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**Religious discrimination
At the work place**

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1. INTRODUCTION

1.1. Political debate (Belgium, France, The Netherlands, Germany) = legal debate

Focus//research x presentation= Labour law

1.2. Why is labour important ?

Labour= human dignity
capabilities = self esteem = health

Why is labour law specific ?

Employment= semi-public sphere
Collective and individual dimension
= Margin of appreciation
of States + employers + collective bargaining
(national context)



1.3. Employment= limitation on personal rights and freedoms:

Labour context= limitations on liberty, privacy, freedom of expression, religion

However:

Horizontalisation of fundamental rights (direct or indirect)
Many cases before the ECtHR: balancing between loyalty and personal freedoms
Human Rights: provide judges leverage to intervene in the employment relationships: finding compromises

Religion= one of fundamental freedoms

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1.4. "Gouvernement des juges"

- Integration problems: A.G. Kokott (3): *"Ultimately, the legal issues surrounding the Islamic headscarf are symbolic of the more fundamental question of how much difference and diversity an open and pluralistic European society must tolerate within its borders and, conversely, how much assimilation it is permitted to require from certain minorities"*

ECtHR: Case-law

New context: EU-law: Dir. 2000/78

Headscarf cases CJEU

C-157/15 (Belgium) - C-188/15 (France)

Religious employers

C-414/16 + C-68/17 (Germany)

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2. Human rights and employment

2.1 HR= rights of minorities

Error n° 1. Discussion HR is not new in history !

Human rights: European heritage = religious conflicts

ECHR: 1950= after WW II - Art. 9 ECHR

International treaties 1960s: Fundamental rights of migrant workers to observe religious duties.

Direct effect ? No.

A. Camus: "*La démocratie, ce n'est pas la loi de la majorité, mais la protection de la minorité*"

Prohibition of discrimination on the ground of religion

(Art. 21 Charter EU)= general principle of EU-law !

Applies horizontally even against national constitutional law !



2. Human rights

2.1 HR= rights of minorities

Error n° 2. It does not concern only muslim migrants

But: other religions !

Jewish religion (kippah), Sikh (turban),
Jehova witnesses, fundamentalist christians

ECtHR: Eweida a.o.

ECtHR: Thlimmenos v. Greece (2000)

What is a religion ?



2.2. EU-law: Thou shalt not discriminate

1957: Treaty of Rome: you shall not discriminate:
Women + migrant workers from the Union
Non-discrimination is not a side-effect of EU-law
Economic purposes: fair competition, economic
inclusion is important goal of the EU (ECJ !)
EU moving on the slippery ice of FR
Treaty of Amsterdam+ Directive 2000/78
 other grounds: "religion"
ECFR- Charter of Lisbon: art. 10



2.3. Horizontalisation of fundamental rights

= **not obvious**

Fundamental rights= rights of minorities in society
What about minorities inside the company ?

Different views on minority rights

Mostly: little room for religious minorities on the work floor
(Religion stays out, religion = forum internum)

New visions (Nussbaum): minority rights require action from
the state: restore equality by reasonable accommodation=

Finding a middle way: both parties must be reasonable

Forum internum : not practical !

Forum externum: finding ways to accommodate



2.3. Horizontal effect of HR in labour law

- Indirect effect: interpretation of open norms
 - "summary dismissal- misconduct"
 - "unfair dismissal"
 - Direct effect: not often
- Difference: very important !?
New challenges for Labour Law
Religion//other FR:
 - privacy (new technologies),
 - freedom of expression (whistle blowers)Balancing FR is very essence of LL



2.4. Religion: from eclipse to crescent moon

Discussion is not new: old case law
New is growing number of Muslim workers
Traditional view: religion becomes less relevant in society
Discussion in France and Belgium: religious holidays
(Belgian constitutional court about work on Sunday: many rules may have a historical religious background, but that does not matter: goal has changed: sports, family day, recreation).
Cf. ECtHR (Lautsi-case)
What about "national identity" (Art. 4(2) TFEU)
Constitutional provisions from Member States: "laïcité" (Fr.)
Margin of appreciation of Member States (ECtHR)



2.5. To understand law, you must understand history



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Different states= different laws Texas- USA (margin of appreciation)



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2.6. Banning the Burqa Discussion about the veil

