OCCUPATIONAL REQUIREMENTS AND RELIGION

Jean-Michel Belorgey

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The title of the subject I was asked to deal with seemed somewhat ambiguous to me. Was my remit restricted to only those justifications permitted under the heading of occupational requirements as regards discrimination on grounds of religion (namely those covered by Art. 4(2) of the Directive) or did it also extend to those of a different nature, common to age, disability or sexual orientation to be found in Art. 4(1) of the same text, or, yet again, was it to deal more generally with the question of the prohibition of discrimination on grounds of religion outside of these exceptions? Of these three hypotheses, I thought it must be the last one that was correct. I even went so far as to think that this aspect of the subject – the prohibition of discrimination – was the matter of priority, since the question of "religious" undertakings tackled by de Fiona Kinsman (or "entreprises de tendance" for French speakers and "Tendenzbetriebe" for German speakers, as analysed by our friend, Marc de Vos) was relatively well circumscribed as a question and, compared with the subject as a whole, was only a comparatively limited issue. So, departing from the practice of classical manuals on labour law or religions, let's start with it, so that we can get it out of the way.

1. On this point, Art. 4(2) of Directive 2000/78/EC states that: "*Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which,* ***in the case of occupational activities within churches and other public or private organisations the ethos of***

which is based on religion or belief, ***a difference of treatment based on a person's religion or belief"*** shall not constitute discrimination ***"where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitutes a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos…***"

Even having sorted that out, it must still be stated that:

"*Churches and other organisations* [may] … ***require individuals working for them to act in good faith and with loyalty to the organisation's ethos.***"

The questions that have to be answered for deciding on whether this article is applicable or not are fairly clear:
- what undertakings?
- what jobs?
- where are the confines of religious matters and the religious ethos? (divorce? homosexuality?)

In judgements handed down on 18 May 1978 and 20 May 1986, the French Cour de Cassation accepted that the fact of being divorced could be considered as contrary to the ethos of educational establishments (both Protestant and Catholic) and could justify non-recruitment or dismissal. It decided the same way as regards a man employed by a Jewish consistory to wash bodies. But it opted the other way in the case of a homosexual sexton (in the parish of Saint-Nicolas du Chardonnet; the institution concerned might perhaps have suffered on account of its fundamentalist image in the eyes of the court (on account of the involvement of Monseigneur Lefebvre), but who can tell what was in the minds of those on the bench... At all events, this solution is hardly consistent with the others).

It seems to me that the concept of a "religious undertaking" is a justified one. But there is a risk that its practical application may err in the direction of either overindulgence or insensitivity.

2. Apart from the special case of "religious undertakings", the reference Directive is strangely silent on what might actually be meant by "not discriminating" in instances in which discrimination is *not* allowed on grounds of religion, which, after all, is the first of the prohibited grounds listed in its Art. 1, and what disciplinary action it presupposes, should the need arise. Nor, moreover, is there the slightest murmur from the community institutions, whereas they have plenty to say about age and sexual orientations (and you will find an impressive list of texts about these subjects on pages 148-150 of your documentation). Now the prohibition on discriminating on grounds of religion brings up a multitude of problems, and, even if they are not instantly evident, it will take no more than a little thought for them to emerge.

So what we have to do is to return to the general concepts, which were expounded yesterday by Fiona Kinsman and Marc de Vos and which, unfortunately, are more difficult to put into practice in this area than in all the others.

- What is it that is religious? What are its confines? (The seat within / the seat without? Rituals, the daily round, prohibitions?)
- What are the respective positions of dominant or traditional religions and minority or non-indigenous ones?
- What are we to make of national social, political and legal orders, which might **appear to be secular** but which are only the **secularised expression of religious traditions, partly inactivated, but partly still active** (for a considerable number of Europeans, Sunday is now merely a day of rest, but others still attend mass; and the same goes for Christmas and Easter)?

Is it possible to consider things religious in this sense in part (but only in part) as relicts of the past, as no longer being religious, as if metamorphosed into something non-religious and as, consequently, **no longer lending themselves to those comparisons,** which, as Marc De Vos has reminded us, govern the establishment of evidence of discrimination? Because **their secularisation has moved them outside of the scope of such comparisons**?

As we shall see, that is the way that several national jurisdictions tend to go – incidentally not only in the field of labour and employment law but also in other fields (but in this presentation we are only supposed to be talking about employment and occupations).

