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Not just another Islamic headscarf case: LF v SCRL and the CJEU's missed opportunity to inch closer to acknowledging intersectionality

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On 13 October 2022, the CJEU (hereinafter: the Court) issued a judgment on religious discrimination in employment. In Case C-344/20 ([LF v SCRL](#)), the Court held that neutrality provisions prohibiting workers from manifesting their religious or philosophical beliefs do not constitute direct discrimination, provided that they are applied in a general and undifferentiated way.

This ruling is not an anomaly in the Court's corpus of equality cases concerning Islamic headscarves. However, its significance lies in the Court's responses to the other questions referred by the French-speaking Brussels Labour Court in Belgium. The referred questions challenged the Court to reassess three elements: its delineation between direct and indirect discrimination, its delineation of comparators in religious discrimination cases, and the acknowledgement of intersectional religious and gender discrimination. Intersectional discrimination describes synergistic disadvantage on the basis of two or more discrimination grounds, resulting in a unique form of discrimination. The aforementioned three elements are interconnected and impact the Court's overall stance towards intersectionality. By not engaging with these three elements thoroughly, and most notably by not engaging in intersectional analysis of the alluded religious and gender discrimination, it forewent an opportunity to inch closer to acknowledging intersectionality. This is notable, particularly as [AG Medina's Opinion to the case](#) delves into an extensive intersectional analysis.

Facts of the case

This CJEU judgment followed from a request for a preliminary ruling from the Brussels Labour Court. In the main proceedings, LF, a Muslim student in office automation made an unsolicited application to SCRL in March 2018 with a view to completing a six-week unpaid internship as part of her studies. After an interview, the managers of SCRL expressed their positive opinion of her application ([para. 15](#)). However, her application was not finalised due to her refusal to comply with the internal neutrality rule within SCRL's terms of employment. LF renewed her request for an internship with SCRL, offering to wear another type of head covering. SCRL informed LF that they were not able to offer her an internship as they do not permit any type of head covering. In May 2019, before the Brussels Labour Court, LF claimed to be directly or indirectly discriminated on the basis of her religious belief, as evidenced by the failure to conclude the internship agreement ([para. 19](#)).

Referred questions and judgment

In the main proceedings, LF sought a declaration that SCRL infringed the provisions of the General Anti-discrimination Law, which is the transposition of Directive 2000/78 establishing a general framework for equal treatment in employment and occupation into Belgian law. While Article 1 of Directive 2000/78 refers to 'religion or belief', the Belgian General Anti-discrimination Law provides for separate protection to religious, philosophical and political beliefs. This prompted the Brussels Labour Court to ask [whether the words 'religion or belief' constitute a single ground of discrimination covering both religious and philosophical or spiritual belief, or whether they are separately protected criteria](#) (para. 23). According to the Brussels Labour Court, if religious beliefs are grouped together with non-religious beliefs, this enlarges the pool of comparators and makes the potential direct discrimination of Muslim women who wear headscarves less visible as the rule applies equally to all members of this category. On the contrary, if religion and religious beliefs are an autonomous ground, this reduces the pool of comparators to other religions and makes the direct discrimination of Muslim women who wear headscarves more visible. Hence, according to the Brussels Labour Court, understanding religion and non-religious belief as separate grounds of discrimination is a [more favourable reading of the principle of equal treatment](#) (para. 22).

The CJEU answered that 'religion' and 'belief' must be analysed as two facets of a single discrimination ground ([para. 26](#)). Furthermore, the Court held that comparisons between workers motivated by religious beliefs and those with non-religious beliefs, and between workers motivated by different religious beliefs remain possible ([para. 59](#)).

The third question, which the Court addressed second, asked whether [Article 2\(2\)\(a\) of Directive 2000/78](#) is to be interpreted meaning that SCRL's aforementioned internal neutrality provision constitutes direct discrimination on the ground of religion or belief. The Brussels Labour Court utilised six comparison tests in which the application of SCRL's internal neutrality rule potentially results in a female worker who wears a headscarf being treated less favourably than the respective comparator. Of the different comparators the Brussels Labour Court uses, the one whereby the female worker wearing a headscarf is compared to a worker with 'the same religious beliefs who manifests this by wearing a beard' is particularly interesting as it implicitly alludes to intersectional religious and gender discrimination ([para. 23](#)).

In its response, the Court does not engage with this alluded intersectional discrimination at all. Instead, it reiterates that this is not a case of direct religious discrimination because it concerned a rule prohibiting the wearing of any visible sign of political, philosophical or religious belief for all workers in a general and undifferentiated way ([paras. 32 - 34](#)).

