

1. The European Context: ECHR

- The European Convention on Human Rights :
- **Article 9 (freedom of thought, conscience and religion) of the European Convention on Human Rights:**
- “1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

Article 9 (2)

- 2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

Scope of Protection

- *Scope of protection of Article 9 ratione materiae*
- 9. Whilst Article 9 of the Convention concerns freedom of religion in particular, the protection afforded is much broader and applies to all personal, political, philosophical, moral and, of course, religious convictions. It extends to ideas, philosophical convictions of all kinds, with the express mention of a person's religious beliefs, and their own way of apprehending their personal and social life. For example, as a philosophy, pacifism falls within the scope of application of Article 9 of the Convention, since the attitude of a pacifist can be regarded as a "belief".

ECHR Article 9 in the Workplace

- Article 9 protection is limited by the 'contracting out' doctrine that an employer does not restrict your freedom of religion is you have a choice to leave the employment for another job.

- The Eur. Ct. H.R. has developed a definition of the scope of religious freedom that deems a voluntary or contractual agreement to limit the scope of religious freedom as a situation that falls outside Article 9(1). Therefore, where an individual either puts themselves into a situation that restricts their religious freedom in some way, or has a choice that would allow them to change their situation in a way that allows them to exercise their religious freedom, then it is assumed that there has been no interference. The ECHR places the concepts of choice and voluntariness at the centre of its analysis of the scope and nature of the individual right to the Art 9 right to religious freedom. This is exemplified in the principle that an individual can voluntarily contract out of the right to freedom of religion.

- The Commission and Eur Ct. H. R have adopted and endorsed this approach in a number of their cases. This point was confirmed in *Steadman v United Kingdom*, (1997) App. No. 29107/95, 89 – A Eur. Comm’n H. R. Dec. & Rep. 104, 107 – 8 where it was held that a woman who objected to Sunday working as an interference with her right to freedom of religion could have left her job if she found that her employment was interfering with her individual right to religion.

- Another example of permissible 'contracting out' of the right to religious freedom is the decision of the European Commission of Human Rights in *X v United Kingdom* (1981) App. No.8160/78, 22 Eur. Comm'n H. R. Dec. & Rep. 27 which held that a Muslim school teacher was found to have limited his right to religious freedom when he accepted an employment contract which included set working hours which prevented him from taking time off for Friday prayers.

- There is some acknowledgement within ECHR jurisprudence that there are limits to the concept of voluntariness and choice in these contexts, *Darby v Sweden*, 187 Eur. Ct. H. R. (Ser A) (1990) indicates, there may be situations where expecting an individuals to change their position in order to manifest their religion may be unreasonable. In *Darby v Sweden* the Commission rejected the argument that the choice of moving countries to Sweden that was available to the individual, and which they did not exercise, meant that they had voluntarily accepted payment of a Church tax that breached their Article 9 rights.

- The fact that the 'contracting out doctrine' may require onerous changes from those who seek to exercise their right to freedom of religion is also criticised in recent British cases. In *Copsey v WBB Devon Clays Ltd*, [2005] I. C. R. 1789 (C.A.); petition refused [2006] ICR 205, HL. Lord Justice Mummery commented that 'costs' such as requiring an employee to change jobs may not be compatible with the importance of the right to freedom of religion.

- This point was recognised *Copsey v WBB Devon Clays Ltd*. (2005) which involved the dismissal of an employee who refused to work on Sundays because of his Christian beliefs. In *Copsey*, the Court of Appeal applied the 'contracting out doctrine' to dismiss Mr Copsey's claim that a requirement to work on Sundays was an infringement of his right to freedom of religion under Article 9 of the ECHR.

- However, this affirmation of the approach of the Commission to the 'voluntary contracting out of rights' principle and the 'right to resign' argument was criticised by Mummery LJ who stated: "The rulings are difficult to square with the supposed fundamental character of the rights. It hardly seems compatible with the fundamental character of article 9 that a person can be told that his right has not been interfered with because he is free to move on, for example, to another employer, who will not interfere with his fundamental right, or even to a condition of unemployment in order to manifest the fundamental right.", [2005] I. C. R. 1789 (C.A.) at para 34.

- Mummery L.J. cited the decision in *R. v. Secretary of State for Education and Employment Ex p Williamson*, House of Lords February 24, 2005 [2005] H.R.L.R. 14. Mummery L. J. concluded: " In the absence of the Commission rulings, I would have regarded this as a case of material interference with Mr Copsey's Article 9 rights. The rights would be engaged and interference with them would require justification under Article 9(2)

- “What constitutes interference depends on all the circumstances of the case including the extent to which in the circumstances an individual can reasonably expect to be at liberty to manifest his beliefs in practice.”
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- Applying that approach to the specific situation of Mr Copsey in the light of the Commission rulings, there was no material or significant interference with his article 9 right and the decision of the employment tribunal that article 9 was not engaged was correct in law.” ([2005] I. C. R. 1789 (C.A.) at para 34 – 37).
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- 8. Despite criticism of the ‘contracting out doctrine’, this line of Eur. C. H. R. and British cases confirm that the ‘contracting out doctrine’ will be relevant to any interpretation of the scope the right to freedom of religion in Article 9. The ‘contracting out doctrine’ is based on the idea that there is no interference with freedom of religion where the individual is left with a viable and voluntary choice to put himself in a position where he can manifest his religion even if this requires some personal sacrifice. In these fact situations individuals have, through the exercise of choice, put themselves in a situation which limits their ability to manifest their religion.

