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# **ANALYSING ECJ'S 2021 PRELIMINARY RULING ON WEARING OF ISLAMIC HEADSCARF IN THE WORKPLACE**

AUTHORED BY - VAANYA SANGWAN

## **Introduction**

Evidence from archaeology points to the presence of religion and belief in human beings going back to the very beginning of civilization<sup>1</sup>. Religion has a multifaceted effect on morality and values. It moulds people's perspectives and reactions to their surroundings, builds practices, and sets standards for how we should dress and behave in daily life. Since a person's religion and views are so deeply personal and significant to them, the state enacts laws that safeguard their right to practice their religion freely and to express or propagate their ideas.

However, this idea was challenged when the ECJ passed a judgment, stating that an internal company rule prohibiting the wearing of visible large symbols of political, philosophical, and religious manifestations at the workplace does not constitute direct discrimination on the grounds of religion or spiritual beliefs but rather such prohibition is important to maintain state 'neutrality'. This decision sparked outrage throughout the world, particularly among individuals and minority communities that fell victim to the harsh outcomes of this ruling. However, this debate regarding prohibiting individuals from wearing visible religious symbols in public, state workplaces, or private corporations in order to uphold the state's agenda of 'secularity' is not new and has been there since France, one of the EU member states, decided to ban headscarves in 2004, leaving a feeling of fear and uncertainty among the women of the Muslim community.

## **What is ECJ's ruling all about?**

The ECJ, or European Court of Justice in Luxembourg, 2021, in the cases of WABE and MH Muller Handel, prohibited wearing any visible form of expression of political, philosophical, or

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<sup>1</sup> Porsson B, 'Religious dresses and symbols: are religions treated equally by The European Court of Human Rights' (2016) accessed 5 November 2023

religious beliefs in the workplace, which may be justified by the employer's need to present a neutral image towards customers or to prevent social disputes. However, that justification must correspond to a genuine need on the part of the employer, and in reconciling the rights and interests at issue, the national courts may take into account the specific context of their member state and, in particular, more favourable national provisions on the protection of freedom of religion<sup>2</sup>.

Before dwelling on the consequences of this judgement, let us first understand the facts of the cases:

- In the cases of IX v. WABE Ev. and MH Muller Handels GmbH v. MJ, IX and MJ were employed in companies governed by German laws as special needs carers and a sales assistant and cashier, respectively, and wore an Islamic headscarf at their respective workplaces. Taking the view that the wearing of such a headscarf did not correspond to the policy of political, philosophical, and religious neutrality pursued with regard to parents, children, and third parties, IX's employer, WABE eV, asked her to remove that headscarf and, following her refusal, temporarily suspended her from her duties on two occasions and gave her a warning. MJ's employer, MH Müller Handels GmbH, following her refusal to remove that headscarf at her workplace, first transferred her to another post in which she could wear that headscarf and then, after sending her home, instructed her to attend her workplace without conspicuous, large-sized signs of any political, philosophical, or religious beliefs<sup>3</sup>.

### Assessment of the court

Since the employer requested that no visible religious symbols be worn by any employee, the court determined that the regulation was enforced uniformly<sup>4</sup>.

The court also considered whether the employer's wish to maintain political, philosophical, and religious neutrality with regard to its clients or users in order to respect their rightful wishes may serve as justification for a treatment disparity that is based on religion or belief and results from

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<sup>2</sup> 'Court of Justice of the European Union Press Release No 128/21 –curia' <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-07/cp210128en.pdf>> accessed 3 November 2023

<sup>3</sup> 'Court of Justice of the European Union Press Release No 128/21 –curia' <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-07/cp210128en.pdf>> accessed 3 November 2023

<sup>4</sup> 'Court of Justice of the European Union Press Release No 128/21 –curia' <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-07/cp210128en.pdf>> accessed 3 November 2023

such an internal rule<sup>5</sup>.

The court then established the parameters for when the employer's pursuit of religious neutrality with respect to the desires of its consumers may be justified, ruling that in this case it was a legitimate aim. The European Court of Justice (ECJ) argued that an employer's legitimate need is the only situation in which a justification for treating employees differently on the basis of their religion or beliefs may be considered objective. The court established the following criteria for determining the existence of such a need: the rights and reasonable desires of clients or users; in the context of education, in particular, parents' need to have their kids attended over by professionals who do not publicly display their religious or philosophical views<sup>6</sup>.