In its second question, the Brussels Labour Court asked for an examination of the discretion afforded to Member States, pursuant [Article 8 Directive 2000/78](#), to adopt provisions which are (in the Brussels Labour Court's view) more favourable to the protection of the principle of equal treatment by interpreting religion and religious beliefs as an autonomous ground.

In its response, the Court held that in the absence of EU consensus and with a margin of discretion to States, national constitutional provisions protecting freedom of religion may be considered as more favourable when examining indirect religious discrimination ([para. 47](#)). However, the Belgian legislature exceeded this margin of discretion. The afforded degree of discretion cannot go as far as to allow States or their national courts to adopt a '[segmented approach](#)' (para. 55) to the ground 'religion or belief' as this undermines the general framework for equal treatment in employment and occupation within Directive 2000/78.

Comment

a) Adjusting the definition of direct discrimination

Concerning the classification of direct discrimination in headscarf cases, the Court skirted around the issue by simply referring to its previous case law which establishes that such internal neutrality rules that apply to all workers do not constitute direct discrimination. However, the Court has now amassed significant case law on Islamic headscarves that portrays a tendency to acknowledge these cases as potential indirect discrimination. Consequently, the question of when persistent indirect discrimination crosses over into direct discrimination arises. This distinction between direct and indirect discrimination is vital, as direct discrimination is rigorously scrutinised, in contrast to indirect discrimination

which has more room for justifications. Therefore, the persistent classification of such cases as solely indirect discrimination, even in instances where the continued adverse effects of such internal neutrality rules on certain religions is repeatedly apparent, can give rise to gaps in employee protection.

Former AG Sharpston in a [Shadow Opinion](#) on *WABE and MH Müller* referred to *LF v SCRL* – then still pending before the CJEU – and its importance for a potential enlarged definition of direct discrimination ([para. 203 Shadow Opinion](#)). She pointed to the ‘[legal black hole](#)’ arising from neutrality rules that continuously escape the classification of direct discrimination and abscond proper scrutiny ([para. 43 Shadow Opinion](#)). Indeed, members of non-Christian religions who often see themselves as obliged to wear mandated religious apparel, experience internal neutrality rules as direct discrimination. Such a realisation calls for an adjusted definition of direct discrimination, and subsequently a different delineation between direct and indirect discrimination. As former AG Sharpston proposed, direct discrimination should also include the situation where ‘an employer imposes a criterion that he either knows or ought reasonably to have known will inevitably place a member of a particular group in a less favourable position on the basis of a prohibited ground’ ([para. 263 Shadow Opinion](#)). In light hereof, *LF v SCRL* was an opportunity for the Court to address this. Nonetheless, the Court showed its reluctance and apprehension to adjust its definition of direct discrimination by adhering to its established distinction between direct and indirect discrimination in Islamic headscarf cases.

b) The importance of comparators for determining direct discrimination

In its response to the third question, the Court held that Directive 2000/78 does not limit the circle of persons in relation to whom a comparison may be made to ascertain religious discrimination ([para. 59](#)). The Court’s answer to this question is remarkably different to the [Opinion of AG Medina](#), who recognises that ‘both the type of comparison employed for the assessment of the existence of discrimination and the circle of reference delineated for that purpose involves far-reaching judgments about the desirable level of equality in society’ ([point 34 Opinion AG Medina](#)). AG Medina’s Opinion acknowledges that Directive 2000/78 has traditionally only been interpreted as prohibiting discrimination between in- and out-groups, also referred to as intergroup comparison ([point 37](#)). An example of intergroup comparison is between people with disabilities and non-disabled persons. However, recent developments in the Court’s case law demonstrate a shift towards an approach focused on intragroup, rather than intergroup comparison ([point 38](#) referencing paras. 29, 30 and 35 [VL](#), and para. 47 [Cresco Investigation](#)). Intragroup comparison assesses discrimination within a group of individuals with the same protected characteristic. An example of intragroup comparison is between persons with different types of disabilities, for example between people with mental disabilities and those with visual impairments.

This recent shift towards intragroup comparison is important for two reasons. Firstly, it extends the reach of Directive 2000/78 with elevated sensitivity to less visible disadvantages, and subsequently visualises direct discrimination which would otherwise be classified as indirect discrimination. Secondly, it extends equality protection to less privileged individuals within the same protected characteristic, visualising relative disadvantage within the same discrimination ground. Additionally, intragroup comparison reduces the circle of possible comparators, thereby promoting diversity and accommodation. Intergroup comparison, on the contrary, widens the circle of possible comparators and promotes uniformity and assimilation. Intragroup comparison therefore brings the Court closer to acknowledging intersectional discrimination, as visualised through the different effects of neutrality provisions on Muslim women who wear headscarves and Muslim men who have a beard.