- France: laïcité as constitutional principle
Burqa-ban, Veil in schools and employment
Fr. Cass. "the Baby-Loup" Case
- Belgium : difference between Burqa and hijab (headscarf)
Burqa-ban: Constitutional Court 6.12.2012
Veil in public service: Antwerp-discussion
Veil in public schools: Conseil d'Etat (14-10-2014)
-Judgement// Bundesverfassungsgericht 27.1.2015
-Discussion has not ended: resistance of schools !
Veil in private employment: contradicting judgements
Hema-case, Abchita-case
Right to wear headscarf in court room: ECtHR 18.09.18



CONFLICTING PERCEPTION





III. Freedom of religion as a fundamental right

Art. 9 ECHR- 1950

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.*
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.*

Forum internum and Forum externum

= Belief and manifestation

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Freedom of religion as a fundamental right

Art. 14 ECHR- 1950

*The enjoyment of the rights and freedoms **set forth in this Convention** shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'*

Protocol XII-2000 (only 10 ratifications- EU Member States)

*The enjoyment of **any right** set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'*

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3.2. What is religion ?

Defining the undefined...= difficult

Pitfall: deciding about religious questions

Cf. Veil: real duty or not ?

Not everything falls under the scope of religion !

Religious manifestations v. religiously motivated practices

ECtHR Pichon and Sajous v. France (2001)

Farmacists refusing to sell contraceptives

ECtHR Eweida (2013): Wearing a cross: more flexible approach

Analogy: Conscience objections ? What about pacifist, vegetarians, human rights activists, unionists ?

Art. 9: conscience, beliefs // religion

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3.3. Religion as a different discrimination ground

1° Discrimination grounds: sex, age, disability, sexual orientation, race= **immutable** physical features or personal characteristics (AG Kokott)

Religion/belief= **Subjective** decision or conviction ???

Balancing fundamental rights/freedoms, comp. "privacy"

2° Reasonable accommodation

Dir. 2000/78: only for disability

A "stolen" concept ? Cf. Canada, USA - Yes, indeed !

Cuyper, Howard : Reasonable accommodation=central concept of discrimination law= proportionality test

HRM-Research Belgian labour relations (ULB): practice of collective negotiations (often no specific religious policy but practical solutions !)

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3.4. Restrictions: Legitimate aim

- = Protection of other rights and freedoms
(= balancing act)
- Most of fundamental rights are explicit
(privacy, association, equality)
- Right of the employer to conduct his business ?= FR ?
- Not in ECHR but Protocol n° I (property)
- In most national constitutions
- Strong in EU- law: Economic liberties !
- E.g. TFEU: Art. 49: *"The freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms"*
- E.g. Art. 16 CFREU: *"The freedom to conduct a business in accordance with Union law and national laws and practices is recognised."*



3.5. Necessity and margin of appreciation

- ECtHR: solving part of the problem by allowing large margin of appreciation to member states
- Case law: education !
- Case law: religious employers
 - Conflicting FR= margin of appreciation by the employer



Case Law ECtHR Education

MARGIN OF APPRECIATION

ECtHR 10.11.2005, Leyla Şahin v. Turkey

"...it is not possible to discern throughout Europe a uniform conception of the significance of religion in society ... and the meaning or impact of the public expression of a religious belief will differ according to time and context.."

ECtHR 15.2.2001, Dahlab v. Switzerland

ECtHR 24.01.2006, Kurtulmuş v. Turkey

ECtHR 26.11.2015, Ebrahimian v. France

ECtHR 1.07.2014, S.A.S. v. France (Burqa)



3.6. ECtHR- Religious employers

(Tendenzbetriebe- Germany !)

- Rommelfanger (Eur.Comm.HR) 6-09-1989 (Opinion-abortion)

- Obst: ECtHR 23-09-2010: Staff member: OK//Art. 8 ECHR

- Schüth: ECtHR, 23-2010: Organ player: Not OK//Art. 8 ECHR

- Siebenhaar, ECtHR, 3-2-2011, Kindergarten teacher:

OK// Art. 9 ECHR (proselytism)

- Martinez: ECtHR 7-5-2011 + Gr.Ch.ECtHR 12-06-2014:

Catholic religion teacher (8 v. 7 !) // Art. 9, 11, Quid art. 8 ECHR ? Dissenting opinions ! See merits of the case !

Did he seek publicity ?

Importance of this case: criteria for proportionality test relevant for ECJ



3.7. Case Law ECtHR- Religious employees

Employees – Religious symbols and convictions

4 joint cases: Christians !

15-01-2013

1° Eweida

2° Chaplin

3° Ladele

4° McFarlane



Eweida en Chaplin

1° Eweida: Coptic christian, airhostess BA,
small cross on necklace: under/above uniform
Lab.Trib.: no religious obligation- individual expression
ECtHR: x art. 9: disproportionate (discrete, hesitation of BA)

2° Chaplin: nurse NHS, cross on necklace
reasonable accommodation for other religions
alternative employment
Medical reasons: //art 9

Remark: collective relations and negotiation ?