Finally, the court ruled that the distinction in treatment had to be made in order to guarantee that the neutrality policy is appropriately implemented, meaning that it had to be followed in an orderly manner. If there are serious negative effects that the employer would wish to prevent, then it is appropriate to forbid employees from wearing any visible symbol of their political, philosophical, or religious beliefs at work<sup>7</sup>.

## **The ECJ Headscarf Ruling: Why It Doesn't Make Legal, Moral or Common Sense**

The European Court of Justice passed a judgement on two cases concerning the right of Muslim women to wear a headscarf at work, or more accurately, the right of employers to prohibit a Muslim woman from wearing a headscarf. Alarming, a court meant to protect the rights of its citizens and allow them religious freedom, in its judgement, allowed workplaces to discriminate against women by asking them not to wear a headscarf. The very same court described such behaviour as non-discriminatory in nature as long as it applies equally to all religious groups and is regulated in a legitimate way. However, it does not change the fact that this is discriminatory in nature and marginalises these women from minor communities further from society.

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<sup>5</sup> 'Court of Justice of the European Union Press Release No 128/21 –curia' <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-07/cp210128en.pdf>> accessed 3 November 2023

<sup>6</sup> 'Court of Justice of the European Union Press Release No 128/21 –curia' <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-07/cp210128en.pdf>> accessed 3 November 2023

<sup>7</sup> 'Court of Justice of the European Union Press Release No 128/21 –curia' <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-07/cp210128en.pdf>> accessed 3 November 2023

- **First, and foremost it renders national and religion identity incompatible:** The headscarf ban's detrimental effects involve depicting religion and national identity as mutually exclusive. Since the majority of EU member states casted themselves as "secular or religion neutral," it sabotaged the very essence of the EU, specifically the national identities of its members. We will examine the instance of France in order to have a better understanding.

According to Joan Wallach Scott, wearing a headscarf while practising Islam is considered a "violation of French secularism, and by implication, a sign of the inherent non-Frenchness of anyone who practised Islam" under French law<sup>8</sup>. French Muslim females were able to identify as belonging to both their nation of birth (France in this example) and their religious group up until the prohibition was implemented. Both of these identities, meanwhile, were seen as irreconcilable after the ban, and one could not be French without completely adhering to the secularity concept.

As a result, some Muslim women choose to withdraw within their religious groups after feeling alienated from larger French culture. In addition, the ban scrutinised Muslim females to make sure they complied with the rule by examining their conduct and religious identity after public interest in it subsided. Thus, it is safe to assume the kind of identity crisis that a woman faced after the ECJ's judgement and the problems they faced with the 'moderation of Islam' and their choices<sup>9</sup>.

- **Secondly, it does not make legal sense:** It is equivalent to asking someone to refrain from professing and preaching their religion if you urge them not to wear a certain religious symbol at work or in public. Every nation has laws in place to give its residents the freedom and legal assurance to practise and spread their religion in a morally upright manner. It violates their natural dignity and denies them their right to freedom of choice to wear a religious symbol that is very personal and represents the core of their religious concepts and beliefs.

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<sup>8</sup> Abdelgadir A and Fouka V, 'France's Headscarf Ban: The Effects on Muslim Integration in the West ' (The forum , 14 May 2019) <<https://theforum.erf.org.eg/2019/05/07/frances-headscarf-ban-effects-muslim-integration-west/>> accessed 4 November 2023

<sup>9</sup> Abdelgadir A and Fouka V, 'France's Headscarf Ban: The Effects on Muslim Integration in the West ' (The forum , 14 May 2019) <<https://theforum.erf.org.eg/2019/05/07/frances-headscarf-ban-effects-muslim-integration-west/>> accessed 4 November 2023

I think the ruling by the ECJ violates a woman's right to personal autonomy and freedom of choice. Furthermore, how can the government control what is essential to a person's faith and beliefs? Moreover, a woman who wears a headscarf, which is an item of clothing, does not endanger the public interest or cause injury to anybody else or restrict their ability to exercise their right<sup>10</sup>s. If we look more closely, it appears that the ECJ is regulating what women can choose to wear and what they cannot wear. It is deciding on their choice of what they're and who they want to be.

