

Religious discrimination at the workplace

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Outline of presentation

- ▶ 1) Introduction:
- ▶ ECHR, EU Law and religion in Member States
- ▶ Freedom of religion v. Religious discrimination (different legal norms)
- ▶ 2) Contours of religion as a prohibited ground in employment: no definition but large scope
- ▶ 3) Direct discrimination at work (no compliance to customer preference)
- ▶ 4) Indirect discrimination at work (particular disadvantage linked to blanket ban on wearing visible signs of political, philosophical or religious beliefs in the workplace?)
- ▶ 5) Exemptions for ethos-based employers (Directive 2000/78)
- ▶ 6) What lies ahead: Challenges for France (who asks for accommodation, what extent of accommodation?)
- ▶ 7) Conclusion: the plaintiffs' narratives in France...is it only about religion? Race, ethnic origin? Multiple discrimination? Individual or group question...balancing of rights....

Focus will be on certain recent cases or pending cases

- ▶ *EUCJ 14 March 2017 Achbita Case C-157/15*: Dismissal of a female Belgian Muslim employee wearing the headscarf at work when the employer in question banned all employees from wearing any outward sign of political, philosophical or religious beliefs at work.
- ▶ *EUCJ 17 March 2017 Bougnaoui Case C-188/15*: Dismissal of employee with Islamic headscarf after wish of a customer not to have services supplied by that employee
- ▶ *EUCJ 17 April 2018 Egenbeger Case C-414/16*: German woman with no religion who was refused a temporary contract to write a report on racial discrimination by an organization run by German Evangelical Church whose job advertisement specified Protestant applicants
- ▶ *EUCJ 31 May 2018 IR v JQ pending Case C-68/17, Advocate General's Opinion*: dismissal of the Head of the Internal Medicine Department of a Catholic hospital subject to the supervision of the Catholic Archbishop of Cologne, on the sole ground that he divorced and remarried in a civil ceremony, even though he would not have been dismissed had he not been Catholic

1) Introduction

- ▶ Complexity of law in Europe and religious discrimination in the workplace: reconciling equality and liberty? Individuals or groups?
- ▶ Different legal frameworks are combined to protect the exercise of religion as a **fundamental right** including:
- ▶ Freedom of thought, conscience and religion: article 9 of the European Convention on Human Rights-UN HR Committee for plaintiff in Babyloup case
- ▶ The EU framework (freedom and antidiscrimination): EU Charter of fundamental rights (art.10,21), Directive 2000/78
- ▶ And constitutional /legislation of Member States reflects legal traditions: different perspectives in France and Germany?
- ▶ Example of initial tension between freedom and antidiscrimination law in France: Babyloup case

2) Contours of religion as a prohibited ground in employment: no definition but broad scope **Samira Achbita** Case C-157/15

- ▶ NO DEFINITION:
- ▶ 25 As regards the meaning of 'religion' in Article 1 of Directive 2000/78, it should be noted that **the directive does not include a definition of that term.**
- ▶ INDIVIDUAL OR GROUP:
- ▶ 26 Nevertheless, the EU Legislature referred, in recital 1 of Directive 2000/78, to fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), which provides, in Article 9, that everyone has the right to freedom of thought, conscience and religion, a right which includes, in particular, 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.**
- ▶ REFERENCE TO CONSTITUTIONS, ECHR AND CHARTER:
- ▶ 27 In the same recital, the EU legislature also referred to the **constitutional traditions** common to the Member States, as general principles of EU law. Among the rights resulting from those common traditions, which have been reaffirmed in the **Charter of Fundamental Rights of the European Union** ('the Charter'), is the right to freedom of conscience and religion enshrined in Article 10(1) of the Charter. In accordance with that provision, that right includes freedom to change religion or belief and 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.** As is apparent from the explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17), the right guaranteed in Article 10(1) of the Charter corresponds to the right guaranteed in **Article 9 of the ECHR** and, in accordance with Article 52(3) of the Charter, has the same meaning and scope.
- ▶ BOTH BELIEF AND MANIFESTATION/PRACTICE, PUBLIC/PRIVATE, SUBJECTIVE/OBJECTIVE?
- ▶ 28 In so far as the ECHR and, subsequently, the Charter use the term 'religion' in a broad sense, in that they include in it the freedom of persons to manifest their religion, the EU legislature must be considered to have intended to take the same approach when adopting Directive 2000/78, and therefore the concept of 'religion' in Article 1 of that directive should be interpreted as covering both the **forum internum**, that is the fact of having a belief, and the **forum externum**, that is the **manifestation of religious faith in public.**

