit in with the social inclusion approach which finds its basis in the aims of the anti-discrimination law and wider EU measures.

Using a social inclusion approach in the headscarf cases would also fit in what the CJEU has done in relation to other discrimination grounds. In *Chacon Navas*, the CJEU referred to 'the need for uniform application of Community law and the principle of equality',[89] which suggests that the CJEU should have done so. As Vickers, in her comment on *Wabe and Müller*, points out 'this approach differs from that taken in respect of other equality grounds'. However, she does preface this with 'it is understandable that the Court may want to allow for different national approaches to the vexed and often politicised question of religious symbols in the workplace',[90] which indicates a possible reason why the CJEU has been hesitant to apply the social inclusion approach in these headscarf cases. However, it is submitted that such an approach in these cases would fit much more not only with the aims of EU anti-discrimination law, but also with the values of the EU. Tolerance and diversity would be better served by allowing the wearing of religious symbols in the workplace. This would be less exclusionary for people who want to wear such symbols for religious reasons - people who, precisely because they wear these symbols and are thus visibly different, are especially vulnerable to discrimination.

Declaration of conflicting interests

The author declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author received no financial support for the research, authorship, and/or publication of this article.

ORCID iD


Erica Howard https://orcid.org/0000-0003-0848-5033

89. Case C-13/05 *Chacon Navas v Eurest Colectividades SA*, EU:C:2006:456, para. 40.
90. L. Vickers, 'Religious Discrimination and Headscarves – Take Two', *Oxford Human Rights Hub,* 29 July 2021, https://ohrh.law.ox.ac.uk/religious-discrimination-and-headscarves-take-two/