- **Educational and job disruptions:** The ECJ's ban on Muslim women covering their heads in places of employment or education has a negative impact on a woman's capacity to complete her secondary education and denies them the chance to participate in the labour force. During the 2004 French ban on headscarves, Vasiliki Fouka and Aala Abdelgadir saw an occurrence of discriminatory culture in the schools that had a negative impact on Muslim schoolgirls, disregarding whether or not they wore veils and focusing more on their attire. Additionally, they discovered that Muslim women impacted by the prohibition either had to repeat classes or waited longer to finish their secondary education<sup>11</sup>.

Following the ban's enforcement, women had to attend school without the headscarf. If they failed, they would be placed in mediation. And they were kicked out of the schools in the event that the negotiations failed. They were therefore compelled to abstain from donning headscarves, drop out of the education system or switch to private schools and pursue distance learning, or worse, leave the country<sup>12</sup>.

These women's lives were negatively impacted for a long time due to a delay in education or lack thereof. They faced problems in entering the workforce, and if they did, they were paid less, which widened the employment gap between Muslim and non-Muslim women.

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<sup>10</sup> Bhatti S, 'The ECJ Headscarf Ruling: Why It Doesn't Make Legal, Moral or Common Sense' (The Review of Religions, 20 September 2019) <<https://www.reviewofreligions.org/13045/the-ecj-headscarf-ruling-why-it-doesnt-make-legal-moral-or-common-sense/>> accessed 4 November 2023

<sup>11</sup> Feder S, 'Stanford Scholars Report French Headscarf Ban Adversely Impacts Muslim Girls' (Stanford Humanities and Sciences, 25 August 2020) <<https://humsci.stanford.edu/feature/stanford-scholars-report-french-headscarf-ban-adversely-impacts-muslim-girls>> accessed 3 November 2023

<sup>12</sup> Feder S, 'Stanford Scholars Report French Headscarf Ban Adversely Impacts Muslim Girls' (Stanford Humanities and Sciences, 25 August 2020) <<https://humsci.stanford.edu/feature/stanford-scholars-report-french-headscarf-ban-adversely-impacts-muslim-girls>> accessed 3 November 2023

We may thus easily envisage the identical or even more extreme experience that Muslim women in EU member states would have, given that women in French society have already testified about their experiences with the headscarf ban. As a result, the ECJ's decision adversely affects their daily lives and might have a significant impact on their futures.

## EU as a secular power: A hoax

*The term "secularism" refers to a lack of religion or to the practice of placing religion apart from politics, the economy, and society. When a state is considered secular, it signifies that it is neutral towards religion and does not have an official religion. Europe is typically thought of as the cradle of secularity, but is this actually the case, or is this just the narrative the EU has been selling to us? In an interview with Religion & Diplomacy, Sarah Wolff stated that while secularism in the European context takes on various forms in each of the EU's member states, it is typically linked to the Treaty of Westphalia, the end of religious conflicts, and occasionally the European Enlightenment<sup>13</sup>. She goes on to say that secularism is becoming more and more politicised in Europe. She uses France as an example, where laïcité, or the public religion, has a history of being strongly linked to the marginalisation of some religions, most notably Islam. Islam has always been viewed as requiring "moderation," so Europe has always had a hostile relationship with it. This leads us to ask: Is the EU genuinely secular?*

State funding of religion is the norm rather than a rarity in Europe. For instance, the Roman Catholic Church has enormous influence in society since it gets over €10 billion annually in Germany, one of the founding members of the EU, to operate hospitals, schools, and other facilities. A significant number of individuals have chosen to opt out of the tax due to a reduction in religiosity, which is something they are legally allowed to do. However, the Roman Catholic Church is playing hardball, requiring payment of the fee as a condition of church membership: no tax, no communion, no church funeral. Ultimately, the church could never demand such a large amount of money from its members if it were left to manage itself rather than having the government gather their "voluntary" contributions on their behalf. In the same way, Greece finances the church buildings and the education, salary, and pensions of Greek Orthodox clergy. Italy is another example. Despite Italy's constitution declaring it a secular state, the Italian Unione

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13 Birdsall J, 'Europe as a Secular Power: An Interview with Sarah Wolff' (Religion & Diplomacy, 6 October 2021) <<https://religionanddiplomacy.org/2021/10/06/europe-as-a-secular-power-an-interview-with-sarah-wolff/>> accessed 4 November 2023

degli Atei e degli Agnostici Razionalisti has calculated that the church receives €6 billion annually from the Italian government<sup>14</sup>.