3) Direct discrimination at work (no customer preference) *EUCJ Bougnaoui* Case C-188/15

- ▶ Directive 2000/78: Direct Discrimination
- ▶ • Direct Discrimination: Article 2(2)(a): direct discrimination shall be
- ▶ taken to occur where one person is treated less favourably than
- ▶ another is, has been or would be treated in a comparable situation,
- ▶ on any of the grounds referred to in Article 1;
- ▶ • Direct discrimination can be justified only "by reason of the **nature of the particular occupational activities concerned or of the context in which they are carried out**, such a characteristic constitutes a **genuine and determining occupational requirement**, provided that the
- ▶ objective is legitimate and the requirement is proportionate." (Article
- ▶ 4(1)).

3) Direct discrimination at work (no customer preference as GDOR) *EUCJ Bougnaoui Case C-188/15*

- ▶ **Not GROUND BUT CHARACTERISTIC AS GENUINE DETERMINING OCCUPATIONAL REQUIREMENT (GDOR)**
- ▶ 37 That said, it should be borne in mind that the Court has repeatedly held that it is clear from Article 4(1) of Directive 2000/78 that it is not the ground on which the difference of treatment is based but a characteristic related to that ground which must constitute a genuine and determining occupational requirement (see judgments of 12 January 2010, *Wolf*, C-229/08, EU:C:2010:3, paragraph 35; of 13 September 2011, *Prigge and Others*, C-447/09, EU:C:2011:573, paragraph 66; of 13 November 2014, *Vital Pérez*, C-416/13, EU:C:2014:2371, paragraph 36; and of 15 November 2016, *Salaberria Sorando*, C-258/15, EU:C:2016:873, paragraph 33).
- ▶ **IN VERY LIMITED CIRCUMSTANCES**
- ▶ 38 It should, moreover, be pointed out that, in accordance with recital 23 of Directive 2000/78, it is only in very limited circumstances that a characteristic related, in particular, to religion may constitute a genuine and determining occupational requirement.
- ▶ **NATURE OF OCCUPATION OR CONTEXT CARRIED OUT: DESIGN ENGINEER**
- ▶ 39 It must also be pointed out that, according to the actual wording of Article 4(1) of Directive 2000/78, such a characteristic may constitute such a requirement only 'by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out'.
- ▶ **OBJECTIVELY DICTATED BY OCCUPATION OR CONTEXT OF EMPLOYMENT, NOT SUBJECTIVE CONSIDERATION, WILLINGNESS OF EMPLOYER TO TAKE ACCOUNT OF WISHES OF CUSTOMER**
- ▶ 40 It follows from the information set out above that the concept of a 'genuine and determining occupational requirement', within the meaning of that provision, refers to a requirement that is objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out. It cannot, however, cover subjective considerations, such as the willingness of the employer to take account of the particular wishes of the customer.

4) Indirect discrimination at work (apparently neutral obligation/BAN..... Persons ADHERING TO BELIEF being put at a particular disadvantage)

- ▶ DIRECTIVE 2000/78
- ▶ ARTICLE 2: indirect discrimination shall be taken to occur where an
- ▶ apparently neutral provision, criterion or practice would put persons
- ▶ having a particular religion or belief, a particular disability, a particular
- ▶ age, or a particular sexual orientation at a particular disadvantage
- ▶ compared with other persons unless:
- ▶ • (i) that provision, criterion or practice is objectively justified by a
- ▶ legitimate aim and the means of achieving that aim are appropriate
- ▶ and necessary
- ▶ **ECJ Achbita §34** apparently neutral obligation results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage

4) Indirect discrimination at work (neutrality rule, no direct discrimination)

- ▶ EUCJ Achbita § 30 In the present case, the internal rule at issue in the main proceedings refers to the wearing of visible signs of political, philosophical or religious beliefs and therefore covers any manifestation of such beliefs without distinction. The rule must, therefore, be regarded **as treating all workers of the undertaking in the same way by requiring them, in a general and undifferentiated way, inter alia, to dress neutrally**, which precludes the wearing of such signs.
- ▶ 31 It is not evident from the material in the file available to the Court that the internal rule at issue in the main proceedings was applied differently to Ms Achbita as compared to any other worker.

