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**Approaches to Equality and Non-discrimination Legislation**  
**inside and outside the EU**

**DISCUSSION PAPER - WORKSHOP 3**  
*Religious Discrimination*

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*This discussion paper does not necessarily reflect the opinion or position of the  
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**Introduction**

In many European countries, debates on potential tension and conflict in relation to religious expression make the newspapers almost every day. Many of these controversial issues seem to fall squarely under the scope of application of the EU equality directives. Probably the most familiar example is employment dress codes involving headscarf and/or burqa bans that are often motivated, among other reasons, by notions of sex equality. Such bans are applied in some workplaces or sectors (e.g. the police). Sometimes catering establishments or sports schools refuse admission to people with headwear, including those wearing religiously-significant items, such as turbans or headscarves. Several other controversial issues have surfaced as well. Thus in both Sweden and the Netherlands, for example, courts have had to deal with Muslim workers complaining of being denied employment opportunities because of their religiously-motivated refusal to shake hands with persons of the opposite sex. Meanwhile, several countries increasingly face religiously-motivated demands for segregated facilities for men and women, such as separate male and female integration courses, health services or social counselling.<sup>1</sup>

**Relevant EU non-discrimination law**

Directives that might be applicable in such cases include not only gender equality directives,<sup>2</sup> but also the Race Directive (2000/43) and the Framework Directive (2000/78), the latter of which explicitly prohibits religious discrimination. Religion is the most obvious angle from which to legally address some of the situations described above, but it is not the only one. Different grounds of discrimination could be at stake: religion or belief, gender, and/or race or ethnic origin.

<sup>1</sup>Religion-based segregation was also touched upon, though not extensively dealt with, in the network report on sex-segregated services. See S. Burri & A. McColgan, *Sex-Segregated Services*. European Network of Legal Experts in the Field of Gender Equality, 2008, available at: [http://ec.europa.eu/justice/gender-equality/document/index\\_en.htm#h2-9](http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9), accessed 30 August 2011.

<sup>2</sup>In particular Directives 2006/54 and 2004/113.

As of yet, the Court of Justice of the European Union (CoJ) has not had to deal with prejudicial questions relating to discrimination on the ground of religion. But there is case law of the European Court of Human Rights (ECtHR), national courts and equality bodies. Often, a dilemma arises whereby the choice is between a situation leading to discrimination based on gender and one leading to discrimination based on religion. The approach to the issue of headscarves differs widely between Member States. In some countries, such as the UK, headscarf bans are unacceptable as a rule, both in private and public employment. In others, such as France, they are deemed indispensable in the public sphere to protect freedom of religion and guarantee the neutrality of the state. Thus, in France no personnel in public employment or pupils attending public schools are allowed to wear religious symbols, such as headscarves. In other countries, the picture is more mixed. From the point of view of the EU equality directives, the different outcomes could be problematic. Though directives leave the Member States with discretion as to the means to be employed for their transposition, they impose uniform obligations as to the results to be achieved.

The legal approaches to these issues in case law differ widely between the EU Member States.

### **Diverging legal approaches**

In many cases, we are faced with situations of indirect discrimination, whereby a particular religious group, gender or ethnic group is affected disproportionately by a seemingly neutral provision. What is required in cases of indirect discrimination under EU law is that an appropriate justification is found for the measure or practice concerned (legitimate aim and proportional means to attain this aim). This means, for example, assessing whether a limitation on the expression of religious belief is appropriate and proportional, as for instance allowed under the European Convention on Human Rights (ECHR). The European Court of Human Rights (ECtHR) had to deal with a ban on religious symbols, including headscarves, in the Leyla Sahin case of 2005.<sup>3</sup> Sahin, a young Turkish student, asked the ECtHR whether a university ban on religious symbols, including headscarves, was in violation of the ECHR. According to the Court this was not the case. Among other things, it considered that headscarves are difficult to reconcile with ideas of tolerance and sex equality. Moreover, it was, according to the Court, a powerful symbol that might negatively influence the position of women who do not wish to wear the veil. The ECtHR starts in such cases from the premise that the States Parties to the Convention enjoy a wide margin of appreciation in regulating the relationship between state and religion and in limiting manifestations of religion accordingly outside the private sphere. The *forum internum*, that is adhering to a religion or holding a belief as such, is considered to be the core of the right to freedom of religion that is protected by Article 9 ECHR. Much less protection is given to individual *manifestations* of religion.

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<sup>3</sup>ECtHR, 10 November 2005, 44774/98.