It is remarkable that the Court did not follow [AG Medina](#), particularly as she did not found her arguments on uncharted territory for the Court. Cases such as [VL](#) and [Cresco Investigation](#) show that the Court has already embraced this shift towards intragroup comparison. Instead, in *LF v SCRL*, the Court laments the ‘segmented approach’ by the Brussels Labour Court, and sees this as the creation of subgroups of workers and an undermining of Directive 2000/78 ([para. 55](#)). From an intersectional point of view, the contrary can be argued.

c) Intersectional discrimination on the basis of religion and gender (and ethnicity)

In this case, the Brussels Labour Court implicitly alluded to intersectional gender and religious discrimination through the consistent formulation of the applicant as a ‘female worker who intends to exercise her freedom of religion by wearing a headscarf’ ([para. 23](#)). Furthermore, the inclusion of ‘the worker with the same beliefs who chooses to manifest their freedom of religion by wearing a beard’ as one of the comparators points to gender discrimination as well, as the situation of Muslim women who wear headscarves is differentiated from that of Muslim men who wear beards and do not face the same consequences of such neutrality provisions.

While the Brussels Labour Court refers to religion and gender (implicitly) as the sources of discrimination, the adverse effects of such neutrality provisions also play along ethnic lines. Muslim women who wear headscarves are more likely to be of non-European ethnic origin or not white. As the Court did not have sufficient material to infer a specific ethnic origin from the facts, the omission of the ethnic discrimination is understandable. However, the explicit mentioning of a ‘female worker who wears a headscarf’ in the formulation of comparable scenarios by the Brussels Labour Court and the Court’s subsequent silence on this intersectional discrimination is significant, and a missed opportunity to engage in intersectional analysis.

It is not the first time that the Court has received headscarf cases whereby applicants explicitly refer to intersectional discrimination on the basis of religion, gender and in some instances race or ethnicity. A recent example is [WABE](#). The Court, again, avoided the intersectional analysis by arguing that gender and race or ethnicity fall beyond the scope of Directive 2000/78 ([para. 58 WABE](#)). While this reasoning may be factually correct, by concealing itself behind the single-axis framework that characterises EU non-discrimination law, the Court does not acknowledge the entirety and complexity of the disadvantage that victims of intersectional discrimination face. The current dominant single-axis framework within EU equality law assumes that all discrimination occurs on the basis of a single ground, and that discrimination grounds neither interact nor inform each other.

There is a solution that would enable the Court to recognise intersectional discrimination within the constraints of the single-axis framework. Namely, by adopting a comprehensive approach to grounds, the Court can acknowledge the simultaneous religious, gender and racial or ethnic discrimination at play. A comprehensive approach fits within a single-axis framework because it construes grounds expansively, thereby acknowledging that within a single ground, multiple intersecting power relations can occur. Interpreting grounds comprehensively is an approach borrowed from the international human rights framework, more specifically [CEDAW](#) and [CRPD](#) which appear to be single-axis instruments, guaranteeing equality for women and people with disabilities respectively. However, both conventions acknowledge intersectionality through this comprehensive approach to grounds. The potential of this approach has been acknowledged by the [European Parliament](#) (point 12, referred to as an ‘capacious interpretation’). For example, by interpreting ‘religion’ more comprehensively, Directive 2000/78 can recognise intersectional discrimination on the basis of religion, gender and race or ethnicity. This is because a religious person can also be a woman and/or of a different ethnic origin. The synergy of religion, gender, and race or ethnic origin can therefore be acknowledged within the ground of religion by interpreting it comprehensively or capaciously.

Conclusion

[LF v SCRL](#) is not just yet another headscarf case in the series of similar cases the Court has adjudicated in the past (such as [Achbita](#), [Bouagnaoui](#) and [WABE](#)). A more rigorous analysis of the case shows that the three referred questions are interconnected and integral to the Court’s road to acknowledging intersectional discrimination. A first element is the delineation between direct and indirect discrimination. Second is the delineation of comparators, as the pool of possible comparators can determine if both direct and intersectional discrimination are visualised. Lastly, it is important for the – albeit implicit – nod to intersectional discrimination on the bases of religion and gender that the Brussels Labour Court brought to the fore.

However, the Court's judgment did not acknowledge intersectional discrimination, in contrast to AG Medina's Opinion. This shows the Court's reluctance and apprehension to engage in an intersectional analysis. The question remains if future Islamic headscarf cases can prompt the Court to address these aforementioned issues more thoroughly and forge a new path that would bring it closer to acknowledging intersectionality.