4) Indirect discrimination at work (particular disadvantage linked to blanket ban can be justified by legitimate aim and proportionality test)

- ▶ EUCJ Achbita § 35 Under Article 2(2)(b)(i) of Directive 2000/78, such a difference of treatment does not, however, amount to indirect discriminate **if it is objectively justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary** within the meaning of Article 2(2)(b) of the directive.
- ▶ Legitimacy of neutral policy
- ▶ 37 As regards, in the first place, the condition relating to the existence of a legitimate aim, it should be stated that **the desire to display, in relations with both public and private sector customers, a policy of political, philosophical or religious neutrality must be considered legitimate**.
- ▶ Image of neutrality justified by freedom to conduct business and only for workers in contact with customers
- ▶ 38 An employer's wish to project an image of neutrality towards customers relates to the **freedom to conduct a business** that is recognised in Article 16 of the Charter and is, in principle, **legitimate, notably where the employer involves in its pursuit of that aim ONLY those workers who are required to come into contact with the employer's customers**.

4) Indirect discrimination at work (particular disadvantage linked to blanket ban can be justified by legitimate aim and proportionality test)

- ▶ Policy pursued in a **consistent and systematic manner**
- ▶ 40 As regards, in the second place, **the appropriateness** of an internal rule such as that at issue in the main proceedings, it must be held that the fact that workers are prohibited from visibly wearing signs of political, philosophical or religious beliefs is appropriate for the purpose of ensuring that a policy of neutrality is properly applied, provided that that policy is genuinely pursued in a consistent and systematic manner (see, to that effect, judgments of 10 March 2009, *Hartlauer*, C-169/07, EU:C:2009:141, paragraph 55, and of 12 January 2010, *Petersen*, C-341/08, EU:C:2010:4, paragraph 53).
- ▶ **General and undifferentiated** policy?
- ▶ 41 In that respect, it is for the referring court to ascertain whether G4S had, prior to Ms Achbita's dismissal, established a general and undifferentiated policy of prohibiting the visible wearing of signs of political, philosophical or religious beliefs in respect of members of its staff who come into contact with its customers.
- ▶ Prohibition limited to what is **strictly necessary**
- ▶ 42 As regards, in the third place, the question whether the prohibition at issue in the main proceedings was necessary, it must be determined whether the prohibition is limited to what is strictly necessary. In the present case, what must be ascertained is whether the prohibition on the visible wearing of any sign or clothing capable of being associated with a religious faith or a political or philosophical belief covers only G4S workers who interact with customers. If that is the case, the prohibition must be considered strictly necessary for the purpose of achieving the aim pursued.
- ▶ **Reasonable accommodation? Proportionality...** Possibility to offer a **post not involving any visual contact** with customers
- ▶ 43 In the present case, so far as concerns the refusal of a worker such as Ms Achbita to give up wearing an Islamic headscarf when carrying out her professional duties for G4S customers, it is for the referring court to ascertain whether, taking into account the inherent constraints to which the undertaking is subject, and without G4S being required to take on an additional burden, it would have been possible for G4S, faced with such a refusal, to offer her a post not involving any visual contact with those customers, instead of dismissing her.

5) Religious employers in Germany : the scope of exemptions and judicial review, *EUCJ Egenberger Case C-414/16*, EUCJ 31 May 2018 IR v JQ, Advocate General's Opinion in Case C-68/17 Article 4 (2) Directive 2000/78

- ▶ 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 constitute a **genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos**. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.
- ▶ Provided that its provisions are otherwise complied with, **this Directive shall thus not prejudice the right of churches and other public or private organisations**, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

EUCJ 17 April 2018 Egenbeger Case C-414/16

- ▶ The requirement of religious affiliation for a post within the Church must be amenable to **effective judicial review**.
- ▶ That requirement must be *necessary and objectively dictated, having regard to the ethos of the church*, by the **nature of the occupational activity** concerned or the **circumstances** in which it is carried out, and must comply with the **principle of proportionality**

Egenbeger Case : The requirement of religious affiliation for a post within the Church must be amenable to effective judicial review