This approach is borne out by the case law concerning headscarf bans in public education. States enjoy a wide margin of appreciation and may, for example, prohibit pupils or students from wearing a headscarf or other religious symbol in public educational institutions. At the same time, states are not required to adopt a headscarf ban to protect the rights and freedoms of others. The Court has refused to support the claim that a headscarf ban constitutes sex discrimination. On the contrary, the Court considers that wearing a headscarf is 'hard to square' with notions of sex equality. In the limited case law which deals with tension or conflict between religious norms and sex equality, priority was given to the latter.<sup>4</sup>

At the national level, courts and equality bodies are also confronted with such prohibitions. How should a ban on headscarves be seen: as a form of indirect sex discrimination, as a form of indirect discrimination on the ground of religion, or as both? As most headscarf and burqa bans are part of more general dress codes that will have a disproportionate impact on Muslim women, they could constitute indirect sex discrimination. Norway offers an interesting approach in this respect. The Equality and Anti-Discrimination Ombud considered a case in which a woman had been dismissed from work as a shop assistant because she had refused to remove her headscarf at work. The Ombud split the case into an assessment of indirect gender discrimination, on the one hand, and direct discrimination on the ground of religion, on the other. The Ombud found that the employer had violated both prohibitions.<sup>5</sup> According to the Dutch Equal Treatment Commission, dress requirements which prohibit headscarves might amount to indirect discrimination on the ground of religion.<sup>6</sup> A Dutch case decided even by the highest administrative court gave rise to many controversies. A female teacher at a state secondary school informed her colleagues by e-mail at the beginning of the school year that from then onwards she would no longer shake hands with men, due to her (Muslim) religious beliefs. She was offered another job, which she refused, and she was then dismissed. The Dutch Equal Treatment Commission considered that the requirement to shake hands with people regardless of their sex amounted to unjustified indirect discrimination on the ground of religion, because the requirement was not necessary: there exists an alternative in the form of a friendly sex-neutral nod. Sex discrimination could be avoided by not shaking hands with anybody, men or women.<sup>7</sup> According to the District Court the dismissal was in this case not unjustified and no freedom of religion or any other principle of law was at stake; the issue of indirect discrimination was therefore not considered by the Court.<sup>8</sup> The Central Board of Appeal considered the requirement a form of justified indirect discrimination on the ground of religion.

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<sup>4</sup>See on this issue for example: E. Howard, 'School Bans on the Wearing of Religious Symbols: Examining the Implications of Recent Case Law from the UK', *Religion and Human Rights* 4 (2009) 7–24 and E. Howard, 'Bans on the Wearing of Religious Symbols in British Schools: A Violation of the Right to Non-Discrimination?', *Religion and Human Rights* 6 (2011) 127–14.

<sup>5</sup>See H. Skjeie, 'Multiple equality claims in the practice of the Norwegian anti-discrimination agencies' in: D. Schiek & V. Chege, *European Union Non-Discrimination Law. Comparative perspectives on multidimensional equality law*, London and New York: Routledge. Cavendish, 2009, pp. 295–309, at p. 304.

<sup>6</sup>See for example opinion 2008-123, available at: [www.cgb.nl](http://www.cgb.nl), accessed on 30 August 2011.

<sup>7</sup>ETC opinions 2006-220 and 221, available at: [www.cgb.nl](http://www.cgb.nl), accessed on 30 August 2011.

<sup>8</sup>District Court of Utrecht, 30 August 2007, AB 2007, 307, with annotation by Groen and Vermeulen.

The learning by students of respectful ways of greeting is a legitimate aim and applying uniform rules for greeting is an appropriate means to reach that aim.

The rule is necessary because religious expression takes place in the public sphere and can be considered confrontational by others, and the teacher is carrying out her role, not only at school, but also outside school, when meeting parents of students for example.<sup>9</sup>

The ground chosen to bring a challenge to headscarf or burqa bans (that is discrimination based on religion, sex or race / ethnic origin) could have consequences for the possibilities of justifying such bans. This could also hold true if the objective justification test is applied, even if it is formulated in the same way under all equality directives.

### **Exceptions**

The issue of justification for religious discrimination is linked to the exceptions listed in the equality directives. The question arises as to how the exemption in the Framework Directive (2000/78/EC) applying to religious institutions in Article 4 should be interpreted in relation to the prohibition of direct and indirect religious discrimination. Can a school based on the Christian religious ethos require that teachers do not wear a headscarf? Would that eventually be allowed for all teachers, or only teachers specifically teaching religious issues? Would such a requirement also fall within the ambit of the exception if the post is of a secretarial nature? Or a cleaning job? And how does this relate to the prohibition of sex discrimination?

Exceptions to the principle of non-discrimination may be justified to allow particular treatment based on gender: EU Directives allow the use of 'genuine occupational requirement' as an exception to the principle of equal treatment based on sex and can thus be relied upon by ethos-based organisations for recruitment in certain jobs (eg. priests). Separate facilities for men and women can be justified in the context of access to goods and services, for example for reasons of "decency". This issue here is whether "religious" reasons can be accepted or whether "decency" should be defined in "secular", non-religious terms.

### **Discussion questions:**

- 1) *Can you provide some examples of religious discrimination that have been addressed by courts in your country?*
- 2) *Would you be in favour of some differentiation in levels of scrutiny by courts between indirect discrimination based on religion, on the one hand, and sex and race/ethnic origin on the other?*
- 3) *The European Court of Human Rights considers that wearing a headscarf is 'hard to square' with notions of sex equality. Do you agree with this view?*

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<sup>9</sup>Central Board of Appeal, 7 May 2009, *LJN BI2440*, available (in Dutch) at: <http://zoeken.rechtspraak.nl/default.aspx>, accessed on 30 August 2011.