3. Without doubt, in the absence of any especially topical court judgements concerning acts of discrimination on grounds of religion, we could look for certain landmarks to shed light on these questions in those judgements that constitute the hard core of the *acquis communautaire* in matters of discrimination on other grounds (especially men/women) and also in those handed down by the European Court of Human Rights, which has accumulated considerable experience on the subject of discrimination (and while waiting for Protocol 12 to take effect) in applying the provisions of Art. 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

***Acquis communautaire*:** Marc de Vos has given us a reminder of this and has told us that discrimination may be the result of either:
- different treatments in identical situations,

or
- identical treatments in incomparable situations.

This analysis is confirmed by the key grounds given in the judgement of the **European Court of Human Rights** (Thlimennos v. Greece of 6 April 2000), according to which discrimination occurs when the same treatment is applied to people whose circumstances are different. This is also a line of argument that has been applied several times over by the European Committee on Social Rights, the regulatory body established by the Social Charter of the Council of Europe. The most notable case was in the decision on the collective claim of Autisme-Europe v. France, which was based on Art. E of that charter. Other judgements by the European Commission of Human Rights where religion was an issue, most of them involving Turkey (Kalasc v. Turkey; Leyla Sahin v. Turkey), are more ambiguous in the information they provide; Kalasc was a soldier, which may be grounds for limiting rights, whereas the Leyla Sahin judgement constitutes a poor show, being more political than legal and with perplexing reasoning.

Are non-native religions in a given country in the same situation as the home-grown one(s), even if the latter may have become secularised – that is to say: are they too **affected by secularisation and simultaneously disqualified as religions?** Are they forced to **remain within the same confines as the home-grown religion(s),** low-profiled, anaemic in a certain way, where, in particular, **dietary and contact prohibitions,** which are frequent in young religions, become obsolete as religions mature or become part of a more general cultural context. These questions might perhaps not make a lot of sense for those who are not religiously minded or who see God only through that particular visage through which they came to encounter him, without imagining that other people have encountered him too and learned to encounter him in a different manner. Both groups must, nonetheless, endeavour to understand that each religion (the one they haven't got or the one others have as theirs, if they have one at all) lives within them and that every believer abhors sin and blasphemy in the way that is theirs and may thus legitimately feel resentful against those who force resentment on them.

4. In the absence of other resources, it is not necessarily a waste of time to look into the experience of jurisdictions outside of Europe, such as the US Supreme Court (see Laurent Mayali and Pierre Legendre: "*le façonnage juridique du marché des religions aux U.S.A.*"). The American courts have recently being stopping far short of the initial judgements in this field *(Schubert v. Verner, 1988:* compensation for dismissed Adventists who refuse to work on Saturdays); *Employment Division of Human Resources v. Smith et al., 2000:* denial of unemployment benefits to workers dismissed for consuming peyote – for sacramental purposes, so they maintained, but the denial was found to be justified on account an overriding public-order consideration: i.e. regarding drugs (in both these cases what was at stake was not the actual dismissal, but the judges' line of reasoning can certainly be transposed to other circumstances). The so-called Indian-reserve cases and the case which concluded that prisoners belonging to minority religions are not entitled to exoneration from prison work on the days of their religious festivals reveal, it is true, both a massive confusion between equality and neutrality, which ought really to serve to keep judgements on course, and refereeing borderline decisions like in sport, on which the political authority is expected to arbitrate, but fails to do so.

Even if often contorted, the underlying idea maintains its currency and can be detected in the opinions of individual judges and in learned legal writings, namely that it is not a matter for the State to determine which belief is true but to "*manage the circulation of beliefs in a neutral manner in a pluralist system*", so that minority religions do not have fewer rights than majority religions. It does so by:

- refusing to regard customs as establishing legal norms,
- creating "*special accommodations*",
- understanding that the acceptance of pluralism is not reflected in **additions**, but in the **promotion of flexibility**: the *Sabbath is not Sunday; it is to Judaism what the Eucharist is to Christianity, what the Shahada (confession of faith) is to Islam, what traversing ancestral territory is to the Indians,* and so on.

5. In the light of this analysis of what we must (or ought to) try to understand of things religious and the relationships between the religions, there can be little doubt (and here I repeat my view more bluntly than before) that the position of a number of national jurisdictions is at least open to question and probably not tenable at all.