Eweida: after v. Chaplin: before

D.Cuyper: relevance of collective relations for
proportionality test



Ladele en McFarlane

3° Ladele: Registrar- Londen-Islington- religious objections v. same sex relationships

Unilateral modification of labour conditions

Reasonable accommodation

Dismissal= harsh consequences: ECtHR: No violations

4° McFarlane: sex therapist- religious objections v. same sex relationships

Unilateral modification of labour conditions ?

Reasonable accommodation

Dismissal= harsh consequences: Unanimously

Mission statement of association= duty of the employee



4. EU-Law

4.1. Directive 2000/78: Art. 1,
Limited to employment: Art. 3

Art. 10 CFR- EU: 1. Everyone has the right to freedom of thought, conscience and religion. This 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.

2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.



4. EU-law

4.2. Relationship ECHR- EU law

Interaction: (Interpretation in the light of...)

But only: employment and occupation !

Complementary relationship (Vickers)

but sometimes: tension

ECHR= minimum, EU-law may provide more protection ?

Criteria for proportionality test = relevant for ECJ

EU-Law: no **margin of appreciation** ! DC: is that so ?

There is a margin of appreciation of the employer/undertaking !

Compare: A.G. Kokott v. Sharpston

= Lesser ground in hierarchy ?

No, but inherent more limitations possible

Religion= different, as is disability, age.....



4.3. EU-law Religious employers

Art. 4.2. Dir 2000/78

(1) "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**."



4.3. EU-law Religious employers

Art. 4.2. Dir 2000/78

“**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.”



4.4. Pending- Equality and overtime payment

- C-193/17: Austria
Overtime payment on Good Friday:
Only for four churches
Opinion A.G. Bobek: discrimination
(equal pay)
But no horizontal effect !?
Remark: freedom not to express religion or belief



5.1 Headscarf in EU-law The opinions of the AG

Two cases: 14th March 2017 + two different opinions AG
C-157/15, Achbita v. G4S, Belgian case, AG Kokott 31.5.2016
Labour Court Antwerp 23.11.2011, Belg.Cass. 9.3.2015
C-188/15, Bougnaoui, French case, AG Sharpston 13.7.2016
Fr. Cass. 24.4.2015

Difference ? Yes, but also: different questions, different facts !
Difference= margin of appreciation: how far can the employer
limit FR ? Kokott: relies heavily on this starting point and takes
religion apart (Locke), Sharpston relies more on an Anglo-
saxon legal tradition. Both remain firmly within EU-law and
ECHR and concurring on most of the issues-
but: different merits in the case are important !



5.2. C-157/15, Achbita v. G4S, Belgian case

5.2.1. Facts and questions:

2003: Employment contract
G4S: reception service
Unwritten rule: no religious signs
2006: wish to wear the veil
Refusal – sickness leave –
Works council: confirmation of work rules: no religious signs
Dismissal
Labour tribunal + Labour Court: no discrimination
Cass: Is the refusal to wear the veil direct discrimination ?



C-157/15, Achbita v. G4S, (Belgium)
AG Kokott 31.5.2016

Ban on headscarf= **direct discrimination** ?

AG: No (opinion 46 e.f.)

No discrimination between religions ! (?)

***National identity** does not therefore limit the scope of the Directive as such, but must be duly taken into account in the **interpretation** of the principle of equal treatment which it contains and of the grounds of justification for any differences of treatment. Moreover, even France acknowledged, at the hearing before the Court, that such an approach is a viable way of preserving national identity. (32)*

Is it religion ? Sincere belief is enough: no discussion about religious necessities (34-38)



C-157/15, Achbita v. G4S, (Belgium)
AG Kokott 31.5.2016

5.2.2. Genuine and determining occupational requirement ?

X Art. 4 (1): not necessarily in the form of laws and decrees even by employer / works councils

Restrictive interpretation

But: employer "a degree of discretion" (AG N° 81), so YES !
(even on the basis of unwritten workrules !) (Sic!) ??