So, is state neutrality actually a thing in the EU? All of the aforementioned instances demonstrate how the EU retains Christian principles even if it bills itself as a secular modern state. With the passage of their 1905 legislation of separation, the French claimed to have completely separated the church and state. However, because of the Roman Catholic Church's cunning operations, the state ended up owning all of its churches at the time and has maintained them for the Church at no cost, amounting to an annual subsidy of €100 million<sup>15</sup>. They may now demonstrate separation between the church and the state because the concept of laïcité has been ingrained in the French system, but that doesn't mean we can ignore the reality that their policies have included the ruthless repression of minority populations.

*One idea based on secularism requires it to be a passive prerequisite of neutrality, in which the state has no active participation in religion, which adds to the idea of a secular state. This implies that the state is expected to be religion-neutral, not the citizens. The second idea of secularism holds that there should be no religious expression in any public environment, meaning that the government should remain impartial and refrain from actively encouraging religion<sup>16</sup>. The EU court, however, fails to fall under any of these categories. For instance, the Grand Chamber in the **Lautsi case** skipped over whether having a crucifix in a classroom is consistent with secularism. The Grand Chambers of the ECHR saw the crucifix as a neutral, passive symbol that is not subject to indoctrination. The headscarf case, however, centred on the notion of secularity and the requirement that institutions of religion be kept out of public spaces. This demonstrates that the Grand Chamber did not view the crucifix and its connection to Christianity as contradictory to the idea of secularity that the EU is trying to preach. So, we may conclude that the political theology of a Christian democracy, rather than the framework of rationalist secularism, is the foundation upon which the EU is constructed<sup>17</sup>.*

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<sup>14</sup> Pollock D, 'Secularism in Europe' (*Thinking about Humanism*) <<https://www.thinkingabouthumanism.org/secularism/secularism-in-europe/>> accessed 3 November 2023

<sup>15</sup> Pollock D, 'Secularism in Europe' (*Thinking about Humanism*) <<https://www.thinkingabouthumanism.org/secularism/secularism-in-europe/>> accessed 3 November 2023

<sup>16</sup> Porsson B, 'Religious dresses and symbols: are religions treated equally by The European Court of Human Rights' (2016) accessed 5 November 2023

<sup>17</sup> Porsson B, 'Religious dresses and symbols: are religions treated equally by The European Court of Human Rights' (2016) accessed 5 November 2023

## Conclusion

In conclusion, the paper delved into a critical examination of the intersection between religious expression, secularism, and state neutrality, particularly in the context of the European Court of Justice (ECJ) rulings on conspicuous religious symbols like the headscarf. The Courts are considered to be the guardian of the law; thus, they need to work in a manner that they do not cause identity threats to an individual on the basis of their religion and to make sure that no individual has to jeopardise national identity for religion identity or vice versa. The Court's also need to analyse the implications of what their rulings might cause to religious freedom, national identity, and the potential risk of further marginalising an already minority community. For instance, the adverse effects caused by ECJ's ban on visible religious symbols on education and employment opportunities for Muslim women are underscored, with evidence of the bans leading to educational disruptions and employment gaps.

We can also contend that the idea of state neutrality in the European Union may be false, suggesting that underlying Christian influence persists despite claims of secularism, highlighting the existence of deeply rooted 'European Culture' in the minds of the people of Europe. This idea helps us realise that policies and laws are made based around the very idea of 'European Culture'. The analysis provided a thoughtful examination of the complex dynamics between religion, secularism, and individual rights in modern European society, ultimately leaving us with questions about the EU's commitment to secular principles and the effect of such rulings on the lives and identities of its citizens.