Employment Equality Directive 2000/78/EC

- The EU Protection of Religion and Belief in the Workplace **Religion or belief, disability, age or sexual orientation**

- The Employment Equality Directive prohibits direct and indirect discrimination,¹⁰ harassment,¹¹ instructions to discriminate¹² and victimisation¹³ on grounds of religion and belief.¹⁴ The definitions of these terms are identical for the different grounds, and interpretation is likely to draw on the experience of the courts in interpreting the existing EU protection against discrimination on grounds of sex. However, there are several problematic issues that are likely arising in relation to religion and belief discrimination, which may be unique to this ground.

- Direct discrimination must be 'on grounds of' religion or belief. The Directive is not limited to less favourable treatment on the grounds of a victim's own religion or belief. It would therefore cover treatment based on the discriminator's assumption about a person's religion, even though this assumption may be mistaken; as well as discrimination based on a person's association with people of a particular religion (for example discrimination against someone married to a member of a religious group)

- The Directive may also protect against discrimination based on the employer's religious views; for example, a Catholic employer could dismiss an employee for marrying a divorced person, and the less favourable treatment would still be 'on grounds of religion'. However, some states such as the UK have specifically ruled out this possibility.²⁰

Indirect Discrimination

- The mechanism within the Directive for achieving an equilibrium between conflicting rights is via the exceptions for genuine occupational requirements, and the requirement for indirectly discriminatory rules to be justified. These mechanisms allow exceptions to the non-discrimination principle to be subject to review by courts to ensure that they are objective and reasonable. Courts need to find a balance between protecting freedom of religion and respecting the rights of others

- . To do this they will need to assess the proportionality of exceptions to the non-discrimination principle in the light of the need to uphold equality, to protect freedom of religion, and to protect other human rights such as privacy and freedom of speech. The assessment of proportionality should also take into account the equality interests of service users, the freedom of religion of all members of staff, the right to freedom from religion for customers and colleagues, and an interest in political or religious neutrality for the employer. Where the balance lies may depend in part on the status of the employer (for example, whether it has a religious ethos and whether it is part of the public or private sector) and whether it has a monopoly on providing particular types of employment.

Harassment

- Harassment
- The Directive deems harassment to be a form of discrimination, where there is unwanted conduct related to religion and belief with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.³⁹ Most states have implemented provisions on harassment which are similar to this definition.

- Achtiba worked for G4S who said that employees were not permitted to wear any religious, political or philosophical symbols while on duty. Initially, that prohibition applied only as an unwritten company rule. With the approval of the G4S works council, the G4S employee code of conduct with effect from 13 June 2006 incorporated a prohibitory condition set out as:
 - *'employees are prohibited, in the workplace, from wearing any visible signs of their political, philosophical or religious beliefs and/or from giving expression to any ritual arising from them.'*

Samira Achbita & Anor v G4S Secure Solutions NV [2016] EUECJ C-157/15

- On 12 June 2006, Achbita who is a Muslim was dismissed after refusing to remove her headscarf. Her claim direct religious discrimination in employment was dismissed. The appeal against that decision has been stayed until the following question at this preliminary hearing had been decided by the ECJ:
- *'Should Article 2(2)(a) of Council Directive 2000/78/EC of 27 November 2000 [establishing a general framework for equal treatment in employment and occupation] be interpreted as meaning that the prohibition on wearing, as a female Muslim, a headscarf at the workplace does not constitute direct discrimination where the employer's rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace?'*

Samira Achbita & Anor v G4S Secure Solutions NV [2016] EUECJ C-157/15

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- The issue of the Islamic headscarf has been considered at length in the European Court of Human Rights. This is the first case to be considered by the CJEU.
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- The issue raised is of crucial significance for the EU because unlike the number of women who wear the face veil, there are a significant number of European Muslim women who wear the headscarf who fall within the protection offered by EU discrimination law.
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- Is a private employer permitted to prohibit a Muslim woman employee from wearing a headscarf in the workplace? Is the employer permitted to dismiss her if she refuses to remove the headscarf at work?
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- The court concluded as follows:
- 1. The fact that a female employee of Muslim faith is prohibited from wearing an Islamic headscarf at work does not constitute direct discrimination based on religion within the meaning of Article 2(2)(a) of Directive 2000/78/EC if that ban is founded on a general company rule prohibiting visible political, philosophical and religious symbols in the workplace and not on stereotypes or prejudice against one or more particular religions or against religious beliefs in general. That ban may, however, constitute indirect discrimination based on religion under Article 2(2)(b) of that directive.

- 2. Such discrimination may be justified in order to enforce a policy of religious and ideological neutrality pursued by the employer in the company concerned, in so far as the principle of proportionality is observed in that regard.
- In that connection, the following factors in particular must be taken into account:
 - the size and conspicuousness of the religious symbol,
 - the nature of the employee's activity,
 - the context in which she has to perform that activity, and
- the national identity of the Member State concerned.