- ▶ German Court observes that, in accordance with the case-law (Federal Constitutional Court, Germany) on the churches' privilege of self-determination, judicial review of compliance with those criteria should be limited, in Germany, to **a review of plausibility** on the basis of the church's self-perception.
- ▶ It therefore puts questions to the Court in particular on whether such limited judicial review is compatible with the directive.
- ▶ The Court starts by finding that, under the directive,
- ▶ the right of autonomy of churches (and other organisations whose ethos is based on religion or belief)...
- ▶ and, the right of workers, when they are being recruited, not to be discriminated against on grounds of religion or belief must be the subject of a balancing exercise, (**fair balance**). According to the Court, if dispute, it must be possible for such a balancing exercise **to be the subject of review by an independent authority, and ultimately by a national court...**

Egenbeger Case : The requirement of religious affiliation for a post within the Church must be amenable to effective judicial review

- ▶ Where a church (or other organisation whose ethos is based on religion or belief) asserts, in support of an act or decision such as the rejection of an application for employment with it, that by reason of the nature of the activities concerned or the context in which they are to be carried out, religion constitutes a genuine, legitimate and justified occupational requirement, having regard to the ethos of the church (or organisation), it must be possible for such an assertion to be the subject **of effective judicial review...**
- ▶ The court hearing the case must ensure that, in the particular case, the criteria laid down by the directive for striking a balance between the possibly competing rights are satisfied.
- ▶ The Court observes in this respect that, in principle, **it is not for the national courts to rule on the ethos as such on which the purported occupational requirement is founded**

Requirement of religious affiliation subject to review: what standard of review?

- ▶ National courts must **nevertheless** decide, on a case-by-case basis, whether the three criteria concerning a '**genuine, legitimate and justified**' requirement are **satisfied from the point of view of that ethos.**
- ▶ National courts must ascertain whether the requirement put **forward is necessary and objectively** dictated, having regard to the ethos of the church (or organisation) concerned, by:
 - ▶ the nature of the occupational activity in question
 - ▶ or the circumstances in which it is carried out.
 - ▶ **AND the requirement must comply with the principle of proportionality**, that is to say, it must be appropriate and not go beyond what is necessary for attaining the objective pursued.
 - ▶ On the point that an EU directive does not, in principle, have direct effect between individuals but has to be transposed into national law...
 - ▶ It is for the national courts to interpret the national law transposing the directive, as far as possible, in conformity with that directive.

Requirement of religious affiliation subject to review: what standard of review? Illustrations

- ▶ 63 Thus the lawfulness from the point of view of that provision of a difference of treatment on grounds of religion or belief depends on the **objectively verifiable existence of a direct link between the occupational requirement imposed by the employer and the activity concerned.**
- ▶ Such a link may follow either from the nature of the activity, for example **where it involves taking part in the determination of the ethos of the church or organisation in question (priest)**
- ▶ or
- ▶ **contributing to its mission of proclamation**, or else from the circumstances in which the activity is to be carried out, such as the need **to ensure a credible presentation** of the church or organisation to the outside world.

EUCJ 31 May 2018 IR v JQ, Advocate General's Opinion in Case C-68/17

- ▶ According to Advocate General Wathelet, the prohibition of discrimination on grounds of religion precludes a Catholic doctor who is Head of Department at a Catholic hospital from being dismissed because of his divorce and remarriage
- ▶ The requirement for a Catholic doctor who is a Head of Department to respect the sacred and indissoluble nature of marriage as understood by the Catholic Church does not constitute a real occupational requirement, much less one that is genuine and justified

6) What lies ahead: challenges for France on general ban on visible signs and emergence of concept of accommodation?

- ▶ 1) What kind of accommodation linked to change of post? What scope?
- ▶ 2) Who asks for it?
- ▶ 3) French plaintiffs' narratives: Mrs Afif and Bougnaoui's stories of the litigation

7) Conclusion: taking a step back.....

- ▶ 1) Religion and origin? Challenge of multiple and systemic discrimination....
 - Religion a proxy for origin
- ▶ - Glass ceiling and sex segregation
- ▶ 2) Balancing fundamental rights of individuals and those of organizations/companies?
 - ▶ - Company internal rules reflect a belief in religious neutrality
 - ▶ - Rights of ethos-based organizations