It is obvious that I am going to take France as my example, where the ban on discriminating on grounds of religion predates the transposition of the Directive, since it is a long-standing prohibition inscribed in constitutional law, criminal law and employment law (which explains, without justifying it, France's position that is saw no need for a Directive; that position is correct, if what is at stake is the existence of a statutory provision, but it is wrong if the real issue is one of understanding).

It is indeed the case that Art. L. 121-6 of the French employment code outlaws asking job applicants for any information other than what is necessary for assessing their professional competence and their aptitude for a given post, which explicitly excludes asking about their religion. It does, however, remain true that there are certain external signs that might give a more or less strong hint to the interviewer. Despite that, any discussion that takes place in court, in the conditions described by Michel Miné, will not deal with religion, unless the judge happens to have read the very finely detailed analyses of Abdelmalek Sayad of bodily signs revealing adherence to Islam or, worse still, the equivalence between belonging to Islam and skin colour.

Things, however, become more complicated, when the matter in hand is the execution of an employment contract. The problem resides in the idea advanced by French courts that the **execution of the employment contract is the factor that has priority**. This idea acts like a net, trapping those who belong to religions other than the traditional French ones, in particular Christianity, whose secularity (which may even go as far as being militant or anti-religious) de facto provides the mould for it. There is no equivalent for other religions of the admirable judgement of the Cour de Cassation of 17 October 1973, whereby the discovery after the event that an employee taken on was actually a priest, without that have being disclosed at the time, did not justify his dismissal. Would a solution of the same type still stand up for an imam or a rabbi? It is certainly a question that goes through the mind on reading the pretty scandalous judgement of 24 March 1998 (Azal v. Chamsidinie) concerning a Muslim employed in a food store (in the French overseas dependency of Mayotte, to boot). This employee was moved to the store's meat section, where he had to handle pork, which he refused to do. That was found to justify his dismissal, demonstrating an ethnocentricity and an extravagantly offhand attitude towards what constitutes the contours of those religions that include a dimension of dietary prohibitions, which in the case in point is Islam, which, to put things further into perspective, is actually the majority religion in Mayotte. It is surprising that the respect vowed to the Cour de

Cassation and the dimension of civic dogma attributed to a poorly understood secularity should even have tied the tongues of learned scholars reputed for their independence. One of these is Professor Sabatier, who, writing in "Droit Social", does not go beyond a marginal criticism of this judgement. I pity his poor students, who believe that they are forced to assure a dazzling defence of this solution (and I think here notably of the interesting, but terribly legitimist, work presented by Catherine Comme at Paris Dauphine in 2002/03).

The truth is that the thesis of the "internal seat of religion" is not only contrary to the European Convention on the Protection of Human Rights but also contrary to the European Union's Charter of Fundamental Rights (Art. 10), according to which freedom of religion includes the "*freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance*". It is even contrary to a true understanding of the French concept of secularity.

All that is not stopping the Azal judgement from causing similar cases in its wake:

- in matters of dietary proscriptions (Paris Appeal Court, 18 March 2002, concerning a Muslim cook not wanting to taste dishes including pork, which led the court to consider her dismissal justified);
- in matters of clothing (Cour de Cassation, 28 May 2003; Paris Appeal Court, 16 March 2001), concerning the wearing of a headscarf to be incompatible with neutrality towards customers – a particularly unfortunate formulation (given that it is only public institutions that are supposed to be impartial). The same goes for the judgement of the Cour de Cassation, in which it felt the need to state that the freedom of dress is not a fundamental one. There are only a few judgements in the opposite sense, and their meaning is ambiguous. One of these cases was concerned particularly with the wearing of a headscarf at the time of recruitment;
- in matters of leave of absence either for Friday prayers or Ramadan;
- in matters of canteens or meal subsidies;
- in matters of **lying** (and this might perhaps be of much greater interest, and bring us closer to provisions concerning undertakings with a particular ethos – as if in total contradiction with the perspective governing them). It is possible for employers to dismiss employees who have been instructed to lie and who refuse to do so, because their religion does not permit them... This is, however, a vast topic, since it would also appear almost certain that, if the instruction to lie were to have the intended effect of covering up discrimination vis-à-vis another employee or a customer, then actually telling the lie could not be a

justified reason for dismissal. If the employee were to refuse to tell the lie, which would have made them an accomplice to discrimination, they would then be protected. I wish the best of luck to those lawyers to whom it befalls to draw the dividing line!