5.2.3. Objective and proportional

Dress code=corporate identity=legitimate aim

Consumer preference ? Cautious, but not irrelevant

Policy of neutrality is absolutely crucial

Proportionality test



C-157/15, Achbita v. G4S, (Belgium)
AG Kokott 31.5.2016

Proportionality test

- **Appropriate**

Conflict between manifestation and company policy
Suitable alternatives have not been identified during the proceedings

- **No undue prejudice**

manifestation of religion can be moderated

Dress codes, prominent role or position, contact with customers, neutrality policy, does not affect other protected grounds, equal treatment

- **Rights and freedom of the employee**

OK, but must be balanced with the employer's "freedom to conduct a business" Art. 16 CFR-EU



C-157/15, Achbita v. G4S, (Belgium)
AG Kokott 31.5.2016

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,*
- *the national identity of the Member State concerned.*



5.3. C-188/15, Bougnaoui, French case

AG Sharpston 13.7.2016

Difference between public and private sector ?

Yes ! Case is limited to private sector !

Direct or indirect discrimination ?

Seems to say: direct, but //question

"genuine and determining occupational requirement"

Art. 4 Dir. 2000/78

AG: No, very restrictive framing, "in very limited circumstances" Not for a design engineer !

It may also be regarded as indirect discrimination

Dress code: 1° legitimate aim: freedom of employer: yes but must be balanced

2° proportional: case by case approach

5% contact with clients

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5.4. The CJEU

5.4.1. Achbita= basic case

No definition of religion: cf. art. 9 ECHR and case law ECtHR= Art. 10 ECFR

protects forum internum + forum externum

5.4.2. No direct discrimination: "any religious sign"

- *"It is not evident from the material in the file available..."* (31)

Neutral clothing is not against particular religion

Critics: not so obvious//other case law CJEU

What is neutral clothing ?

Companies: must really impose this on other clothing (T-shirts)

- Indirect discrimination ?

Court narrows appreciation by national judges

Strict proportionality: really necessary !

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5.4.3. CJEU: Indirect discrimination ?

- Legitimate aim ? Neutrality: yes !
- Freedom of enterprise
- Necessary ? National judges must decide about real necessity in contact with customers (§42)
- = more than just "style"
- Proportionality test: National judges (≠ECtHR)



5.4.4. REASONABLE ACCOMMODATION ?

New and strange reasoning:

Reasonable accommodation for Achbita !

= Another job ?

Very strange ! NOT IN DIRECTIVE !

Only for disability

Reasonable accommodation as general principle for discrimination law ?

Poor solution ? (Religion in the back office)



5.4.5. Solomon judgements ?

Genuine and determining occupational requirement

C-188/15, Bougnaoui

- Sharpston: no banalisation of g.d.o.r
- Kokott: margin of appreciation of employer
- CJEU: "Consumer preference" = not decisive ! (40)
- "...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'."



5.4.6. INTERSECTIONALITY ?

Multiple discrimination or intersectionality ?

Missed opportunity by the ECJ ? (Schiek)

Particular disadvantage for women ?

Dress codes may be of more importance for women-

Disproportionate impact is possible

(Skirts and high heels as dress code)

But intersectionality is difficult to handle

+ Avoiding discussion: only for women ? suppression of women v. freedom for women to dress as they like ?

Dress codes remain interesting item and open for discussion.



6. Religious employers

6.1. Two German cases: Importance

Relevance of constitutional principles

6.2. Egenberger C-414/16

1° job description: writing a country report
"membership"

2° Can an employer decide himself ?

No: Access to the court

3° Criteria// Martinez-case ECtHR

4° German constitutional principles// EU-law



6.3. IR, C-68/17

M.D. hospital+ managerial function

New marriage after divorce

CJEU: 4.2. Directive: strict interpretation

g.d.o.r.= linked to the job

Other employees of other beliefs ?

Equal treatment !



7. Some concluding remarks

7.1. Missed opportunity ?

CJEU does not write dissertations

It answers questions... (2 x "not clear")

Missed opportunity ? FR: are not absolute !

Court//public opinion !

Margin of appreciation= controversial, but ECJ does take into account special situation of employment relationship

Balancing FR= margin of appreciation

Lacking: collective setting of employment relationship: "work rules" ?



7.2.Optimism

cf. HRM-Research in Belgium (ULB)

Cf. Cases of ECtHR and ECJ: relevance of works councils !

Cf. Case: "TORFS SHOES": changing work rules=ban- no ban

=Compromising between FR: employer, workers, customers

Consumer preference: may be preference of Muslim customers

New challenge: shortage of qualified workers: necessity for an "inclusive" labour market: regardless of age, orientation, origin, beliefs

Discrimination law= stick; Diversity= gain for everyone

Real drama: talent is being wasted (cf. Feryn-case: vacancy not filled) Statistics of unemployment in Belgium: terrible !

Important: moving from "minority trap" to "diversity management"