Up until now, France's High Authority for Combating Discrimination and Promoting Equality (HALDE) has not had to deal with many cases of discrimination on grounds of religion (one of these concerned the access of a Sikh to the Banque de France, and the other a learner-driver wearing a veil during driving lessons), and the only one dealing with discrimination on grounds of religion at the workplace was a rather strange one, since it established a parallel between the day on which Algerians pay homage to the dead and the Armenian religious festival grafted onto the day of the genocide, as possibly opening the way to leaves of absence. HALDE did not give a clear-cut decision and merely stated that, although the day of the genocide may well have been consecrated as having religious import by the Armenian church, nothing similar had happened as regards the day of homage to the dead in Algeria. Even though it stopped short of a firm ruling, the decision was nonetheless innovative, insofar as it left open the question regarding leave of absence for religious festivals other than Christian ones.

It may well be that my culture does not extend far enough for me to give a definitive view, but it is certainly my impression that the Belgian or Italian courts do not fare any better than the French ones, except for the Italian courts in matters concerning Judaism and the Sabbath. On the other hand, it is my feeling that what happens in Germany is much more enlightened, where the Federal Labour Court handed down a number of open, constructive judgements in 2002 on questions of dietary prohibitions, wearing veils, leave of absence for religious festivals, and even praying at the workplace.

All in all, if we draw up a balance sheet of the situation in France and in the few other countries where the courts reason in the same way as in France, then:

- **the undertaking has the right to have a religion, even a religion within a broad definition of the term, with its ethical ramifications, and to impose it on the workforce,**

- **employees also have a right to a religion, but this religion cannot lead to any consequences as regards the workplace; it does not give rise to any right and does not impose any constraints on the employer.**

6. It is my own moral and philosophical conviction – and my legal conviction too – that the line of reasoning pursued by the French courts and those of other countries that have opted for the same route, will have to be considered outdated.

Many employers are aware of this:
- those who, without making a fuss about it, have set up special holiday arrangements and canteens offering suitable diets for workers of an Arabo-Muslim origin;
- Peugeot-Citroën has done so in a much more visible manner through the agreement of September 2004 concluded by management and the trades unions. Its Articles 1-4, in particular, lay down that: "*within the framework of the law and the applicable regulations, it shall be possible to make individual arrangements with the agreement of plant management. It shall be possible, in particular, to set up specific arrangements to give due consideration to religious or ethnic customs. It shall be possible for this to include catering (vending machines or self-service canteens) offering a choice of dishes compatible with customs of a religious origin. In the same way, it shall be possible, in agreement with management, to arrange working hours or shifts in such a way as to make the job compatible with the customs linked to certain religious practices".* Now this might not be a model of perfect wording, but it does represent considerable progress compared with the past.

It is a shame that all of this is still no more than marginal and especially that the majority of the signatories of the diversity charter, which Michel Miné told you about (and there are 35 of them including Schneider, Accor, La Poste, IBM, Sodexo and Ricard-Pernod), have not yet tackled this subject or, worse still, have returned to the line of argument that the consequences of belonging to a religion are occluded at the workplace.

Why should this be? Whereas the flexibility of working hours opens up vast possibilities and whereas the cost incurred by non-discrimination on grounds of religion, although certainly not negligible, is no greater than the cost of eliminating discrimination on grounds of sex or disability, the answer probably resides in the fact that we are witnessing a considerable move away from all things religious in the better-off classes, unless they can find a pretext in them on which to base their supremacy. This emerges clearly in the case of the concessions made to religious fundamentalism in Italy by Mr Berlusconi over matters of medically assisted procreation. It is further explained by the fact that the West is tensed up in a defensive, and even offensive, posture towards an Islam claimed to be actively expansive and menacing, where such a posture is bound to be counter-productive, if not properly nuanced, and thus more likely to encourage the development of Muslim fundamentalism than to slow it down. A further reason is that it is rare for trades unions to take an interest in religious issues. Moreover, it is because in France secularity has strangely made inroads into institutions, such as S.O.S. Racisme, where originally at least, something better might have been expected.

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I should like to conclude by stating that what is at stake in the entire debate of which I have sketched the outlines for you is neither exclusively – nor even principally – the respect of community law, even though it is amongst the issues. What is at stake is social cohesion in each of the countries affected. It is also the future of relations between the West and everywhere that is not the West. Do we want to prepare for a future of intelligent compromises? Or do we want to nurture resentments? Do we want to foment retaliations? Do we really want to think of these relationships in terms of a clash, even a war, between cultures and civilisations?

Jean-Michel Belorgey
President, European Committee on Social Rights